

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

O'BRIEN CONSTRUCTION COMPANY,

Plaintiff,

v

Case No. 14-138565-CZ  
Hon. Wendy Potts

ROBERT NICKOLOFF,

Defendant.

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OPINION AND ORDER FOLLOWING EVIDENTIARY HEARING ON PLAINTIFF'S  
MOTION FOR PRELIMINARY INJUNCTION

At a session of Court  
Held in Pontiac, Michigan  
On

**FEB 20 2014**

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Plaintiff O'Brien Construction Company (OCC) filed this action against its former employee Defendant Robert Nickoloff alleging several claims including that he breached a Non-Solicitation and Non-Disclosure of Trade Secrets Agreement. OCC filed a motion seeking a preliminary injunction which the Court heard on February 5, 2014. The next day, the Court issued an opinion concluding that OCC was likely to prevail on its claim that Nickoloff breached the agreement. However, the Court was unable to conclude, based on the evidence presented with the motion, that OCC was entitled to injunctive relief. The Court set the matter for an evidentiary hearing on February 11, 2014. At the conclusion of the hearing, the Court ordered the parties to submit supplemental briefs addressing the evidence presented at the hearing.

When deciding a motion for injunctive relief, the Court considers (1) whether the applicant will suffer irreparable injury if the injunction is not granted; (2) the likelihood that the applicant will succeed on the merits; (3) whether harm to the applicant in the absence of relief outweighs the harm to the opposing party if the injunction is granted; and (4) the harm to the public if the injunction issues. *Thermatool Corp v Borzym*, 227 Mich App 366, 376; 575 NW2d 334 (1998). The Court should also consider whether granting an injunction is necessary to preserve the status quo before a final hearing or whether it will grant one of the parties final relief before a decision on the merits. *Thermatool, supra*.

Regarding OCC's alleged irreparable injury, the Court finds that OCC presented evidence that it was likely to suffer "noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Thermatool, supra* at 377. Nickoloff correctly notes that OCC is claiming lost profits as a result of Norstar Development's decision to use Norstar Building on the Ann Arbor projects, and lost profits can generally be determined with reasonable certainty. However, OCC is claiming losses beyond lost profits that are not readily calculable. In particular, OCC's President Tim O'Brien testified that OCC's loss of the Ann Arbor projects would lead to employee layoffs, diminished bonding capacity, damage to its reputation in the construction industry, and loss of goodwill among its customers. The Court agrees with OCC that these injuries would be irreparable.

However, OCC fails to demonstrate that it is likely to prevail on its claim that Nickoloff breached the agreement. Nothing within his agreement precludes Nickoloff from working for Norstar Development or Norstar Building. Contrary to OCC's characterization of the agreement, Nickoloff did not sign a noncompetition agreement that bars him from working for OCC's customers or competitors or from competing against OCC. The agreement states that Nickoloff

will not contact or have dialogue with OCC's employees, however, it does not prohibit all contact or dialogue. Rather, it states that he will not contact or have dialogue with OCC's employees or "take any action to assist Employee's prospective or successor employer, or any other entity, in recruiting any other Employees . . ." Although the inartfully drafted agreement is somewhat difficult to understand, the only reasonable interpretation is that he is barred only from contact or dialogue that involves recruiting OCC's employees. Nickoloff admits to contacting OCC employees after he left the company, but there is no evidence that his contact was for the purpose of recruiting them.

The agreement also states that Nickoloff will not "directly or indirectly engage or participate in the solicitation of any customer, or prospective customer . . ." Although the Court concluded in its earlier opinion that Nickoloff solicited employment from Norstar Development, the evidence at the hearing and closer review of the language of the agreement calls into question whether he breached this provision. The agreement does not define the term "solicitation," does not specify what type of conduct is prohibited, and does not bar Nickoloff from having contact with OCC's customers. Nickoloff admits that he discussed employment with Norstar beginning in September 2013, however, it is unclear from the evidence presented whether he solicited employment from them or whether Norstar Development approached him. Further, Nickoloff is employed by Norstar Building, which OCC admits is a competitor, not a customer. The agreement does not bar Nickoloff from soliciting OCC's competitors, and, as noted above, it does not bar him from working for OCC's competitors or customers. As for whether Nickoloff was somehow involved in Norstar Development's decision to divert the Ann Arbor projects to Norstar Building, OCC presents no evidence of this. Certainly, Norstar Building's employment of Nickoloff facilitated its ability to take on the projects, and there was evidence giving rise to an

inference that Norstar Building could not have taken on these projects without acquiring Nickoloff. However, Norstar Development's principal Richard Higgins testified that its decision to award the Ann Arbor projects to Norstar Building was an internal decision, and OCC presented no evidence that directly contradicts his testimony. For all of these reasons, the Court cannot conclude that OCC is likely to prevail on its claim that Nickoloff breached his agreement.

The Court also cannot conclude that OCC is likely to prevail on its remaining claims. As for OCC's tortious interference claim, there is no evidence that OCC had a contract with Norstar Development regarding the Ann Arbor projects, which is an essential element of a claim for tortious interference with a contract. *Badiee v Brighton Area Schools*, 265 Mich App 343, 366; 695 NW2d 521 (2005). Further, OCC's claim for tortious interference with a business relationship or expectancy is subject to a factual dispute because Higgins denied that Norstar Development's decision was caused by Nickoloff's alleged interference. *BPS Clinical Laboratories v BCBSM*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996). As for the unfair competition claim, "[u]nfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor." *Carbonated Beverages, Inc v Wisko*, 297 Mich 80, 83; 297 NW 79 (1941). Because OCC presents no evidence of unfair competition as defined under Michigan law, it is unlikely to prevail on this claim. OCC also fails to show that it is likely to prevail on its claim that Nickoloff engaged in fraud. Although OCC claims that Nickoloff misrepresented the nature of his employment with Norstar Building, Nickoloff denies any misrepresentation or

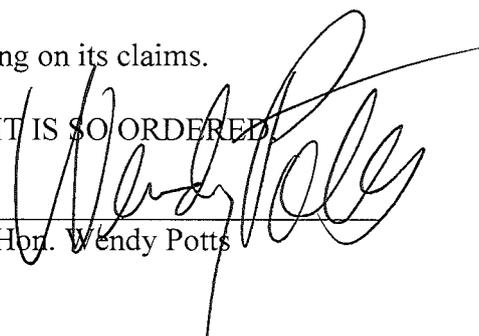
failure to disclose. In sum, OCC has not demonstrated a likelihood of prevailing on any of its claims.

As for the balancing of the harms, these factors do not favor either party. As noted above, OCC presented evidence of irreparable harm caused by Nickoloff's employment with Norstar Building. However, Nickoloff would also be harmed by an injunctive order that bars him from continuing his employment with Norstar Building. The public is not likely to be harmed by an injunctive order because this is private dispute with no apparent public repercussions.

Based on the evidence presented at the evidentiary, OCC has not demonstrated that it is entitled to entry of an order barring Nickoloff from continuing his employment with Norstar Building. The Court denies the order without prejudice to OCC's ability to renew its motion if further factual development supports a likelihood of prevailing on its claims.

Dated: FEB 20 2014

IT IS SO ORDERED

  
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Hon. Wendy Potts