Blackmon v. Mary Kay

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Blackmon v. Mary Kay

Case: Blackmon v. Mary Kay (2009)

Subject Category: Distributor Termination

Agency Involved: Private Civil Suit

Court: Texas Court of Appeals, Fifth District.

Texas

Case Synopsis: Blackmon appealed her claim that she was entitled to the income stream of her downline even after her termination as a sales director for Mary Kay.

Legal Issue: Does the Mary Kay distributor agreement allow a distributor to continue to receive profits from their downline after termination?

Court Ruling: The Court held that the terms of the Distribution agreement between Blackmon and Mary Kay were unambiguous. The agreement specified that all rights of a distributor terminate when the agreement is terminated, including the right to receive profits from a distributor's downline. According to the contract this benefit existed only while the distributor agreement was in place. When Blackmon was terminated for promoting travel vouchers alongside her Mary Kay products, she lost the rights to her downline stream of income.

Practical Importance to Business of MLM/Direct Sales/Direct Selling/Network Marketing/Party Plan/Multilevel Marketing: The distributor agreement between an MLM company and a distributor will

be judged like any other contract. If the contract is unambiguous, then its terms will govern the parties' relationship.

Blackmon v. Mary Kay, No. 05-08-00192-CV. (2009): The Court held that the terms of the Distribution agreement between Blackmon and Mary Kay were unambiguous. The agreement specified that all rights of a distributor terminate when the agreement is terminated, including the right to receive profits from a distributor's downline. According to the contract this benefit existed only while the distributor agreement was in place. When Blackmon was terminated for promoting travel vouchers alongside her Mary Kay products, she lost the rights to her downline stream of income.

ROBIN BLACKMON-DUNDA, Appellant,

v.

MARY KAY, INC., Appellee.

No. 05-08-00192-CV.

Court of Appeals of Texas, Fifth District, Dallas.

Opinion issued April 1, 2009.

Before Justices BRIDGES, RICHTER, and MAZZANT.

MEMORANDUM OPINION

Opinion By Justice BRIDGES.

Robin Blackmon-Dunda appeals the trial court's summary judgment in favor of Mary Kay, Inc. In six issues, appellant argues the trial court erred in granting Mary Kay's motion for summary judgment on appellant's claims related to the business relationship between the parties. We affirm the trial court's judgment.

On July 27, 1987, appellant entered into an Independent Beauty Consultant agreement (IBC agreement) with Mary Kay. Among other things, the IBC agreement provided that it was terminable by either party by not less than thirty days' written notice. On July 1, 1994, appellant was appointed a "Sales Director" by Mary Kay, and the parties entered an Independent Sales Director agreement (ISD agreement). The agreement provided appellant's appointment was based solely on her "meeting standards of personal performance for qualification and participation in the Sales Director Program, and without the payment to [Mary Kay] of any monetary consideration whatsoever." The agreement named appellant a "Unit Sales Director" and defined a "sales unit" as all active beauty consultants recruited by appellant or members of her sales unit.

As Unit Sales Director, the agreement entitled appellant to a monthly commission based on the total monthly wholesale purchases bought for resale by all members of her sales unit. Mary Kay expressly reserved the right to "alter, modify, or change the discount, commission, and bonus and Minimum Sales Unit Production provisions" upon sixty days' prior written notice. The agreement set forth certain responsibilities and privileges appellant would have as a sales director. Like the IBC agreement, the ISD agreement provided either party could terminate the agreement by written notice to the other party mailed at least thirty days prior to the date of intended termination. The ISD agreement also set forth nine specific acts which would result in appellant's immediate termination. Regardless of the cause of termination, the ISD agreement provided that, upon termination, "any and all rights and privileges Director has in regard to Director activities under this Agreement shall terminate." An entire section of the ISD agreement clarified appellant's position as an independent contractor, not an employee of Mary Kay, and provided appellant was not authorized to conduct business on behalf of Mary Kay. The ISD also provided that it contained the entire agreement between the parties, and "no representation, inducement, promise or agreement, oral or otherwise, including terms of any prior Agreement" was of any force or effect.

In December 2004, Mary Kay sent appellant a letter asking her to immediately discontinue promoting or giving away cruise or travel vouchers, citing the ISD agreement's prohibition against such activities. In January 2005, Mary Kay sent appellant a letter asking her to discontinue promotion and/or distribution of a DVD and CD she created, citing the same provision of the ISD agreement. On August 10, 2006, Mary Kay notified appellant by certified letter that it was exercising its right to terminate the IBC and ISD agreements. On November 6, 2006, appellant filed suit against Mary Kay alleging, among other things, causes of action for breach of contract, deceptive trade practices, and intentional infliction of emotional distress. Appellant subsequently added claims for breach of the duty of good faith and fair dealing and fraudulent breach of a promise without the intention to perform it when made. On January 16, 2008, the trial court granted Mary Kay's motion for summary judgment as to all of appellant's claims. This appeal followed.

In her first and second issues, appellant argues the trial court erred in granting Mary Kay's motion for summary judgment on appellant's breach of contract and breach of oral contract claims. In the present case, the trial court did not specify the grounds on which the summary judgment was granted. If a summary judgment order issued by the trial court does not specify the ground or grounds relied upon for a ruling, the ruling will be upheld if any of the grounds in the summary judgment motion can be sustained. Bradley v. State ex rel. White, 990 S.W.2d 245, 247 (Tex. 1999); Ortega v. City Nat. Bank, 97 S.W.3d 765, 772 (Tex. App.-Corpus Christi 2003, no pet.). Since traditional and no-evidence grounds were asserted in Mary Kay's motion for summary judgment, we will first review the grant of the summary judgment under traditional summary judgment standards and only consider the no-evidence grounds if the issue is not disposed of by the former review. Ortega, 97 S.W.3d at 772; see also Clifton v. Hopkins, 107 S.W.3d 755, 761 n. 3 (Tex. App.-Waco 2003, no pet.) (given the court's disposition of the traditional motion, it did not consider the no-evidence motion).

The standards for reviewing a traditional summary judgment are well established. The party moving for summary judgment has the burden of showing no genuine issue of material fact exists and that it is

entitled to judgment as a matter of law. See Tex. R. Civ. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W.2d 546, 548 (Tex. 1985). In deciding whether a disputed material fact issue exists, precluding summary judgment, evidence favorable to the non-movant will be taken as true. Nixon, 690 S.W.2d at 548-49. Further, every reasonable inference must be indulged in favor of the non-movant and any doubts resolved in its favor. Id. A motion for summary judgment must expressly present the grounds upon which it is made and must stand or fall on those grounds alone. McConnell v. Southside Indep. Sch. Dist., 858 S.W.2d 337, 341 (Tex. 1993); Espalin v. Children's Med. Ctr. of Dallas, 27 S.W.3d 675, 688 (Tex. App.-Dallas 2000, no pet.).

Appellant's breach of contract claim is premised on her arguments that she is entitled to commissions under the ISD agreement even though that agreement is terminated and that she is entitled to assign or "will" the income stream from her former sales unit. Appellant does not dispute the ISD agreement was terminable by either party by thirty days' written notice. The ISD provided that, upon termination of the agreement, "any and all rights and privileges Director has in regard to Director activities under this Agreement shall terminate." Appellant argues we should apply independently the ISD provisions entitling her, as Director, to commissions and conclude those provisions entitle her to commissions as long as her former sales unit remains active. Appellant argues the termination of her "rights and privileges" regarding "Director activities" does not terminate her separate entitlement to commissions.

Contrary to appellant's arguments, the ISD unambiguously provides that the entire agreement is terminable by either party upon thirty days' written notice. Appellant's only entitlement to commissions was governed by the ISD and all of her rights and privileges under the ISD terminated upon termination of the ISD. In construing a contract, we must ascertain and give effect to the parties' intentions as expressed in the document. Frost Nat'l Bank v. L & P Distribs., Ltd., 165 S.W.3d 310, 311-12 (Tex. 2005). We consider the entire writing and attempt to harmonize and give effect to all the provisions of the contract by analyzing the provisions with reference to the whole agreement. Id. at 312. In this case, as a matter of law, we conclude the plain language of the ISD agreement shows that, upon its termination, all rights and privileges afforded to the Director terminated, including the Director's right to commissions. See id.

As to whether appellant was entitled to assign or "will" the income stream from her former sales unit, we conclude the ISD agreement clearly provides she therefore had nothing to assign or "will" after the ISD was terminated. Further, the ISD agreement specifically provides that it is not assignable or transferable. In her brief, appellant further argues the Uniform Commercial Code renders the non-assignment clause unenforceable. However, appellant failed to raise this argument in the court below, and it therefore presents nothing for our review. See Tex. R. App. P. 33.1(a)(1). Under these circumstances, the trial court did not err in granting summary judgment on appellant's claims that Mary Kay breached the ISD agreement.

As to appellant's claim that Mary Kay breached an oral contract between the parties, appellant cites her affidavit stating Mary Kay repeatedly advised her to "build [her] business." According to appellant's affidavit, Mary Kay's representation was that, "by purchasing Mary Kay products [appellant and others] were building our `businesses' with sales volume and new Consultants, who were also told to purchase

Mary Kay products in order to build their businesses." Based on this affidavit testimony, appellant argues a fact issue exists whether Mary Kay made an oral promise to appellant that she would own her own business and breached that oral promise.

Mary Kay's motion for summary judgment cited appellant's response to an interrogatory requesting that appellant identify the contractual provisions Mary Kay allegedly breached. Mary Kay argued appellant had "merely alleged an ambiguous agreement to `join Mary Kay, Inc.' in return for the promise that she would `own [her] own business.'" Mary Kay argued appellant's assertion failed to plead the requisites of a contract because it was "void of details such as the time of performance, the price to be paid, the work to be done or service to be rendered." In addition, Mary Kay argued that both the IBC and ISD agreements contained a recital that they contained the entire agreement between the parties and could only be amended in writing.

Here, the ISD provided that it contained the entire agreement between the parties, and "no representation, inducement, promise or agreement, oral or otherwise, including terms of any prior Agreement" was of any force or effect. Taking as true appellant's assertion that Mary Kay made representations concerning "building her business," nothing contractually obligates Mary Kay to continue paying appellant commissions or allow appellant to assign her position with Mary Kay after the termination of the ISD. Under these circumstances, the trial court did not err in granting summary judgment on appellant's breach of oral contract claim. See Nixon, 690 S.W.2d at 548-49. We overrule appellant's first and second issues.

In her third issue, appellant argues a fact issue exists whether she justifiably relied on Mary Kay's misrepresentations that appellant would be compensated for the "business she developed" and would be allowed to sell the income stream from that business. Therefore, she argues, summary judgment was improper on her fraud claim. However, even taking as true appellant's assertion that Mary Kay made such misrepresentations, one of the elements of a fraud claim is that the plaintiff actually and justifiably relied on the misrepresentation to suffer injury. DRC Parts & Accessories v. VM Motori, S.P.A., 112 S.W.3d 854, 858 (Tex. App.-Houston [14th Dist.] 2003, pet. denied). Reliance upon an oral representation that is directly contradicted by the express, unambiguous terms of a written agreement between the parties is not justified as a matter of law. Id. As discussed above, the ISD unambiguously provided that it was terminable by either party with thirty days' written notice, and all appellant's rights and privileges as a director would terminate at that time. Thus, not only did the ISD provide appellant's commissions would terminate, it provided that the ISD was not assignable. Because these provisions of the ISD directly contradict the alleged misrepresentations of Mary Kay, appellant's reliance on such misrepresentations was not justified as a matter of law. Id. We overrule appellant's third issue.

In her fourth issue, appellant argues there was some evidence of a special relationship between appellant and Mary Kay giving rise to an implied duty of good faith and fair dealing. Thus, appellant argues, fact issues exist precluding summary judgment on her claim that Mary Kay breached its duty of good faith and fair dealing. A common-law duty of good faith and fair dealing does not exist in all contractual relationships. Subaru of Am. v. David McDavid Nissan, 84 S.W.3d 212, 225 (Tex. 2002). Rather, the duty arises only when a contract creates or governs a special relationship between the

parties. Id. A "special relationship" has been recognized where there is unequal bargaining power between the parties and a risk exists that one of the parties may take advantage of the other based upon the imbalance of power, e.g., insurer-insured. See Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex.1987). But the supreme court has ruled that the elements which make a relationship special are absent in the relationship between an employer and an employee. See City of Midland v. O'Bryant, 18 S.W.3d 209, 215 (Tex. 2000). Appellant cites no authority, and we have found none, holding that an independent contractor has a special relationship with a company for which it sells products. Under these circumstances, we conclude the evidence conclusively established appellant's relationship with Mary Kay was only that of an independent contractor and did not constitute a "special relationship" with Mary Kay. See id. Thus, summary judgment was appropriate on appellant's claims premised on a breach of the duty of good faith and fair dealing. See Nixon, 690 S.W.2d at 548-49. We overrule appellant's fourth issue.

In her fifth issue, appellant argues there is more than a scintilla of evidence to support her claims for intentional infliction of emotional distress. To recover under this independent tort, a plaintiff must prove that 1) the defendant acted intentionally or recklessly, 2) the conduct was "extreme and outrageous," 3) the actions of the defendant caused the plaintiff emotional distress, and 4) the resulting emotional distress was severe. Standard Fruit and Vegetable Co., Inc. v. Johnson, 985 S.W.2d 62, 65 (Tex. 1998). "Extreme and outrageous" behavior requires that the conduct be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Sw. Bell Mobile Sys., Inc. v. Franco, 971 S.W.2d 52, 54 (Tex. 1998). Liability does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities. Hoffmann-La Roche Inc. v. Zeltwanger, 144 S.W.3d 438, 445 (Tex. 2004).

Here, appellant cites Mary Kay's refusal to let her be the last speaker at the June 2005 Mary Kay sales seminar as the basis of her claim of intentional infliction of emotional distress. Appellant concedes that, on its face, the refusal to let her speak at the seminar is not extreme and outrageous. Further, appellant "does not contend that she had some contractual or otherwise legal `right' to give the final seminar speech." Nevertheless, appellant contends that, "in the unique Mary Kay business and social context," Mary Kay's refusal to let her speak was "viewed by those present as an extreme and outrageous insult." Under these circumstances, however, we cannot conclude Mary Kay's refusal to let appellant speak at Mary Kay's seminar was beyond all possible bounds of decency, atrocious, and utterly intolerable in a civilized community. See Franco, 971 S.W.2d at 54. Accordingly, the evidence conclusively disproves appellant's claim of intentional infliction of emotional distress. We overrule appellant's fifth issue.

In her sixth issue, appellant argues she was a "consumer" under the DTPA, and the trial court erred in granting summary judgment on her DTPA claim. At least two requirements must be established for a person to qualify as a consumer under the DTPA. Cameron v. Terrell & Garrett, Inc., 618 S.W.2d 535, 539 (Tex. 1981). One requirement is that the person must have sought or acquired goods or services by purchase or lease. Id. Another requirement is that the goods or services purchased or leased must form the basis of the complaint. Id. In her pleadings below, appellant argued her DTPA claim was based on her status as a consumer of Mary Kay's products. To the extent appellant failed to raise the issue of her

status as a consumer of Mary Kay's services in her pleadings, she cannot raise that issue for the first time on appeal. See Tex. R. App. P. 33.1(a)(1).

As to appellant's status as a consumer of Mary Kay's products, the record shows Mary Kay's products do not form the basis of her complaints. See Cameron, 618 S.W.2d at 539. Instead, appellant's claims are based on Mary Kay's (1) refusal to let appellant speak at a sales seminar, (2) refusal to pay appellant commissions after the termination of the ISD, and (3) refusal to allow appellant to transfer her rights under the terminated ISD. Because none of these claims are related to appellant's purchase of goods from Mary Kay, Mary Kay has conclusively established appellant is not a "consumer" under the DTPA. See id. Under these circumstances, the trial court did not err in granting summary judgment on appellant's DTPA claim. See Nixon, 690 S.W.2d at 548-49. We overrule appellant's sixth issue.

We affirm the trial court's judgment.

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