

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 11, 2003

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-1912
STATE OF WISCONSIN**

Cir. Ct. No. 00 CV 8732

**IN COURT OF APPEALS
DISTRICT I**

K. WILLIAM ALLEN ENTERPRISES, INC.,

PLAINTIFF-APPELLANT,

v.

SAFEWAY INDUSTRIES, INC.,

DEFENDANT-RESPONDENT,

SERIO S.P.A.,

DEFENDANT.

APPEAL from an order of the circuit court for Milwaukee County:
THOMAS R. COOPER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

¶1 PER CURIAM. K. William Allen Enterprises, Inc. appeals from an order granting summary judgment to Safeway Industries, Inc. and dismissing the complaint alleging breach of contract, breach of good faith and tortious

interference. Allen claims the trial court erred in granting summary judgment because: (1) material facts are in dispute as to whether Safeway breached the contract by sending a termination notice; (2) Safeway breached its covenant of good faith; and (3) Safeway tortiously interfered with the agreement. Because the trial court did not err in granting summary judgment, we affirm.

BACKGROUND

¶2 On June 16, 1995, Allen, Safeway and Serio S.p.A. entered into a written agreement for the sale of Iodip. The agreement provided for the distribution of the product from Safeway, through Allen as the exclusive distributor to Serio in Japan. The agreement indicated that the exclusive dealership arrangement would be for two years:

7. This contract shall be continuous for a period of two (2) years from the date hereof unless;

....

H. Shipments of Iodip to Distributor are less than twelve (12) full 20 foot containers for the first year of the contract and fifteen (15) full 20 foot containers for the second year of contract, or less than two (2) full 20 foot containers per quarter in any year.

¶3 Violation of provision (7)(H) allowed for termination on ninety days notice. The agreement would automatically renew under the terms set forth in paragraph (8), which states: “In the absence of such termination, this contract shall be automatically renewed from year to year if all parties agree to in writing minimum shipment requirements prior to the end of the then current contract year.”

¶4 During the first year, Allen shipped twelve containers and in the second year, Allen shipped fourteen containers. Contrary to paragraph (8) of the agreement, the parties did not agree in writing on the minimum shipment requirements. Despite this, the parties continued the relationship. On August 3, 1999, Safeway provided written notice to Allen that it was terminating the agreement, effective June 15, 2000. After that date, Safeway indicated it would deal directly with Serio.

¶5 Allen commenced this lawsuit alleging that Safeway's termination of the contract constituted a breach, that Safeway's direct contact with Serio breached the implied duty of good faith, and that Safeway tortiously interfered with the contractual relationship between Allen and Serio.¹ Safeway filed a motion seeking summary judgment, which was granted. Allen now appeals.

DISCUSSION

¶6 This appeal arises following a grant of summary judgment. Our standard of review of such appeals is well-known. We review the trial court's decision independently, using the same methodology as the trial court. *R.W. Docks & Slips v. State*, 2001 WI 73, ¶12, 244 Wis. 2d 497, 628 N.W.2d 781. We will affirm the trial court's decision to grant summary judgment if there are no genuine issues of material fact and if the "moving party is entitled to judgment as a matter of law." *Id.* (citation omitted).

¹ The original complaint also alleged a violation of the Wisconsin Fair Dealership Law and sought punitive damages. The trial court dismissed these portions of the complaint and Allen does not challenge that decision on appeal.

¶7 We conclude that Safeway was entitled to judgment as a matter of law. First, paragraph (8) of the contract indicates that if there is no written agreement as to the minimum shipment requirements, then the contract does not automatically renew. Here, it is undisputed that the parties did not enter into a written agreement in compliance with paragraph (8). Allen argues that despite the violation of that provision, the course of dealings between the parties demonstrates the renewal of the contract for three years subsequent to the initial two-year period. Allen argues that based on these actions, Safeway waived the requirements of paragraph (8) and the parties chose not to be bound by the terms of the written agreement.

¶8 At first glance, Allen's argument is persuasive; however, a closer review of the agreement demonstrates that Allen's contentions fall short. Section (11) of the agreement precludes oral modifications, and section (14) requires that the agreement "shall not be modified or changed except by an instrument or instruments in writing signed by the parties hereto." Moreover, section (17) indicates that a waiver of any breach of the terms of the agreement "shall not in any way be constructed as a waiver of any subsequent breach."

¶9 Relying on these provisions, Safeway argues that the agreement precludes oral modifications, which Allen claims changed the terms of the contract. Further, Safeway contends that even if it waived the minimum requirements of paragraph (8) in years three and four, it clearly did not waive the requirement in the fifth year of the agreement, as evidenced by its written notice to Allen that it was terminating the agreement on June 15, 2000. Given the clear terms of the contract, we cannot rule in Allen's favor. We must apply the terms of the contract as written, and cannot rewrite the contract. *Meyer v. City of Amery*,

185 Wis. 2d 537, 543-44, 518 N.W.2d 296 (Ct. App. 1994). Accordingly, Safeway's termination of the agreement did not constitute a breach.

¶10 Second, Allen contends that Safeway breached its duty of good faith when it talked to Serio about working with Serio upon the termination of the agreement with Allen. The trial court found there were no facts in dispute as to the good faith argument. The trial court ruled that no facts supported the allegations of a breach of good faith. We agree.

¶11 The duty of good faith is intended as a guaranty against "arbitrary or unreasonable conduct." *Foseid v. State Bank of Cross Plains*, 197 Wis. 2d 772, 796, 541 N.W.2d 203 (Ct. App. 1995). Breaches of good faith include conduct which violates community standards of decency, fairness or reasonableness. *Id.* There is no factual support that Safeway engaged in a breach of good faith. To the contrary, the record reflects that even after Allen failed to meet the minimum requirements in year two, Safeway continued to honor the agreement for a reasonable period of time. This demonstrates that Safeway made a good faith effort to abide by its commitment to the exclusive dealership. Moreover, Safeway provided Allen with substantial advance notice—ten months—further demonstrating its good faith and forthright attitude with respect to termination of the agreement. The trial court did not err when it granted summary judgment on this claim.

¶12 Third, Allen contends that Safeway tortiously interfered with its contractual relationship with Serio. The trial court disagreed and granted summary judgment on this claim as well. We agree with the trial court that Safeway was entitled to judgment on this claim as a matter of law.

¶13 The agreement involved here was a contract involving Safeway, Allen and Serio. Safeway provided the product to Allen, who was the exclusive distributor of the product to Serio. A party cannot tortiously interfere with its own contract. *Wausau Medical Ctr. v. Asplund*, 182 Wis. 2d 274, 297, 514 N.W.2d 34 (Ct. App. 1994). Safeway, Allen and Serio all were parties to this contract as evidenced by each party's signature on the agreement. Accordingly, as a matter of law, Allen cannot maintain a claim for tortious interference with a contract against a party to that contract. Accordingly, we must affirm the trial court's grant of summary judgment.

By the Court.—Order affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

