

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

**BCH HOLDING, INC, RYAN TRANSPORTATION,
INC, RYAN TRANSPORTATION GROUP, INC,
RYAN EQUIPMENT LEASING, LLC, RYAN
REALTY LEASING, LLC and AUTO EXPEDITING,
INC,**

Plaintiffs,

14-003083-CB

-v-

Case No. 14-003083-CB

**JOSEPH HART, DEAN KIROSKI, MENSUDIN
MUJOVIC, KEVIN ZAHRA, M&A TRANSPORT,
LLC, and BRIGHT SKY TRANSPORT, LLC,**

Hon. Daniel P. Ryan

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CATHY M. GARRETT
/s/ Michelle Howard

Defendants,

and

**M&A TRANSPORT, LLC, and BRIGHT SKY
TRANSPORT, LLC,**

Counter-Plaintiffs,

-v-

**BCH HOLDING, INC, RYAN TRANSPORTATION,
INC, RYAN TRANSPORTATION GROUP, INC,
RYAN EQUIPMENT LEASING, LLC, RYAN
REALTY LEASING, LLC and AUTO EXPEDITING,
INC,**

Counter-Defendants.

OPINION

This case is before the Court on Defendants/Counter-Plaintiffs' Motion for Summary Disposition, and Plaintiffs/Counter-Defendants' Motion for Leave to File First Amended Complaint. For the reasons stated below, the Court will deny the motions.

1. Facts and Procedural History

Plaintiff Ryan provides commercial freight transportation services. Defendant Joseph Hart was an employee of Ryan and in 2008 executed two agreements with Ryan. The first agreement was a Non-Competition Agreement, which precluded Hart from competing with Ryan, soliciting or interfering with Ryan's customers and employees, and disparaging Ryan or disclosing or using Ryan's confidential proprietary business information for a period of five years, ending December 22, 2013. The second agreement was a Buy-Out Agreement. Pursuant to the Buy-Out Agreement, Hart agreed to not compete against Ryan, solicit Ryan's customers or employees, or improperly use or disclose Ryan's confidential proprietary information for a period of two years following the end of his employment with Ryan. Following the execution of the agreements, Hart became Ryan's President and CEO, and later its CFO.

Sometime in the beginning of 2013, defendants Mensudin Mujovic and Dean Kiroski approached Hart, who was still working at Ryan, about starting another trucking company. According to Mujovic and Kiroski, Hart informed them that he was not allowed to start such a company. Hart also informed Kevin Zahra that he was subject to a non-compete agreement with Ryan. In November of 2013, defendants Zahra, Kiroski, and Mujovic filed Articles of Organization with the State of Michigan to form Bright Sky, a trucking company.

Plaintiffs allege that despite knowing about Hart's non-compete agreements, Defendants¹ induced Hart to break the non-compete agreements and assist them in forming Bright Sky, including, but not limited to, stealing employees from Plaintiffs and helping Defendants obtain the required insurance. On March 10, 2014, Plaintiffs filed suit, alleging claims of: (1) Breach of Contract as to Defendant Hart, (2) Breach of Fiduciary Duties as to Defendant Hart, (3) Tortious

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"Defendants" in this opinion will refer to all defendants except Joseph Hart.

Interference as to Defendant Hart, (4) Tortious Interference as to Other Defendants, (5) Civil Conspiracy as to All Defendants, and (6) Breach of Contract as to M&A Transport.

On November 4, 2014, this Court dismissed count (6), the breach of contract claim, against M&A Transport. Defendants then filed the instant motion for summary disposition, seeking dismissal of the tortious interference and civil conspiracy claims. Also before the Court is Plaintiffs' motion for leave to file an amended complaint.

2. Standard of Review

Defendants bring their motion pursuant to MCR 2.116(C)(10). In reviewing a motion under MCR 2.116(C)(10), a court must consider the pleadings, admissions, affidavits, and other relevant documentary evidence submitted in the light most favorable to the nonmoving party. *Corely v Detroit Bd of Ed*, 470 Mich 274, 278; 681 NW2d 342 (2004). If no genuine issue of material fact is established, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

3. Analysis

A. Motion for Summary Disposition

i. Tortious Interference With a Contract

Defendants first argue that Plaintiffs' claim for tortious interference must fail because it is premised on nothing more than speculation and conjecture.

"The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant."

Knight Enterprises v RPF Oil Co, 299 Mich App 275, 280; 829 NW2d 345 (2013). To prove tortious interference with a contract, plaintiff must prove improper interference by defendant. “In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs’ contractual rights. . . .” *Advocacy Organization for Patents & Providers v Auto Club Ins Assoc*, 257 Mich App 365, 383; 670 NW2d 569 (2003). Actions motivated by legitimate business reasons do not constitute improper interference. *Badiee v Brighton Area Schools*, 265 Mich App 343, 366; 695 NW2d 521 (2005).

Defendants argue that Plaintiffs’ claims fail as a matter of law because there is no evidence that Defendants instigated Hart to take any action as alleged by Plaintiffs or intentionally induced Hart to breach his contract with Plaintiffs. They argue that Plaintiffs have failed to produce any documentary or testimonial evidence to support the claim that Defendants induced Hart to breach his agreements with Ryan.

In response, Plaintiffs argue that they have presented sufficient evidence to at least raise a genuine issue of fact regarding whether Defendants were aware of Hart’s non-compete agreements and induced him to breach the agreements.² The Court agrees.

Mujovic and Kiroski testified that they met with Hart around October 2013 and asked him about opening another trucking company. When Hart informed them that he was not allowed to do so, Kiroski testified that they “moved right away from Joe.” Zahra’s deposition testimony establishes that he also knew about the non-compete agreements. He testified that Hart told him that he was under a non-compete agreement and could not be involved in the formation of Bright Sky.

² Plaintiffs also request summary disposition in their favor under MCR 2.116(I)(2).

Although Defendants asserted in their depositions that they moved away from Hart after learning of the non-compete agreement, there is evidence that they induced Hart to help set up Bright Sky, a direct competitor of Ryan. For example, Zahra asked Hart for help in purchasing insurance for Bright Sky. Hart was thereafter actively involved in obtaining insurance for Bright Sky, including exchanging numerous emails with Natalie Harold and Raymond Booth of Shears II Insurance. In helping to obtain insurance for Bright Sky, Hart asked Jim Gibson, Ryan's safety director, for a list of all M&A Transport's equipment, driver names, driver's license numbers and social security numbers. An email train between Booth, Hart, and Zahra shows that Hart met at least twice with Booth to discuss obtaining insurance for Bright Sky. Finally, Hart's phone records show that Hart spoke on the telephone with Mark Dull at least eight times, and that Bright Sky eventually purchased insurance from Dull.

Jim Gibson also testified that Hart came to his house in December of 2013 to discuss setting up a new trucking company. Two weeks later, in January of 2014, Hart, Zahra, Kiroski and Mujovic all met with Gibson at his house to discuss the formation of Bright Sky. Hart was actively involved in the discussion.

There is also evidence that Defendants used Hart, despite knowledge of the non-compete agreements, to solicit Ryan's employees. Three of Ryan's employees left in February of 2014 to work for Bright Sky. Brian Latham, one of the employees who left, sent a text message to another Ryan employee who ultimately left for Bright Sky, indicating that Hart and other Defendants wanted the employee to work at Bright Sky.

Based on the foregoing evidence presented by Plaintiffs, the Court finds that there remains a genuine issue of material fact regarding whether Defendants interfered with the non-compete agreements between Plaintiffs and Hart. Accordingly, the Court will deny Defendants'

motion for summary disposition as to this claim and will also deny Plaintiffs' request for summary disposition under MCR 2.116(I)(2).

ii. Civil Conspiracy

Defendants also request summary disposition on the civil conspiracy claim. However, requested dismissal of the civil conspiracy claim is dependent on the Court's grant of summary disposition on the tortious interference claim. "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986). Because the Court has denied summary disposition on the tortious interference claim, the Court will also deny summary disposition as to the civil conspiracy claim.

B. Plaintiffs' Motion For Leave to File Their First Amended Complaint

Plaintiffs seek leave to amend their complaint to essentially reinstate their breach of contract claim against defendant M&A. On October 8, 2014, M&A filed a motion for summary disposition under MCR 2.116(C)(8) and (C)(10), arguing that there was no express contract between M&A and Plaintiffs. Plaintiffs argue that the contract did not terminate until M&A gave the notice required under the contract, which occurred in February of 2014. On November 4, 2014, this Court granted M&A's motion under MCR 2.116(C)(10), holding that the contract between Plaintiffs and M&A expired on September 25, 2013. Plaintiffs now seek leave to amend their complaint to reinstate the breach of contract claim against M&A.

A trial court should freely grant leave to amend a complaint when justice so requires. MCR 2.118(A)(2). Leave to amend may be denied for particularized reasons such as undue delay, bad faith or dilatory motive on the movant's part, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of

the amendment, or futility of the amendment. *Hakari v Ski Brule, Inc*, 230 Mich App 352. 355; 584 NW2d 345 (1998).

In this case, the Court will deny leave to amend because amendment would be futile. Plaintiffs have presented no new evidence in their request to amend which establishes that a contract existed between Plaintiffs and M&A after September 25, 2013. At best, Plaintiffs have proffered evidence which establishes that M&A provided two weeks' notice to Plaintiffs in February 2014 because that was the standard operating procedure between Plaintiffs and M&A. Plaintiffs have not, however, proffered any new evidence that there was an express contract between Plaintiffs and M&A that was valid after September 25, 2013. Accordingly, the Court will deny Plaintiffs leave to amend the Complaint to reinstate the breach of contract claim against M&A.

/s/ Daniel P. Ryan

Circuit Judge

DATED: 6/1/2015