

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
CENTRAL DIVISION AT LEXINGTON
CIVIL ACTION NO. 06-383-JBC
ELECTRONICALLY FILED

PRIME CONTRACTING, INC., et al

PLAINTIFFS

vs.

**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

WAL-MART STORES, INC.

DEFENDANT

** ** * ** * ** * ** * ** * ** * ** * ** *

Wal-Mart's motion for summary judgment should be **DENIED**. First, there was no contractual privity between Wal-Mart and plaintiffs. Second, plaintiffs did not breach any of the contracts at issue in this case. Third, a reasonable jury could find that Wal-Mart acted without justification in interfering with the contracts between plaintiffs and the general contractors.

STATEMENT OF THE CASE

Plaintiffs Prime Contracting, Inc. (Prime) and Complete Contracting, LLC (Complete) for many years at many locations performed steel erection and/or masonry subcontracting services for construction of both Wal-Mart stores and Sam's Club stores. At issue in this case are a total of nine projects involving three general contractors, Cleveland Construction, Inc., Weis Builders, Inc, and Hudson Construction Company. Each of these general contractors, in turn, contracted with one of the plaintiffs to do the steel erection and/or masonry work for a particular project. Plaintiffs, in turn, often further subcontracted the work. (Morton Depo. on behalf of Complete at 20-21). Prime subcontracted every job at issue in this case. (Morton Depo. on behalf of Prime at 42, 46).

The substantial genesis of this case occurred in September 2005 when two individuals working for a subcontractor to Complete Contracting at a joint Sam's Club/Wal-Mart project in Bismarck, North Dakota were arrested. (Morton Depo. on behalf of Complete at 28, 62-63). It developed that the two individuals had illegally entered the United States and had presented fraudulent documentation regarding their status to the subcontractor. (*Id.* at 28, 58-59, 67-68).

Wal-Mart ordered the job site shut down for about a week. (*Id.* at 37). Complete was informed by an agent, Tim Callahan, for the general contractor, Weis Builders, Inc., that Wal-Mart had ordered Complete off the project. (*Id.* at 36-37). Weis accepted the recommendation of Complete's agent, Tony Morton, that a company operated by Morton's cousin, Danny Elkins, be hired to complete the project. (*Id.* at 51-52, 65, 72). Knowing that Complete had acted reasonably and diligently the recommendation was accepted. (Deposition of Tim Callahan at 33-34). Callahan acknowledged that Weis was provided with I-9s for the individuals in question. (*Id.* at 34, exs. 10 & 11).

Subsequently, Wal-Mart ordered all of its general contractors to eject plaintiffs from any Wal-Mart or Sam's Club project on which they were engaged. (Deposition of Bryan Novak as Wal-Mart Corp. Rep at 4-5, ex. 2)(hereinafter referred to as "Novak depo.") Wal-Mart's instruction to its general contractors stated, in pertinent part, as follows:

Recently, at several Wal-Mart construction sites, Wal-Mart has become aware of I-9 documentation insufficiencies involving Prime Contracting and Complete Contracting (collectively, the "Sub-Contractor") ... Please verify to Wal-Mart in writing, by the close of business on Monday, November 14, 2005, that the Sub-Contractor is no longer on this project.

In March 2005, Wal-Mart entered into a consent decree with the United States government regarding immigration violations in which it had been implicated.¹ The consent decree required Wal-Mart, among other things, to provide “all information known to Wal-Mart regarding any criminal activity, involving employment of illegal aliens, including but not limited to the matters described in this Agreement.” Consent Decree ¶¶ 11.A further required Wal-Mart to take affirmative steps to ensure compliance by its independent contractors. Consent Decree ¶¶ 11.D. So onerous was this undertaking that Wal-Mart was allowed 18 months to develop these guidelines. *Id.*

Wal-Mart did not make a determination that plaintiffs had violated any immigration or other laws prior to ordering plaintiffs’ ejection, according to the testimony of their corporate representative. (Novak depo. at 10-16). Wal-Mart apparently acted on the belief that it would do as it pleased based on contractual language in contracts between it and the general contractors. (*Id.*) Although Wal-Mart was bound by the consent decree to report any illegal immigration activity it became aware of to the government, it, of course, made no such report regarding plaintiffs. (Novak depo. at 16, 20-21).

Although Wal-Mart claims here that news publicity and hyper-vigilance motivated its actions towards plaintiffs, it failed to take any action against a subcontractor when news reports surfaced in 2006. (Novak depo. at 22).

¹ A copy of the Consent Decree and Order entered in *United States v. Wal-Mart Stores, Inc., No. 1:CV-05-0525, Middle District of Pennsylvania*, is tendered herewith as Exhibit A to this memorandum.

ARGUMENT

POINT I

PLAINTIFFS AND WAL-MART WERE NOT IN CONTRACTUAL PRIVACY AND PLAINTIFFS MAY ASSERT A CLAIM OF TORTIOUS INTERFERENCE BY WAL-MART WITH PLAINTIFFS' CONTRACTS WITH THE GENERAL CONTRACTORS.

Contrary to Wal-Mart's argument, there is no privity of contract between it and plaintiffs. The cases Wal-Mart cites regard the expressed preference for arbitration of construction disputes; none support Wal-Mart's contention that it by dint of incorporating language became contracted to plaintiffs. Accordingly, Wal-Mart's argument is without merit.

Wal-Mart principally relies on *Buck Run Baptist Church, Inc. v. Cumberland Surety Ins. Co., Inc.*,² for its argument that there is privity of contract between it and plaintiffs. This reliance is misplaced. Buck Run, a church, contracted with Z & J Construction for construction of a new sanctuary and education building for the church. 983 S.W. 2d at 502. Cumberland Surety issued a bond guaranteeing Z & J's performance. *Id.* Z & J failed to perform adequately, was terminated, and, as a result, "Cumberland in effect, stood in the shoes of C & J and became the contractor on the project." 983 S.W. 2d at 503.

Wal-Mart does not contend her that it "in effect stood in the shoes of" any of the general contractors. Furthermore, none of the cases it cites endow it with that status.

² 983 S. W. 2d 501 (Ky. 1998)

Buck Run and the other cases cited by Wal-Mart do evidence the strong preference for arbitration of commercial disputes, a point the Kentucky Supreme Court emphasized. 983 S.W. 2d at 504. Furthermore, a bonding company issuing a performance bond is a guarantor that a contracting party will perform. Wal-Mart, by contrast, required its general contractors to indemnify and hold harmless it against any and all claims.³ Accordingly, Wal-Mart's argument that there is privity of contract between it and plaintiffs is without merit.

POINT II

WAL-MART IS NOT IMMUNIZED FROM LIABILITY WHERE IT CAUSED AND DIRECTED THE GENERAL CONTRACTOR'S BREACH OF THEIR DUTY OF GOOD FAITH AND FAIR DEALING.

Contrary to Wal-Mart's contention, Kentucky law does not endow contract language as immunity for any and all action no matter how wrongful and tortious. This radical notion would obviate wage and hours laws, civil rights laws, and the duty of good faith and fair dealing that inheres in every contract. Accordingly, Wal-Mart's contention that the general contractor had an unfettered right to eject plaintiffs and thus Wal-Mart's wrongful conduct is immunized is without merit.

Kentucky law imbues "every contract [with] an implied covenant of good faith and fair dealing." *Ranier v. Mt. Sterling Nat. Bank*, 812 S.W.2d 154, 156 (Ky. 1991). The covenant imposes a duty on the parties to do everything necessary to carry out the purposes and provision of the contract. *Id.*, citing *Beech Creek*

³ Wal-Mart filed as Exhibit 3 to its memorandum a contract between it and Cleveland Construction. It represents that this contract is materially indistinguishable from the others. The indemnification obligations are set forth in Articles 13 and 14 of that contract.

Coal Co. v. Jones, 262 S.W. 2d 174 (Ky. 1953). Wal-Mart's contention is contrary to this fundamental principle of Kentucky law; a party may not contract for immunity to do whatever it wants no matter how wrongful.

The make-weight nature of Wal-Mart's argument is further illustrated by considering an analogous situation where it ordered for reasons of racial discrimination that a general contractor ejects one of plaintiffs' employees from a job site. Such an employee would have a cause of action against plaintiffs pursuant to KRS 344.450 for racially discriminatory employment practices. The employee would likewise have a cause of action against Wal-Mart and the general contractor for a violation of KRS 344.280(2).⁴ Yet under Wal-Mart's theory no such liability could arise because the general contractor had an unfettered right to do as it wishes or as Wal-Mart directed it to do. Kentucky law is to the contrary; Wal-Mart's argument is without merit.

The court's decision in *Stratmore v. Goodbody*, 866 F. 2d 189 (6th Cir. 1989) does not go so far as Wal-Mart urges. The Court in *Stratmore* held that the defendants' "interference was not 'without justification' or 'coercive.'" *Id.* at 195. The Court did not rule that contract language granting a party discretion to take or not take action shelter any and all unlawful conduct. *Stratmore* simple does not rest upon the point Wal-Mart urges and fails to support Wal-Mart's position.

POINT III

PLAINTIFFS DID NOT BREACH THE CONTRACTS AT ISSUE IN THIS CASE.

⁴ KRS 344.280(2) makes it unlawful for a person to "aid, abet, incite, compel or coerce a person" to engage in racially discriminatory employment practices.

Contrary to Wal-Mart's contentions, there is no competent evidence that plaintiffs breached their contractual duties with regard to any project at issue in this case. Accordingly, Wal-Mart's argument that plaintiff's ejection from the projects was authorized by their breach of the contracts is without merit.

Wal-Mart does not offer competent evidence in its discussion of a Norton, Virginia project. The witness it cites, a fellow named Andy Rada, offered hearsay that he claims to have gathered from unknown, unnamed persons. Rada is simply incapable of offering competent evidence to support Wal-Mart's position. Hearsay cannot be relied upon to support a motion for summary judgment. *Moore v. Holbrook*, 2 F. 3d 697, 699 (6th Cir. 1993).

The Mansfield, Ohio project is not at issue in this case, as plaintiffs do not seek damages regarding it. Furthermore, Complete Contracting reached a settlement with the general contractor, Adena Corporation, with regard to that project. (Deposition of Dwight Farmer at p. 30).

Contrary to Wal-Mart's assertion, no violation of any immigration law occurs merely because an I-9 form is completed inaccurately or incompletely. A performance of an administrative task does not equate, in all instances, a violation of federal law. Furthermore, the conclusions of an individual agent also do not establish a violation of federal law.

Contrary to the testimony offered by the representative of the general contractor on the Bismarck, North Dakota project, Weis Builders, it was provided with the I-9s. (Deposition of Tim Callahan at 34, exs. 10 & 11). That Complete's contractor was duped into employing a person who was actually an illegal alien

but who presented facially valid documentation also does not establish a violation of immigration law.

Wal-Mart's argument goes farther than its actual decision-making. Its representative testified that no determination was made that plaintiffs had violated any immigration law. That failure is for good reason: because it did not occur. Accordingly, Wal-Mart's argument that plaintiffs breached the general and subcontract is without merit.

POINT IV

A REASONABLE JURY COULD FIND THAT WAL-MART ACTED WITHOUT JUSTIFICATION IN TERMINATING THE CONTRACTS.

A jury could reasonably find that Wal-Mart acted without justification in causing the contracts to be terminated. Accordingly, Wal-Mart's motion for summary judgment should be DENIED.

The framework for plaintiffs' tortious interference claim comes from the *Restatement of Torts § 766* endorsed in *Carmichael-Lynn-Nolan Adv. Agency, Inc. v. Bennett and Assocs.*, 561 S.W.2d 99, 102 (Ky. App. 1977). The tort arises where one intentionally and improperly interferes with the performance of a contract between another and a third person by inducing or otherwise causing the third person not to perform the contract. *Id.* Such wrongful interference gives rise to liability for the harm caused thereby.

Here, there is no dispute that Wal-Mart ordered the general contractors to eject plaintiffs. Wal-Mart claims good faith and/or justification for doing so. A jury can find otherwise and summary judgment should be **DENIED**.

Wal-Mart's contention that it acted in good faith and justification is basically that it had a need of demonstrating the importance to any subcontractor on any of its projects of avoiding entanglement in any immigration issues. Therefore, the argument follows it was justified in causing plaintiffs' ejection.

In contrast to the action it claims it felt it was compelled to take against plaintiff, Wal-Mart found it sufficient to obtain 18 months for its own contractors put in place to comply with immigration law. That undercuts Wal-Mart's assertion that it needed to act decisively and expeditiously toward plaintiff because the government was breathing down its neck. In contrast to the many years and apparently systematic and intentional violations of law conducted by Wal-Mart and its independent contractors, plaintiffs here for the projects at issue complied with the immigration laws and were, as are many employers from time to time, misled by paperwork presented by capable workers.

Second, Wal-Mart's diligence in this area has been less than uniform. When confronted with a news report of a contractor in 2006 similarly troubled with illegal aliens who had presented false documentation, it appears that Wal-Mart, in contrast to the precipitous and unjustified action directed at plaintiffs, did not act. (Novak depo. at 22).

Ultimately, these issues, ones of "good faith," "improper purpose," and "motive" present fact questions for a jury. A jury can find that Wal-Mart acted without justification in causing termination of plaintiffs' contracts, where it did not and could not bother to gather sufficient information to determine that

plaintiffs had actually violated immigration laws with respect to the projects at issue. Just as surely, a reasonable jury could find that Wal-Mart's purported justification - excision of all contractors that become entangled in immigration issues - erodes where there it is a standard applied to some but not all.

Instruction can be gained from a decision by the Kentucky Court of Appeals, *Uppal v. Gateway Regional Health System, Inc.*⁵ Uppal was a physician that was hired through a staffing agency to provide medical coverage of the hospital's emergency room. A few months after she began working in the emergency room, the hospital informed Uppal that it was reviewing her care of at least four patients. The hospital later requested she no longer be scheduled to work in the emergency room and her staff privileges were terminated. She filed suit against the hospital for tortious interference. Uppal presented as evidence an affidavit indicating that the hospital's concerns regarding three out of the four cases in question were unfounded while conceding that there was a deficiency with regard to one case. The hospital countered that it had relied in good faith on a review of the cases.

The Kentucky Court of Appeals reversed the summary judgment entered by the trial court. First, the Court observed that "questions like 'good faith,' 'improper purpose,' and 'motive' are fact questions properly decided by a jury." Opinion at p. 5. Second, the Court noted that the hospital's failure to allow Uppal to respond to the reviewer's comments was probative as to the issue of its good faith. *Id.*

⁵ 2005 WL 2323174 (Ky. App. 2005). A copy is tendered herewith as Ex. B to this memorandum.

The ruling in *Uppal* is illustrative of the even-handedness that is a material element of Kentucky law in this area. Furthermore, the hospital in *Uppal* was on firmer ground than Wal-Mart is: the hospital had actual findings at the time of its decision supporting concerns about Uppal's quality of care. Wal-Mart, by contrast, did not bother to make the termination – mistaken or otherwise – regarding plaintiffs' compliance with immigration laws. Furthermore, the disparity in Wal-Mart's reaction to plaintiffs in that it would afford itself and other contractors is striking and is probative on the issue of good faith, just as in *Uppal*.

Uppal also offers instruction regarding Wal-Mart's claim that it could cause plaintiffs to be ejected because it (and/or the general contractors) had an unfettered right to say who could work on its projects. The hospital's contract with the staffing agency provided "that the hospital could require that a certain physician not be assigned to the hospital." Opinion at 1. The employment contract between Uppal and the staffing agency contained similar language. Yet neither banned Uppal's tortious interference claim. And so Wal-Mart's argument here similarly fails.

This case presents fact issues regarding the justification for Wal-Mart's action that a reasonable jury can resolve in plaintiff's favor. Accordingly, Wal-Mart's motion for summary judgment should be denied.

CONCLUSION

For all the foregoing reasons, Wal-Mart's motion for summary judgment should be **DENIED**.

Respectfully Submitted,

/s/ Robert L. Abell
ROBERT L. ABELL
271 W. Short Street, Suite 200
P.O. Box 983
Lexington, KY 40588-0983
Telephone: 859-254-7076
Facsimile: 859-231-0691
robert@robertabelllaw.com
COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that on April 25, 2008, I electronically filed the foregoing with the Clerk of the Court by using the CM/EMF system, which will send notice of electronic filing to the following: All Counsel of Record.

BY: /s/ Robert L. Abell
ROBERT L. ABELL
COUNSEL FOR PLAINTIFFS