Affirmed and Majority and Concurring and Dissenting Opinions filed July 20, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01152-CV

MICHELLE P. GRAHAM, Appellant

V.

MARY KAY INC., Appellee

On Appeal from the 334th District Court
Harris County, Texas
Trial Court Cause No. 95-48788

C O N C U R R I N G AND D I S S E N T I N G OP I N I O N

Because I believe the trial court improperly resolved questions of credibility in this summary judgment proceeding, and did not apply the standard of review normally accorded a nonmovant in a summary judgment proceeding, I respectfully dissent.

Under our summary judgment standard, we take all evidence favorable to the nonmovant as true and indulge every reasonable inference in the nonmovant's favor. *Walker v. Harris*, 924 S.W.2d 375, 377 (Tex. 1996). I believe there are at least two instances in which a fact issue arose in this proceeding and which should have precluded summary judgment.

While the judgment recites that the parties stipulated there was no issue of fact, there is no written agreement or stipulation to guide us. With no agreement to guide us, we will presume the agreed-upon facts are the ones provided by the parties in the appellate record. And this record is rife with conflicting facts.

First, in her deposition testimony appellant asserted that all she ever did was advertise in a local shoppers' publication that she would buy Mary Kay merchandise. If true, this would not constitute tortious interference because she would have an equal or superior right to the subject matter of the agreement. *See Victoria Bank & Trust v. Brady*, 811 S.W.2d 931, 939 (Tex. 1991); RESTATEMENT (SECOND) OF TORTS § 766 and comments m and n (1979). Appellant also acknowledged ordering products directly from Mary Kay, but this was with the approval of Michelle Ogden, a marketing director who supplied appellant with her account number and the numbers of consultants under her. In any case, once the products were purchased, Mary Kay had no further interest in them. *See Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 409 (1911). Viewed in the light most favorable to appellant, I believe this testimony was sufficient to raise a fact question as to whether or not there was tortious interference on the part of Graham.

Second, deposition testimony shows that a meeting was held between outside counsel for Mary Kay and members of Mary Kay's independent sales force who had complained about appellant's activities. Although the witness forgot what was said at that meeting, the record contains letters from directors and beauty consultants to the mall manager where appellant had set up shop, urging the mall to terminate her lease. I believe that a reasonable inference should have been indulged that Mary Kay was in fact coordinating and sanctioning this activity, precluding summary judgment on appellant's tortious interference counterclaim.

Finally, I am not convinced that the law on trademark is on Mary Kay's side. The evidence in favor of the nonmovant shows that appellant dealt only in products which Mary Kay sold to its independent sales force. This includes shopping bags and beauty books which Ogden purchased from Mary Kay and which Ogden sold to appellant. Under the first sale doctrine, once a trademark owner sells his product, the buyer ordinarily may resell the product under the original mark without incurring any trademark liability. *NEC Electronics v. Cal. Circuit ABCO*, 810 F.2d 1506, 1509 (9th Cir. 1987). Furthermore, the first

sale doctrine applies even when consumers may erroneously believe the reseller is affiliated with or authorized by the producer. *Sebastian Int'l v. Longs Drug Stores,* 53 F.3d 1073 (9th Cir. 1995). I believe appellant may thus be immunized from trademark liability for dealing in items which were sold by Mary Kay. I agree, however, that appellant can be enjoined from using the trademark Mary Kay rose.

Mary Kay's recourse is against the sales directors and beauty consultants who chose to supply appellant with products. Because the majority holds otherwise, I respectfully dissent.

/s/ D. Camille Hutson-Dunn
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Justices Sears, Lee and Hutson-Dunn. *

Publish — TEX. R. APP. P. 47.3(b).

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*Senior Justices Ross A. Sears, Norman Lee and D. Camille Hutson-Dunn sitting by assignment.