

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**FORGE INDUSTRIAL STAFFING, INC,
Plaintiff,**

v.

**Case No. 13-137675-CK
Hon. James M. Alexander**

**BRYAN DIXON,
Defendant.**

_____ /

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff’s motion for summary disposition or, in the alternative, an evidentiary hearing on a preliminary injunction.¹ On March 5 of this year, the Court decided a very similar motion. As summarized in the prior Opinion:

This suit arose after Defendant left his employment with Plaintiff and began working for another staffing company. On August 17, 2013, two days after his termination, Defendant signed a General Release Agreement in exchange for an \$11,751.40 payment from Plaintiff. In relevant part, this agreement contained non-compete, non-solicitation, and confidentiality provisions.

On October 11, 2013, non-party Impact Management Services hired Defendant as a Program Manager. Then on December 3, 2013, Plaintiff filed the present suit on claims that Defendant’s employment with Impact breached the confidentiality and non-competition provisions of the General Release Agreement
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In the prior motion, Defendant moved for summary disposition under MCR 2.116(C)(10), arguing that Plaintiff failed to present any evidence that Defendant violated any portion of the Agreement. In response to Defendant’s motion, Plaintiff sought summary disposition under

¹ The Court previously conducted a preliminary injunction hearing on December 11, 2013 and denied Plaintiff’s request for the same.

MCR 2.116(I)(2), arguing that Defendant was doing the same work for Impact that he did when employed by Plaintiff. As a result, Plaintiff argued that it was entitled to judgment on its claim that Defendant was “working in a prohibited capacity in direct violation of the agreement he had with [Plaintiff].”

Under paragraph 5 of the Agreement, Defendant agreed that he “shall not . . . be employed by . . . any Competitive Business . . . in any capacity **in which [Defendant’s] knowledge of [Plaintiff’s] Confidential Information would facilitate [Defendant’s] work for the Competitive Business.**” (emphasis added).

After analyzing the contract language, the Court reasoned that the parties presented competing evidence whether Defendant worked in a capacity where his knowledge of Plaintiff’s Confidential Information “would facilitate” his work for Impact.

Additionally, the Court noted that Plaintiff repeatedly questioned Defendant’s credibility, and the same was properly an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007).

The Court also cited language from *Vanguard Ins Co v Bolt*, 204 Mich. App. 271; 514 N.W.2d 525 (1994), where the Court of Appeals held:

The granting of a motion for summary disposition is especially suspect where motive and intent are at issue or where a witness or deponent’s credibility is crucial. Accordingly, where the truth of a material factual assertion of a moving party depends upon a deponent’s credibility, there exists a genuine issue for the trier of fact and a motion for summary disposition should not be granted. *Vanguard Ins, supra* at 276 (internal citations omitted).

The Court then concluded:

Whether or not Defendant works for Impact “in a capacity in which [his] knowledge of [Plaintiff’s] Confidential Information would facilitate [his] work for [Impact]” is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.

Inexplicably, Plaintiff again moves for summary disposition of its breach of contract claim under MCR 2.116(C)(10), arguing that “discovery has changed the undisputed facts” and revealed sufficient information to establish its entitlement to judgment as a matter of law. In other words, Plaintiff filed the present (C)(10) motion based on **more** “undisputed” evidence. Despite Plaintiff’s characterization, however, nothing has changed.

The parties present competing evidence that Defendant works in a capacity where his knowledge of Plaintiff’s Confidential Information “would facilitate” his work for Impact. Plaintiff’s evidence comes in the form of deposition testimony, affidavits, and other documentary evidence. Plaintiff also repeatedly questions Defendant’s credibility. Defendant, on the other hand, presents deposition testimony that he is not working in a prohibited capacity.

There is no way for this Court to rule on the present motion without making credibility and factual determinations that are inappropriate for such a motion.

The Court will also note that it seems that Plaintiff’s interpretation of the restrictive covenant is also overly broad. Much of Plaintiff’s argument appears to be founded on the interpretation that the provision reads that Defendant “shall not . . . be employed by . . . any Competitive Business” – while ignoring the remainder of the sentence “in any capacity in which [Defendant’s] knowledge of [Plaintiff’s] Confidential Information would facilitate [Defendant’s] work for the Competitive Business.”

This, however, is not the case. The Agreement provides Defendant cannot be employed by any competitive business in which his knowledge of Plaintiff’s confidential information “would facilitate” his work for the competitor. Plaintiff glances over the “confidential information” and “would facilitate” requirements. Certainly, not all information that Defendant

acquired while working for Plaintiff was “confidential.” And Plaintiff fails to sufficiently identify what “confidential” information Defendant is using to make his job easier at Impact.

Plaintiff also appears to argue that the phrase “would facilitate” is interchangeable with “could facilitate” or “has the possibility.”² This interpretation is flawed.

The word “would” is defined in Black’s Law Dictionary as follows: “A word sometimes expressing what might be expected or preferred or desired. Often interchangeable with the word ‘should,’ but not with ‘could.’” The Merriam Webster Dictionary defines “would,” in part, as the past tense of “will.”

Black’s Law defines “will” as “[a]n auxiliary verb commonly having the mandatory sense of ‘shall’ or ‘must.’ It is a word of certainty, while the word ‘may’ is one of speculation and uncertainty.” “Facilitate” is defined as “[t]o free from difficulty or impediment” or “to make easy or less difficult.” Black’s Law Dictionary, Sixth Edition.

Based on these definitions, the Court finds that the Agreement’s use of the term “would facilitate” means that Defendant is only prohibited from working for a competitor if he works in a capacity where his knowledge of Plaintiff’s confidential information actually makes it easier to do his job for said competitor.

Defendant testified that “nothing” he learned at Plaintiff helps him in his job at Impact. He further testified that Plaintiff’s confidential information does not help him because Impact has its own way of doing things that is “very different” from Plaintiff’s way.

Plaintiff apparently disagrees. This is why there are trials, which is where this case has to be decided. The Court repeats its prior ruling:

Whether or not Defendant works for Impact “in a capacity in which [his] knowledge of [Plaintiff’s] Confidential Information would facilitate [his] work for

² Plaintiff argues that the Agreement “applies only to those positions where Forge’s Confidential Information is **potentially relevant** to Dixon’s work, i.e., ‘would facilitate.’” (Brief in Support, at 14) (emphasis added).

[Impact]” is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition wholly inappropriate.

For the foregoing reasons and viewing the evidence in the light most favorable to Defendant, this Court cannot conclude that there are no material facts in dispute to warrant judgment in favor of Plaintiff as a matter of law. As a result, Plaintiff’s Motion for Summary Disposition is DENIED.

Plaintiff’s alternative request for an evidentiary hearing on a preliminary injunction is similarly DENIED because Plaintiff has failed to sufficiently identify what “confidential” information Defendant is using to make his job easier at Impact.

The Court will also note Plaintiff was aware that the Court previously ruled that summary disposition based on credibility determinations and factual disputes was inappropriate. Despite this, Plaintiff filed the present motion for summary disposition based on additional “undisputed” evidence (that was clearly disputed), a broad interpretation of the restrictive covenant, and again attacking Defendant’s credibility. As a result, the Court finds that Plaintiff’s motion is frivolous.

MCR 2.114(D) provides that:

The signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that . . . the document is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and . . . the document is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

Plaintiff violated MCR 2.114(D) by filing a motion on the same basis that it was previously denied. Under MCR 2.114(E):

If a document is signed in violation of this rule, the court, on the motion of a party or on its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. The court may not assess punitive damages.

Under MCR 2.114(F): “In addition to sanctions under this rule, a party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2). The court may not assess punitive damages.”

MCR 2.625(A)(2) provides, “if the court finds on motion of a party that an action or defense was frivolous, costs shall be awarded as provided by MCL 600.2591.”

The cited statute, MCL § 600.2591 states:

(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court . . . shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.

(2) The amount of costs and fees awarded under this section shall include all reasonable costs actually incurred by the prevailing party and any costs allowed by law or by court rule, including court costs and reasonable attorney fees.

Defendant may bring an appropriate motion for actual costs and actual attorney fees against Plaintiff based on this Opinion.

IT IS SO ORDERED.

August 13, 2014
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge