

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

ENVIRONMENTAL SOLUTIONS & INNOVATIONS, INC.,	:	APPEAL NO. C-220634 TRIAL NO. A-2002809
	:	
Plaintiff-Appellant,	:	
	:	<i>OPINION.</i>
vs.	:	
	:	
EDGE ENGINEERING & SCIENCE, LLC,	:	
	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Reversed and Cause Remanded

Date of Judgment Entry on Appeal: July 28, 2023

Bricker Graydon LLP, Susan M. Argo, Alexandra M. Berry and Michael A. Roberts,
for Plaintiff-Appellant,

Bonezzi Switzer Polito & Hupp Co. L.P.A., Thomas F. Glassman, Beth A. Sebaugh,
Crain, Caton & James and Kimberly R. Stuart, for Defendant-Appellee.

ZAYAS, Presiding Judge.

{¶1} Plaintiff-appellant Environmental Solutions & Innovations, Inc., (“ESI”) appeals from the judgment of the Hamilton County Court of Common Pleas granting summary judgment in favor of defendant-appellee Edge Engineering and Science, LLC, (“Edge”) on ESI’s claim for interference with employment relations and contracts. In two assignments of error, ESI argues that the trial court failed to properly apply the summary-judgment standard when ruling on the parties’ cross-motions for summary judgment. For the following reasons, we sustain ESI’s assignments of error, reverse the judgment of the trial court pertaining to the interference claim, and remand this cause for further proceedings consistent with this opinion and the law.

I. Facts and Procedural History

{¶2} This appeal arises from the trial court’s grant of summary judgment in favor of Edge on ESI’s claim for interference with employment relations and contracts.¹ ESI’s complaint alleges that, after unsuccessfully attempting to acquire ESI, Edge used one of ESI’s officers—Casey Swecker—to persuade a large group of ESI’s employees to resign from their positions with ESI and join Edge. This allegedly included seven employees who Edge knew had entered into noncompetition, nonsolicitation, and confidentiality agreements (“the agreements”) with ESI.

{¶3} After engaging in discovery, the parties filed cross-motions for summary judgment on this claim. Edge moved for summary judgment, arguing that ESI could not establish a claim for interference with employment relations and contracts because

¹ ESI’s original complaint contained multiple claims against ESI and another defendant, Casey Swecker. Partial summary judgment was granted only as to the interference claim in favor of both Edge and Swecker. ESI does not appeal the trial court’s grant of summary judgment in favor of Swecker on this claim. Additionally, prior to this appeal, all remaining claims against defendant Swecker were dismissed without prejudice and all remaining claims against Edge were dismissed with prejudice. Therefore, the only claim before this court is ESI’s claim against Edge for interference with employment relations and contracts.

the noncompetition agreements were invalid and unenforceable, and Edge did not know of the agreements. ESI responded in opposition, arguing that Edge could not show—as a matter of law—that the agreements were unenforceable and, based on the evidence in the record, reasonable minds could only conclude that Edge knew about the agreements.

{¶4} ESI moved for summary judgment, arguing that all the elements for a claim of tortious interference were established by the evidence in the record and, even when viewing the evidence in a light most favorable to Edge, reasonable minds could only conclude that Edge tortiously interfered with the agreements. Edge responded in opposition, arguing that ESI could not prove the existence of an enforceable contract and issues of material fact remained as to Edge’s knowledge of the agreements.

{¶5} The trial court considered the cross-motions for summary judgment together. When explaining the law applicable to determining whether the noncompete agreements were enforceable, the trial court stated, “The Plaintiff must establish each factor by ‘clear and convincing evidence.’ ” The trial court then analyzed each factor based on the evidence in the record and determined that Edge did not interfere with any valid contract as the agreements were unenforceable. Based on this determination, the trial court granted Edge’s motion for summary judgment on the interference claim and denied ESI’s motion for summary judgment on the same. ESI now appeals.

II. Law and Analysis

A. Standard of Review and Summary-Judgment Standard

{¶6} This court reviews a trial court’s grant of summary judgment de novo. *Mid-Century Ins. Co. v. Stites*, 1st Dist. Hamilton No. C-200421, 2021-Ohio-3839, ¶ 10. A party against whom a claim is asserted may move for summary judgment in the

party's favor as to all or part of the claim. Civ.R. 56(B). Summary judgment should be rendered in the party's favor if the timely filed Civ.R. 56(C) permissible evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Civ.R. 56(C). The permissible evidence for the trial court to consider includes the pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *Id.* No other evidence or stipulation may be considered except as stated in Civ.R. 56. *Id.* Summary judgment "shall not be rendered unless it appears from the evidence or stipulation, and only from the evidence or stipulation, that reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary judgment is made." *Id.*

{¶7} In other words, to obtain summary judgment, the moving party must show that (1) there is no genuine issue of material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion when reviewing the evidence in favor of the nonmoving party, and that conclusion is adverse to the nonmoving party. *Grafton v. Ohio Edison Co.*, 77 Ohio St.3d 102, 105, 671 N.E.2d 241 (1996). The moving party has the initial burden of informing the trial court of the basis for the party's motion and identifying those portions of the record that demonstrate the absence of a genuine issue of material fact on the essential elements of the nonmoving party's claim. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 294 (1996). If the moving party meets this initial burden, the nonmoving party then bears the burden of setting forth "specific facts showing that there is a genuine issue for trial." Civ.R. 56(E). If the nonmoving party does not do so, then summary judgment is appropriate and must be entered against the nonmoving party. *Id.*

{¶8} Because the trial court must construe the evidence in the light most favorable to the nonmoving party when ruling on a summary-judgment motion, all competing inferences and questions of credibility must be resolved in favor of the nonmoving party. *See, e.g., Appellant v. Alpha Phi Alpha Homes, Inc.*, 9th Dist. Summit No. 29026, 2019-Ohio-960, ¶ 9, citing *Nationstar Mtge., LLC v. Waisanen*, 9th Dist. Lorain No. 16CA010904, 2017-Ohio-131, ¶ 8. The trial court is prohibited from weighing the evidence or choosing among reasonable inferences at the summary-judgment stage. *Id.* The purpose of summary judgment “is not to try issues of fact, but rather to determine whether triable issues of fact exist.” *Walker v. Hodge*, 1st Dist. Hamilton No. C-080002, 2008-Ohio-6828, ¶19; *accord, e.g., Natl. City Real Estate Servs. LLC v. Frazier*, 2018-Ohio-982, 96 N.E.3d 311, ¶ 25 (4th Dist.). Thus, if reasonable minds could reach different conclusions based on the evidence, then summary judgment should be denied, and the matter should proceed to trial.

B. Applicable Law

{¶9} The elements of a claim for tortious interference with a contract are: (1) the existence of a contract, (2) the wrongdoer’s knowledge of the contract, (3) the wrongdoer’s intentional procurement of the contract’s breach, (4) the lack of justification, and (5) resulting damages. *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 176, 707 N.E.2d 853 (1998). The trial court granted summary judgment in favor of Edge after finding that no valid contract existed because the noncompete agreements were unenforceable.

{¶10} Noncompete agreements are generally enforceable only if the restraint “ ‘is no greater than is required for the protection of the employer, does not impose undue hardship on the employee, and is not injurious to the public.’ ” *Wigton v. Univ. of Cincinnati Physicians, Inc.*, 2021-Ohio-3576, 179 N.E.3d 241, ¶ 6 (1st Dist.), quoting

Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 26, 35 N.E.2d 544 (1975). Factors to be considered when making this inquiry include: (1) whether the agreement contains time and space limitations; (2) whether the employee is the sole contact with the customer; (3) whether the employee has confidential information or trade secrets; (4) whether the covenant seeks to limit only unfair competition or is designed more broadly to eliminate ordinary competition; (5) whether the agreement seeks to stifle the employee's inherent skill and experience; (6) whether the benefit of the employer is disproportional to the detriment of the employee; (7) whether the agreement bars the employee's sole means of support; (8) whether the skills that the agreement seeks to restrain were actually developed during the employment; and (9) whether the forbidden employment is merely incidental to the main employment. *Id.*, citing *Raimonde* at 25.

C. The Trial Court Improperly Weighed the Evidence on Summary Judgment

{¶11} In its first assignment of error, ESI argues that the trial court improperly elevated the burden on ESI to respond to Edge's motion for summary judgment by requiring ESI to prove an element of its claim—the existence of an enforceable contract—by clear and convincing evidence. Edge concedes that the trial court applied the clear-and-convincing-evidence standard on summary judgment but argues that this was proper. We disagree.

{¶12} Application of the clear-and-convincing-evidence standard “presupposes a weighing of the evidence, which a trial court should not undertake at summary judgment.” *Wigton* at ¶ 13. Because the trial court applied the clear-and-convincing-evidence standard on summary judgment, we agree with ESI and sustain the first assignment of error.

{¶13} In its second assignment of error, ESI argues that the trial court also applied the improper summary-judgment standard when denying its cross-motion for summary judgment. For the same reasons already established under the first assignment of error pertaining to Edge’s motion for summary judgment, we agree and sustain the second assignment of error. We note that, when assessing cross-motions for summary judgment, “ ‘each motion must be considered individually and separately, construing the evidence most strongly in favor of the party against whom the motion under consideration was filed. * * * If neither movant is so entitled, both motions must be denied.’ ” *Wigton*, 2021-Ohio-3576, 179 N.E.3d 241, at ¶ 12, quoting *United States Fid. & Guar. Co. v. Rains*, 1st Dist. Hamilton No. C-790073, 1980 Ohio App. LEXIS 10510, 1 (Apr. 16, 1980).

{¶14} We reach no conclusion on the merits of either summary-judgment motion. Rather, we remand this cause to the trial court for consideration of each motion under the appropriate standard.

III. Conclusion

{¶15} Having sustained both of ESI’s assignments of error, we reverse the judgment of the trial court pertaining to ESI’s claim for interference with employment relations and contracts. This cause is remanded for the trial court to consider each party’s motion for summary judgment on the interference claim under the appropriate summary-judgment standard.

Judgment reversed and cause remanded.

WINKLER and BOCK, JJ., concur.

Please note:

The court has recorded its own entry this date.