

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

**JAMES W. FLINCHBAUGH,
Plaintiff,**

v.

**Case No. 16-151196-CB
Hon. James M. Alexander**

**LEAN LEARNING CENTER, INC and
WILLIAM ARTZBERGER,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Counter-Defendant Angelo Carlino’s motion for summary disposition.¹ Plaintiff and Carlino previously owned Defendant Lean Learning Center, a training and service business, which they sold to Defendant William Artzberger through his company, non-party LL Acquisition.

The structure of the deal was such that Plaintiff and Carlino would continue to work for LL Acquisition to ensure the success of Lean Learning. To that end, on August 29, 2012, Plaintiff and Carlino executed Noncompetition and Employment Agreements with LL Acquisition – along with the Asset Purchase Agreement, which conveyed Lean Learning to LL Acquisition. The Court will note that it is unclear why LL Acquisition is not a party to this lawsuit – particularly considering that LL Acquisition is the named entity on **all** of the Agreements with Plaintiff and Carlino.

¹ Although named a Counter-Defendant by Lean Learning Center, Inc, Mr. Carlino was not a Plaintiff in Mr. Flinchbaugh’s Complaint, so Carlino is properly a Third-Party Defendant.

In any event, sometime after executing the Agreements, Plaintiff, Carlino, and Artzberger had a falling out, which resulted in the termination of Carlino's and Plaintiff's Employment Agreements with LL Acquisition.

Believing his termination unlawful, Carlino filed a lawsuit against LL Acquisition and Artzberger in the United States District Court for the Eastern District of Michigan on January 22, 2016 – alleging claims for breach of contract, promissory estoppel, unjust enrichment, and defamation.

Three days later, on January 25, 2016, Plaintiff filed a similar lawsuit against Lean Learning and Artzberger – alleging breach of contract and defamation.

Then on March 2, 2016, the respective Defendants to these lawsuits filed their Answers, and in the present suit, Lean Learning and Artzberger filed a Counter-Complaint naming Carlino as a “Counter-Defendant.” This Counter-Complaint alleges claims of breach of contract (specifically the Employment and Noncompetition Agreements), breach of fiduciary duties, and tortious interference.

Carlino now seeks summary disposition of Defendants' Counter-Complaint under MCR 2.116(C)(6) because, before Plaintiff filed this lawsuit and Defendants filed their Counter-Complaint, the Federal action was already pending between Carlino and LL Acquisition and Artzberger – alleging breaches of the very same agreements that form the basis for Defendants' Counter-Complaint.

Summary disposition is appropriate under (C)(6) where there is “[a]nother action has been initiated between the same parties involving the same claim.” Such a motion is not limited to those actions filed in this state or federal courts in the State of Michigan. *Valeo Switches & Detection Sys, Inc v Emcom, Inc*, 272 Mich App 309, 319; 725 NW2d 364 (2006).

“[T]he plain language of MCR 2.116(C)(6) is in keeping with the purpose of the plea of abatement by prior action rule, which was designed to prevent parties from ‘litigious harassment’ involving the same question and claims as those presented in pending litigation.” *Valeo Switches*, 272 Mich App at 319-320.

Further, it is not necessary that the parties and claims in the two actions be identical. “Complete identity of parties is not necessary” provided that the two suits are “based on the same or substantially the same cause of action.” *J.D. Candler Roofing Co, Inc v Dickson*, 149 Mich App 593, 598; 386 NW2d 605 (1986), quoting *Ross v Onyx Oil & Gas Corp*, 128 Mich App 660, 666-667; 341 NW2d 783 (1983).

Summary disposition under MCR 2.116(C)(6) is appropriate where “[r]esolution of either action will require examination of the same operative facts.” *JD Candler*, 149 Mich App at 601.

Carlino argues that Defendants’ Counter-Complaint involves the same operative facts as the prior, pending Federal Court action because, in both cases, each party points the finger at the other claiming breaches of the Noncompetition and Employment Agreements. Indeed, a review of both claims appears to involve examination of the same operative facts – which party breached said agreements.

In response, Defendants first argue that summary under (C)(6) is improper because the parties to both actions are not the same. But, as stated, “Complete identity of parties is not necessary” provided that the two suits are “based on the same or substantially the same cause of action.” *J.D. Candler*, 149 Mich App at 598. As a result, the Court rejects this argument.

Defendants also argue that dismissal is improper because the Michigan Court Rules permit joinder of parties where inclusion of a person is “essential to permit the court to render

complete relief” or where claims are asserted against multiple persons “jointly, severally, or in the alternative.” MCR 2.205(A); MCR 2.206(A)(1)(a).

But Defendants’ argument ignores the nature of their Counter-Claims. Defendants allege that Plaintiff and Carlino (1) breached the Noncompetition and Employment Agreements, (2) breached their respective fiduciary duties, and (3) tortiously interfered with Defendants’ business relationships.

Whether Plaintiff is found liable on any of these claims has nothing to do with whether Carlino is found liable on any of these claims. This is so because Plaintiff’s and Carlino’s respective actions do not necessarily implicate the other. While the Court recognizes that Plaintiff and Carlino may be necessary witnesses to the other’s case, Defendants’ alleged Counterclaims stand alone as to each “Counter-Defendant.”

For the foregoing reasons, Carlino’s federal court action and Defendants’ counterclaims against Carlino have indistinguishable subject matter and, therefore, are appropriately considered the same or substantially the same cause of action for purposes of MCR 2.116(C)(6). As a result, the Court GRANTS Carlino’s motion to for summary disposition under (C)(6) and DISMISSES Plaintiff’s Counter-Complaint (against Carlino only) without prejudice.²

Carlino may file a motion for costs.

IT IS SO ORDERED

May 11, 2016
Date

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

² Dismissals under MCR 2.116(C)(6) are appropriately without prejudice. *JD Candler*, 149 Mich App at 601.