

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

**RJ UNLIMITED, INC and
RICHARD NIENHUIS,
Plaintiffs,**

v.

**Case No. 14-139079-CK
Hon. James M. Alexander**

**MERCEDES-BENZ FINANCIAL
SERVIDES USA, LLC, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendants’ (Mercedes-Benz Financial, Mercedes-Benz USA, Tina Waibel, and Peter Jones) motion for summary disposition. Plaintiff RJ Unlimited is a company that provides security and investigative services. In its Complaint, Plaintiffs allege that RJ provided such services for Mercedes Benz from 2007 to 2013.

In April 2013, the parties entered into their final contract to provide services from May 1 to December 31, 2013. At some point in 2013, however, Mercedes-Benz wished to terminate its contract with Plaintiff and put the security contract for 2014 out for bid. Plaintiff continued to operate under the contract for the remainder of 2013, but Defendants also used other companies for some services. Ultimately, Defendants hired other companies for security and investigative services for 2014.

After the contract terminated, Plaintiff filed the present suit on claims that Defendants failed to pay over \$500,000 that was owed under the final contract and that Defendants otherwise “embarked on a campaign to sabotage [Plaintiff’s] business, breach its contract, steal its

employees and subcontractors, interfere with its future employment, and ruin its reputation.”

Specifically, Plaintiffs’ First Amended Complaint alleges claims of: (1) breach of contract; (2) unjust enrichment; (3) tortious interference with employment contracts; (4) tortious interference with business relations; (5) defamation; and (6) fraudulent misrepresentation.

Defendants now moves for summary disposition under MCR 2.116(C)(8) and (C)(10). A (C)(8) motion tests the legal sufficiency of the complaint, and a (C)(10) motion tests the factual basis of a complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In response, Plaintiffs seek summary disposition of their breach of contract claim under MCR 2.116(I)(2).

1. Breach of Contract (Count I)

Defendants first argue that they are entitled to summary disposition of Plaintiff’s breach of contract claim. In their Amended Complaint, Plaintiffs allege that Defendant Mercedes-Benz breached the contract “by failing to pay RJ Unlimited all amounts due” under the agreement. Specifically, Plaintiffs allege that Mercedes-Benz only paid \$688,830.25 of a \$1.2 million contract, leaving a balance of \$511,169.80.

Michigan law is well-established that “a court must construe and apply unambiguous contract provisions as written.” *Rory v Cont’l Ins Co*, 473 Mich 457, 461; 703 NW2d 23 (2005). Further, “[a] contract must be interpreted according to its plain and ordinary meaning.” *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008), citing *St Paul Fire & Marine Ins Co v Ingall*, 228 Mich App 101, 107; 577 NW2d 188 (1998). “Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court.” *Holmes v Holmes*, supra at 594; quoting *Meagher v Wayne State Univ*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997).

Three documents comprise the Agreement of the parties. Under the May 20, 2013 “Purchase Order,” RJ was to provide services to Mercedes-Benz. The only listed price on the Purchase Order was “1,200,000.00 USD.” The Purchase Order also provided “All terms and conditions per the Consolidated Supplier-Vendor Agreement executed on April 1, 2013 and Statement of Work No. 1 dated April 29, 2013.”

Under the Supplier-Vendor Agreement, “**All fees are fixed price unless** ‘Time and Materials’ or ‘T&M’ is clearly indicated in this Agreement or the SOW, or **as may otherwise be stated in a SOW.**” (emphasis added).

Under the Statement of Work (SOW), “[r]egardless of the number of hours a Supplier employee or approved subcontractor may work in a given week, Daimler will pay Supplier per the Fee Schedule for all hours the Supplier’s employee or approved subcontractor works pursuant hereto.” Directly below this language, the SOW contains a fee schedule for certain job titles relevant to the subject matter of the Agreement and subcontractors and employees that worked for RJ.

On this issue, Plaintiff claims that the Agreement’s language indicates that this contract was a flat-fee Agreement – for which, RJ was to be paid \$1.2 million. Defendants, on the other hand, argue that the Agreement was to be paid according to the fee schedule.

Initially, the Court rejects Plaintiffs’ interpretation that the Agreement “unambiguously provides for a fixed fee of \$1,200,000, not hourly fees.” This reading not only ignores the incorporated language of the Supplier-Vendor Agreement that “All fees are fixed price unless . . . as may otherwise be stated in a SOW.” It also renders irrelevant the incorporated language of the SOW, which contains a detailed hourly rate fee schedule. It makes no sense for the parties to

negotiate and include a fee schedule that was not to be used.¹

As often repeated by our Supreme Court, “courts must ... give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.” *Knight Enterprises v Fairlane Car Wash*, 482 Mich 1006; 756 NW2d 88 (2008); quoting *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003).

Simply stated, Plaintiffs’ interpretation would run afoul of this longstanding legal principal. For the foregoing reasons, the Court finds that the parties’ Agreement was not a fixed-price Agreement. Rather, by its plain terms, the Agreement provides that RJ was required to submit invoices on work performed according to the negotiated fee schedule. Mercedes-Benz was to pay said invoices within 30 days.

At best, the \$1.2 million purchase order amount was the anticipated value of the contract or maximum amount to be charged under the same. But further discovery or factfinding is unnecessary because, in either event, the outcome does not change. RJ was entitled to payment for invoices submitted pursuant to the fee schedule. Plaintiffs do not dispute that Mercedes-Benz paid each bi-weekly invoice that RJ submitted for payment. As a result, RJ received all benefits it was supposed to under the Agreement.

For all of the foregoing reasons, the Court finds that there are no material facts in dispute and Defendants are entitled to judgment as a matter of law. Therefore, the Court grants Defendants’ motion for summary disposition on Plaintiffs’ breach of contract claim, and the same

¹ It likewise makes no sense to include 30-day payment-on-invoice language (Vendor-Supplier Agreement, paragraph 4.2) if the entire \$1.2 million was due up front as argued by Plaintiffs. Additionally, the Vendor-Supplier Agreement controls in the event of a conflict with any Purchase Order (paragraph 11.7).

is DISMISSED.²

2. Unjust Enrichment (Count II)

With respect to Plaintiffs' claim for unjust enrichment, Defendants claim that "[RJ's] claim of unjust enrichment . . . should be dismissed . . . because an express contract between [RJ] and [Mercedes-Benz] exists regarding the same subject matter."

In its response, Plaintiffs argue that they should be able to plead in the alternative. But Plaintiff ignores that its claim for breach of contract exists solely based on the express contract for security services. And indeed, it is well settled that an unjust enrichment claim cannot be maintained when there is an express contract covering the disputed subject matter. *Campbell v Troy*, 42 Mich App 534, 537; 202 NW2d 547 (1972).

For the foregoing reason, Defendants are entitled to summary disposition of Plaintiffs' unjust enrichment claim, and the same is DISMISSED.

3. Tortious Interference (Counts III & IV)

Defendants next seek dismissal of Plaintiffs' claims for tortious interference. In order to establish tortious interference with a contract or business advantage, a plaintiff must prove:

[1] the existence of a valid business relationship or the expectation of such a relationship between the plaintiff and some third party, [2] knowledge of the relationship or expectation of the relationship by the defendant, and [3] an intentional interference causing termination of the relationship or expectation which results in [4] damages to the plaintiff. *Blazer Foods, Inc v Rest Props*, 259 Mich App 241, 255; 673 NW2d 805 (2003); citing *Meyer v Hubbell*, 117 Mich App 699; 324 NW2d 139 (1982).

² The Court also rejects Plaintiffs' argument that Mercedes-Benz breached the contract with respect to some, unidentified "exclusivity" provision of the Agreement. Plaintiffs have not identified the source of any exclusivity language, nor have they alleged the existence (and subsequent breach) of such a provision in their Complaint.

Further, “[O]ne who alleges tortious interference with a contractual or business relationship must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.” *Feldman v Green*, 138 Mich App 360, 378; 360 NW2d 881 (1984). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Prysak v R L Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992).

Further, Michigan Courts have long held that “defendants motivated by legitimate personal and business reasons are shielded from liability against this cause of action [tortious interference with a contractual or business relationship].” *Formall, Inc v Community Nat'l Bank*, 166 Mich App 772, 780; 421 NW2d 289 (1988); citing *Christner v Anderson, Nietzsche & Co, PC*, 156 Mich App 330, 348-349; 401 NW2d 641 (1986). See also *Mino v Clio Sch Dist*, 255 Mich App 60, 78; 661 NW2d 586 (2003), quoting *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan*, 217 Mich App 687, 698-699; 552 NW2d 919 (1996) (“Where the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.”).

Plaintiffs allegations on these claims are that Defendants: (1) hired Plaintiffs’ employees to continue working for Defendants in the same or similar positions; and (2) interfered with Plaintiffs’ expectation that they could be hired to work with the new, incoming security company taking over Defendants’ needs in 2014.

A. Employees

With respect to Plaintiffs’ claims regarding its former employees, it is undisputed that said employees were all at-will. While Plaintiff cited some authority for the proposition that Michigan

law permits some actions for tortious interference with an at-will employment contract, the Court finds the facts of said cases distinguishable and otherwise unpersuasive under these circumstances.³

Even accepting all well-pled factual allegations as true, Plaintiffs fail to allege “the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law.” Rather, Defendants simply hired skilled employees – which is a legitimate business reason – and unable to establish improper motive or interference.

B. Plaintiffs’ expectation of working with incoming security company

Next, Plaintiffs claim that Defendants tortuously interfered with Plaintiffs expectation to work with the incoming 2014 security company. Defendants argue that they entitled to summary disposition on this claim for two reasons. First, Plaintiffs’ belief that they were going to be retained by the incoming company was merely wishful thinking – i.e. something that may happen in the future (if a contract was awarded to a company contemplating using Plaintiffs). Second, Plaintiffs do not allege conduct that was “illegal, unethical or fraudulent.”

The Court agrees with Defendants’ second argument. For whatever reason, Defendants wished to use another security company for its needs. Mercedes-Benz fulfilled its contract with RJ and chose to seek a new security company for 2014. Mercedes-Benz was certainly within its

³ Further, the Court notes the difficulty in establishing such a claim brought by a former employer against a new employer in the context of an at-will employment relationship. As stated in Comment i to Restat 2d of Torts, § 768:

If the third person is free to terminate his contractual relation with the plaintiff when he chooses, there is still a subsisting contract relation; but any interference with it that induces its termination is primarily an interference with the future relation between the parties, and the plaintiff has no legal assurance of them. As for the future hopes he has no legal right but only an expectancy; and when the contract is terminated by the choice of the third person there is no breach of it. The competitor is therefore free, for his own competitive advantage, to obtain the future benefits for himself by causing the termination. Thus he may offer better contract terms, as by offering an employee of the plaintiff more money to work for him or by offering a seller higher prices for goods, and he may make use of persuasion or other suitable means, all without liability.

right (particularly with respect to something as keenly intimate to a business as its own security) to choose to not be involved with the company that it wanted to terminate in the first place. This Court will not extend the doctrine of tortious interference with business expectancy to these circumstances.

For the foregoing reasons, the Court finds that each of Plaintiffs' tortious interference claims are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." Therefore, the Court GRANTS Defendants' motion as it relates to Plaintiff's Count III and IV for tortious interference.

4. Defamation (Count V)

Next, Defendants allege that Plaintiffs failed to state a valid defamation claim.

The elements of a defamation claim are: (1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication. *Mitan v Campbell*, 474 Mich 21, 24; 706 NW2d 420 (2005).

In their Complaint, Plaintiffs allege that:

Defendants M-B USA, Daimler, Jones and Volle made false and defamatory statements to third parties that Plaintiffs paid kickbacks to Paul Yaeck, the former Corporate Security Director for Mercedes-Benz, or that Yaeck was a silent owner or shareholder in RJ Unlimited. (Amended Complaint, at paragraph 45).

According to Plaintiff Richard Nienhuis's Affidavit, it is apparent that Plaintiffs base their defamation claim on rumors of the above-alleged statements made in internal conversations in the Mercedes-Benz group of companies.⁴ Such internal communications are subject to a privilege that

⁴ The Court will also note that Plaintiffs' affidavits merely attest to claims based on hearsay of rumored statements

precludes Plaintiffs' defamation claim. See *Merritt v Detroit Mem'l Hosp*, 81 Mich App 279; 265 NW2d 124 (1978); and *Gonyea v Motor Parts Fed Credit Union*, 192 Mich App 74 (1991).

5. Fraudulent Misrepresentation (Count VI)

Finally, Defendants seek summary disposition of Plaintiffs' fraudulent misrepresentation claim because "an action for fraudulent misrepresentation must be predicated upon a statement relating to a past or an existing fact. Future promises are contractual and do not constitute fraud." *Hi-Way Motor Co v International Harvester Co*, 398 Mich 330, 336; 247 NW2d 813 (1976).

Plaintiffs' Amended Complaint alleges that "Defendants represented to RJ Unlimited that it would have the opportunity to bid on the 2014 contract for security and investigative services for Mercedes-Benz." While Plaintiffs acknowledge that the alleged fraudulent misrepresentation was based on future conduct, Plaintiffs argue that the "bad faith exception" applies in this case.

Plaintiffs, however, fail to make any specific factual allegations beyond their mere conclusory statement that Defendants made the above statement in bad faith. As a result, Defendants are entitled to summary disposition of this count under (C)(8).

Summary

To summarize, Defendants' motion for summary is GRANTED, and Plaintiffs' Complaint only as to Defendants Mercedes-Benz Financial, Mercedes-Benz USA, Tina Waibel, and Peter Jones is DISMISSED in its entirety.

IT IS SO ORDERED.

July 30, 2014
Date

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

within the Mercedes-Benz group of companies.