

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

PERSONAL CARE PRODUCTS, LLC,

Plaintiff,

Case No. 14-138521-CK

v

Hon. Wendy Potts

MARY ANN WEISBERG, et al,

Defendants.

_____/

OPINION AND ORDER RE:
DEFENDANT MARY ANN WEISBERG'S MOTION FOR SUMMARY DISPOSITION
AND
DEFENDANT BRYCE PERRY'S MOTION FOR SUMMARY DISPOSITION
AND
PLAINTIFF'S MOTION TO STRIKE SUPPLEMENTAL AFFIDAVIT OF XIAO (SAM)
LANG
AND
DEFENDANTS' MOTION TO STRIKE THE AFFIDAVIT OF ANSIS V. VIKSNINS

At a session of Court
Held in Pontiac, Michigan

On

JUL 24 2015

In 1985, Defendant Mary Ann Weisberg acquired stock in her father Lawrence Weisberg's company, Personal Care Products, Inc., which sold home, health, and beauty products to discount stores. Ms. Weisberg held that stock as a passive investor until 2010, when Lawrence Weisberg sold the company's assets to Plaintiff Personal Care Products, LLC (PCP, LLC). As a part of that sale, Ms. Weisberg signed a noncompetition agreement with PCP, LLC that barred her from directly or indirectly engaging in any business that is the same as, similar to, or competitive with PCP, LLC. Weisberg also agreed that she would not become an owner,

principal, investor, or lender in a competitive business or “acquire or hold any interest in any Person that directly or indirectly engages in any business” that is competitive with PCP, LLC.

Weisberg’s husband, Defendant Bryce Perry, was an independent sales representative for Personal Care Products Inc. for more than twenty years. After PCP, LLC took over the business, Perry continued to serve as an independent sales representative for PCP until April 2013. Perry did not have a written agreement with either Personal Care Products, Inc. or PCP, LLC. After Perry left PCP, LLC he began representing a Chinese company Ningbo Rejoice I/E Co., LTD through his company Perry Group International, Inc. Ningbo Rejoice competes directly with PCP, LLC in the sale of products to discount stores. PCP, LLC claims that since Perry began representing Ningbo Rejoice, it has undercut PCP, LLC’s prices and caused it more than a \$1 million in lost profits.

PCP, LLC filed this action alleging several claims against Perry including misappropriation of trade secrets and tortious interference with PCP, LLC’s contracts and prospective economic advantages. PCP, LLC alleges that Weisberg breached her noncompetition agreement by assisting Perry in competing against PCP, LLC and conspiring with Perry to misappropriate PCP, LLC’s trade secrets. PCP, LLC further asserts that Perry is liable for breach of Weisberg’s noncompetition agreement on the theories that he is bound by the agreement as Weisberg’s spouse and as a co-conspirator. Defendants responded to the complaint with a motion to dismiss for lack of personal jurisdiction, which the Court denied.

The matter is now before the Court on Defendants’ motions for summary disposition under MCR 2.116(C)(10), which tests the factual support for its claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). When deciding a (C)(10) motion, the Court

considers admissible evidence submitted by the parties in the light most favorable to the nonmoving party to determine if there is a genuine issue of material fact for trial. *Id* at 120.

I. Motions to strike affidavits

Before analyzing the summary disposition motions, the Court will address the parties' requests to strike affidavits.

PCP, LLC moves the Court to strike the affidavit of Sam Lang, President of Ningbo Rejoice. Defendants filed Lang's affidavit after the briefing was complete on their motions for summary disposition. PCP asserts that the affidavit is prejudicial because (1) it is given by a Chinese national whom they cannot subpoena, (2) pertains to Rejoice's finances, on which they were unable to conduct discovery, and (3) PCP will not be allowed an opportunity to respond.

The Court agrees with PCP, LLC that the affidavit is fundamentally unfair because it recites facts that PCP, LLC has no way of verifying and references information that Defendants opposed providing to PCP, LLC. As PCP, LLC notes, Lang cannot be compelled to testify at a deposition or trial because he is a Chinese national and does not live or work in the United States. Lang's company Rejoice was unwilling to produce any financial documents due to their confidential nature and the competitive relationship between PCP, LLC and Rejoice. Further, Defendants resisted PCP, LLC's efforts to obtain their financial information on the grounds that the information is confidential and not relevant to the proceeding. Thus, PCP, LLC has no means of verifying Lang's statement that Defendants did not provide funding to Rejoice or Lang's other business entities. Defendants cannot vigorously oppose PCP, LLC's discovery, and then rely on facts or evidence that they refused to allow PCP, LLC to access. Therefore, the Court strikes Lang's affidavit and will not consider it in deciding the summary disposition motions.

Defendants move the Court to strike an affidavit attached to PCP, LLC's response to Defendants' motions for summary disposition. The affiant is Ansis Viksnins, who is pro hac vice counsel for PCP, LLC. Defendants assert that the affidavit cannot be considered in deciding the summary disposition motions because it is inadmissible. See MCR 2.116(G). PCP, LLC contends that the Viksnins affidavit is not presented as substantive evidence of their claims, but as a showing under MCR 2.116(H) that PCP, LLC cannot adequately respond to the summary disposition motions because it is unable to obtain the necessary discovery. Thus, the Court will not strike the affidavit, but will consider it only in deciding whether summary disposition is premature due to outstanding discovery. To the extent that there are inadmissible or inappropriate statements in the affidavit, the Court will disregard them.

II. Weisberg's Summary Disposition Motion

Weisberg moves for summary disposition on the ground that there is no evidence that she is competing against PCP, LLC, and thus is not violating her noncompetition agreement. PCP, LLC's theory of Weisberg's liability is based on her having an interest in, investing in, or funding Perry's business. However, PCP, LLC produces no evidence that Weisberg funded Perry's business or has any interest in it. The only evidence of Weisberg's involvement in Perry's business is that she allowed Perry to use her investment money to fund a short-term loan to a Chinese manufacturer Ludao Technology. PCP, LLC presents no evidence that Ludau is a direct competitor, that Weisberg invested any funds in Perry's company or Ningbo Rejoice, or that she was otherwise involved in Perry's business. PCP, LLC claims that Perry provides funding for Ningbo Rejoice's operations and speculates that Perry does not have adequate resources to do so without receiving money from Weisberg. However, PCP, LLC presents no

evidence of where Perry obtained the funding for Ningbo Rejoice, and PCP, LLC produces no evidence verifying its suspicion that the money came from Weisberg.

PCP, LLC further asserts that Weisberg has an interest in Perry's business because she is his spouse and directly or indirectly benefits from the business. However, Weisberg's noncompetition agreement does not bar her from giving money to her spouse or receiving money from her spouse. Although the agreement bars Weisberg from having an interest any "person" who competes with PCP, LLC, it cannot credibly assert that Weisberg holds a financial interest in her husband that would violate the agreement. PCP, LLC cites no authority for the notion that a person can violate a noncompetition agreement simply by receiving a personal economic benefit from a spouse's competitive business. The fact that Weisberg shares financial resources with Perry, as do most spouses, does not mean that she has an interest in him or his business.

PCP, LLC also complains that it was precluded from obtaining needed discovery because it was not allowed access to Weisberg and Perry's personal financial records. However, Weisberg answered PCP, LLC's written discovery requests, produced some documents, and cooperated in two depositions. Despite this, PCP, LLC was unable to uncover any evidence that Weisberg invested in, provided funding to, or has an interest in Perry's business. Although summary disposition is generally premature when discovery on disputed issues is ongoing, PCP, LLC has the burden of explaining how further discovery will yield support for its position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000). Other than its speculation that Weisberg is funding Perry's company or receiving financial benefits from it, PCP, LLC is unable to articulate what evidence it expects to find in her personal financial records that would support its claim that she breached her noncompetition agreement.

In sum, PCP, LLC fails to demonstrate a question of fact whether Weisberg violated her noncompetition agreement, Weisberg is entitled to summary disposition, and the Court dismisses the claims against her with prejudice.

III. Perry's Summary Disposition Motion

A. Breach of contract and conspiracy or aiding and abetting theories

Perry seeks dismissal of PCP, LLC's claims that Perry was bound by Weisberg's noncompetition agreement and is liable for breaching the agreement. PCP, LLC's theory of Perry's direct liability is based on the fact that he is married to Weisberg. However, PCP, LLC presents no Michigan authority for its position that a nonsignatory spouse is bound by the other spouse's noncompetition agreement. Further, the out-of-state cases PCP, LLC cites are not persuasive. In each of those cases, there was evidence that the signatory spouse was directly involved in or directly benefiting from the nonsignatory spouse's competitive business. As the Court noted above, there is no evidence raising a question of fact whether Weisberg had any interest or involvement in Perry's business. Thus, unlike the cases PCP, LLC cites, Weisberg is not using Perry to get around her restrictive covenant and there is no rationale for imposing Weisberg's contractual obligations on Perry.

PCP, LLC also alleges that Perry is liable because he conspired with or aided and abetted Weisberg to breach the noncompetition agreement. This theory fails because, as explained above, PCP, LLC has not demonstrated a question of fact whether Weisberg breached the agreement. Conspiracy is not an independent cause of action. Rather, it is a theory of indirect liability that holds a party liable for someone else's misconduct because that party conspired with the wrongdoer. *Advocacy Organization for Patients & Providers v Auto Club Ins Assn*, 257 Mich App 365, 384; 670 NW2d 569 (2003). A conspiracy cannot exist in a vacuum; it requires

underlying wrongful conduct. *Roche v Blair*, 305 Mich 608, 613-14; 9 NW2d 861 (1943). In order for PCP, LLC to support its theory that Perry conspired with Weisberg to breach the noncompetition agreement, it would have to establish that the agreement was in fact breached. Because PCP, LLC fails to demonstrate a question of fact on its claim that Weisberg breached her noncompetition agreement, it cannot hold Perry liable as a co-conspirator.

In sum, Perry cannot be held liable for breaching the noncompetition agreement, and he is entitled to summary disposition of PCP, LLC's claims against him for breach of contract, aiding and abetting breach of contract, and civil conspiracy.

B. Misappropriation of Trade Secrets

Perry asks the Court to dismiss PCP, LLC's claim that he violated Michigan's Uniform Trade Secrets Act (MUTSA) because it cannot demonstrate a question of fact on the essential elements of the claim. To survive summary disposition of its MUTSA claim, PCP, LLC must show a question of fact that it had a "trade secret" and Perry "misappropriated" the secret, as those terms are defined by the statute. A "trade secret" means

[I]nformation, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d)]

Perry asserts, and the Court agrees, that a list of customer names, contact information, or other readily ascertainable information is not a trade secret. *Hayes-Albion v Kuberski*, 421 Mich 170, 183; 364 NW2d 609 (1985). However, PCP, LLC's information about the particular needs of those customers, and its pricing lists, marketing plans, costs, profit margins, and other financial information could fall within the definition of a trade secret. PCP, LLC need only show

that the information derives independent economic value from not being generally known to others, and it took reasonable steps to protect the confidentiality of the information. *Kelly Services v Eidnes*, 530 F Supp 2d 940, 951 (ED Mich, 2008). Perry claims PCP, LLC did not take reasonable measures to protect its information, noting PCP, LLC gives its customers access to its price lists. However, this fact, if proven, would apply to only one of the items that PCP, LLC is claiming as a trade secret. PCP, LLC's Vice President Philip Goldsmith testified in an affidavit about the measures the company takes to keep this information confidential and why there is economic value to its secrecy. Thus, PCP, LLC demonstrates a question of fact whether it had trade secrets within the meaning of MUTSA.

The more critical inquiry is whether PCP, LLC can show a factual dispute over Perry's alleged misappropriation of those trade secrets. The first definition of misappropriation – acquisition of another's trade secret by improper means – is not applicable here. MCL 445.1902(b)(i). There is no genuine dispute that Perry did not acquire PCP, LLC's trade secrets by improper means because it allowed Perry to access the information as a normal part of his work. In fact, Goldsmith conceded in his deposition that PCP, LLC is not claiming that Perry did anything inappropriate to acquire the alleged trade secrets.

At issue is the second definition, which involves improper use or disclosure of trade secrets:

“Misappropriation” means . . .

* * *

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving

rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b)]

As noted above, there is no evidence that Perry acquired the trade secrets by improper means, so § 1902(b)(ii)(A) is inapplicable. Likewise, there is no evidence that Perry acquired the information by accident or mistake, so § 1902(b)(ii)(C) does not apply. The question becomes whether Perry disclosed or used information that he acquired under circumstances giving rise to a duty to maintain its secrecy. § 1902(b)(ii)(B).

Perry first asserts that PCP, LLC cannot demonstrate a question of fact whether Perry used or disclosed its trade secrets. However, PCP, LLC asserts, and the Court agrees, that PCP, LLC has been stymied in its efforts to discover this fact. As PCP, LLC and its attorney note, Perry has refused to respond to even narrowly tailored discovery requests on this issue, citing the competitive relationship between Perry's company and PCP, LLC as support for its refusal. The Court acknowledges the sensitive nature of information sought and that PCP, LLC is asking Perry to reveal information that could place Perry's company at a competitive disadvantage to PCP, LLC. However, the Court cannot allow Perry to refuse to provide discovery on an issue, and then claim that PCP, LLC is unable to demonstrate a question of fact on that same issue. Further, PCP, LLC is continuing its efforts to obtain this information from other sources. Thus, summary disposition on the grounds of lack of evidence that Perry used or disclosed PCP, LLC's trade secrets is premature.

Perry also asserts that he was under no duty to keep PCP, LLC's information confidential, noting that PCP, LLC did not require him to sign a nondisclosure or confidentiality agreement and did not demand that Perry return the information when he left. PCP, LLC notes

that Perry asserts that his company's pricing, cost, profit, and financial information is confidential and proprietary, which is why he refused to produce it in discovery. This fact could give rise to an inference that Perry knew or had reason to know that similar information from PCP, LLC was confidential and proprietary and should be kept secret from its competitors. However, it does not establish that Perry had a continuing duty to keep PCP, LLC's information secret. It is undisputed that Perry had no contractual duty to maintain the secrecy of the information at issue, and PCP, LLC cites no authority holding that Perry would have a common-law obligation to do so under these circumstances. As an agent of PCP, LLC, Perry owed the company certain fiduciary or loyalty duties during the course of the relationship that would likely encompass keeping confidential information secret. *H J Tucker & Assocs v Allied Chucker & Eng'g Co*, 234 Mich App 550, 574; 595 NW2d 176 (1999). However, PCP, LLC cites no authority that these duties would continue once the relationship terminates.

Thus, while Perry may have known or had reason to know that PCP, LLC intended to keep certain information secret, and while there may be evidence that Perry used or disclosed this information, PCP, LLC fails to establish a question of fact that Perry had a duty to keep the information secret. For lack of evidence of this duty, PCP, LLC's MUTSA claim fails as a matter of law and Perry is entitled to summary disposition of that claim.

C. Tortious Interference with Contract and Prospective Economic Advantage

Perry asserts that PCP, LLC's tortious interference claim fails because it is preempted by MUTSA. However, MUTSA "displaces conflicting tort remedies for misappropriation of a trade secret." *CMI Int'l v Intermet Int'l Corp*, 251 Mich App 125, 132; 649 NW2d 808 (2002). Because PCP, LLC is not alleging that Perry interfered with its contractual or economic relationships through use of misappropriated trade secrets, the claim is not preempted by MUTSA. Because

Perry cites no other grounds for dismissing the claim, he is not entitled to summary disposition of the tortious interference claim.

Perry also asserts that the conspiracy and injunction claims should be dismissed on this ground. As the Court noted above, conspiracy is not an independent cause of action and cannot survive on its own. *Roche, supra*. The conspiracy claim alleges only a conspiracy to violate Weisberg's noncompete and to misappropriate PCP, LLC's trade secrets and, because those claims are now dismissed, the conspiracy claim against Perry and Weisberg fails as a matter of law. Likewise, PCP, LLC's "injunction" claim in Count VI fails because injunctive relief is a remedy, not a cause of action. *Terlecki v Stewart*, 278 Mich App 644, 663; 754 NW2d 899 (2008). Thus, both Perry and Weisberg are entitled to dismissal of the injunctive relief claim.

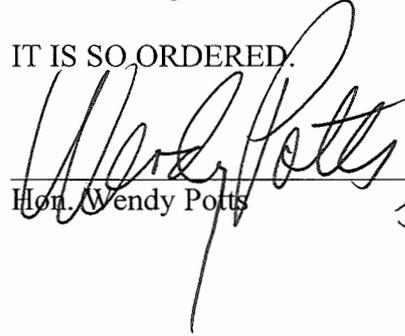
IV. Conclusion

For all of these reasons, the Court grants Weisberg's motion for summary disposition and dismisses PCP, LLC's claims against her with prejudice. The Court grants Perry's motion for summary disposition as to all claims other than Count IV alleging tortious interference.

Dated:

JUL 24 2015

IT IS SO ORDERED.


Hon. Wendy Potts

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