

STATE OF MICHIGAN
SAGINAW COUNTY CIRCUIT COURT

SARGENT DOCKS AND TERMINAL, INC,
SARGENT SAND COMPANY, LLC, and
WILLIAM WEBBER,

Plaintiffs,

v

THOMAS WEBBER,
AVANT LOGISITCS, LLC,
f/k/a SARGENT LOGISTICS, LLC,
MARCELLUS ENERGY SERVICES, LLC,
and ERIC STRANG,

Defendants.

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Case No. 11-014229-CB

Judge: M. Randall Jurrens (P27637)

OPINION AND ORDER
RE: DEFENDANTS'
MOTION FOR SUMMARY
DISPOSITION No. 2
(Actions and Damages Post-Strang
Employment and Post-Transition
Agreement)

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This case arises out of a failed business venture involving the sale of sand to the oil and gas industry for use in "frac" drilling operations.

The plaintiffs' amended complaint states several causes of action against the defendants premised, in part, on actions occurring or damages accruing after termination of defendant Strang's employment with, or termination of business by, the LLC.

With discovery now completed, the defendants move to have these portions of the plaintiffs' claims summarily dismissed.

For the reason stated in this opinion, the court concludes the defendants' motion should be granted in part and denied in part.

Background / Standards

The Factual Background, Procedural Background, and Summary Disposition Standards included in the court's Opinion and Order re: Defendants' Motion for Summary Disposition No. 1 are adopted and incorporated by reference.

Analysis

Post-Strang Employment

The plaintiffs allege that defendant Strang ("Eric"), during his course of employment with the LLC (together with Tom Webber), formed Marcellus Energy Services LLC ("Marcellus") and Sargent Logistics LLC ("Logistics") to pursue business opportunities of and in competition with the LLC, all without informing Bill Webber (Amended Complaint, ¶¶ 21-32); and that, following his termination, Eric became affiliated with Chippewa Sand Company ("Chippewa") to pursue business opportunities of and in competition with the LLC (Amended Complaint, ¶ 33).

With discovery concluded, the defendants assert that there is no evidence that Eric was subject to any non-competition, confidentiality or non-solicitation agreement with any plaintiff and, therefore, "all claims against him, Logistics and Marcellus premised on his actions or alleged damages incurred by [p]laintiffs after his severance from the [LLC] on July 1, 2010 [should be, pursuant to MCR 2.116(C)(10), dismissed] as a matter of law".

The defendants emphasize that an agent's fiduciary duties coincide with his/her agency relationship and, accordingly, cease upon termination of that relationship. *Central Cartage Co v Fewless*, 232 Mich App 517, 524; 591 NW2d 422 (1998). Accordingly, the defendants assert that, following Eric's July 1, 2010 separation, Eric was free to compete against the LLC with impunity; placing particular emphasis on Eric's post-termination pursuit of opportunities to purchase frac sand in Wisconsin.

Conversely, the plaintiffs argue Eric's pre-termination conduct exposes him to liability for "all profits made and advantage gained [(whenever occurring)] . . . in the execution of [his] agency" relationship with the LLC, *Production Finishing Corp v Shields*, 158 Mich App 479, 486-487; 405 NW2d 171 (1987); including benefits received from transactions consummated after Eric's termination, if they began during the existence of his relationship with the LLC or were founded on information or knowledge acquired during the relationship, *Central Cartage, supra*, at 539-540 (O'Connell, PJ, dissenting).

The court concludes that, as far as they go, both positions have merit.

As observed in Pappas, McNeill, and Quick, *Michigan Business Torts*, 2d ed, § 8.51, p 260 [citations omitted]:

In most respects, the termination of employment also terminates the fiduciary duty of the agent. There are, however, some well-recognized continuing duties of loyalty. In general, an agent is under a continuing fiduciary duty (i.e., a duty that survives the termination of the fiduciary relationship) in connection with any transaction that began during the relationship or that is founded upon certain types of confidential information acquired during the relationship. See *Chem-Trend, Inc v McCarthy*, 780 F Supp 458 (ED Mich 1991)^[1]; *Schwayder Chem Metallurgy Corp v Baum*, 45 Mich App 220, 206 NW2d 484 (1973)^[2] (enjoining ex-employee from using information collected during relationship for purpose of competing); see also *Hayes-Albion v Kuberski*, 421 10, 364 NW2d 609 (1984)^[3]; *Raycon Corp, Inc v Ceramtech Inc*, No 209332, 2000 Mich App LEXIS 2511 (Mar 28, 2000) (unpublished)^[4].

¹ In *Chem-Trend*, the plaintiff was in the business of producing mold release agents (i.e. chemicals that release rubber pieces from their molds). Notwithstanding a non-compete clause in his employment contract, the defendant developed his own formula, “solicited Chem-Trend customers, allegedly to test his product, entered his product, under a fictional name, into trade shows, sold his product to Chem-Trend customers, and sabotaged the very relationships he was supposed to be promoting in order to obtain business at the expense of his employer-principal.” Under these circumstances, the court granted Chem-Trend’s motion for preliminary injunction preventing the defendant from using information concerning Chem-Trend’s current customers, acquired by the defendant during his employment,

² In *Schwayder*, the plaintiff was engaged in a patented manufacturing process, and when the defendant was hired a business manager, he signed a confidentiality agreement. When the defendant subsequently resigned to start a competing business, he took files, papers and reports without the plaintiff’s knowledge or consent, and utilized confidential information obtained during his employment with the plaintiff. Although an award of damages was reversed and remanded due to lack of evidence, the Court of Appeals affirmed the trial court’s findings that the defendant breached fiduciary and confidential duties.

³ In *Hayes-Albion*, while working as chief engineer of the plaintiff’s manufacturing business that utilized unpatented but confidential technology, the defendant signed an agreement not to disclose trade secrets and an invention assignment agreement, but, importantly, did not sign a noncompetition agreement. While employed, the defendant secretly incorporated a competing business using the plaintiff’s confidential processes, unnecessarily favored businesses affiliated with a co-defendant to fulfill the plaintiff’s needs for tools, parts and supplies, and took one of the plaintiff’s proprietary molds without signing for it and keeping it for several months before returning it. After resigning, the defendant proceeded to compete with the plaintiff, using equipment, processes, and formulas similar to plaintiff’s, communicated with plaintiff’s customers and performed services for clients employing techniques that plaintiff had developed specifically for those customers, quoting prices just below plaintiff’s. While affirming the trial court’s decision that the defendant appropriated and used the plaintiff’s trade secrets, the court concluded that “[i]n general there is nothing improper in an employee establishing his own business and communicating with customers for whom he had formerly done work in his previous employment”.

⁴ In *Raycon*, the defendants signed employment and confidentiality agreements with the plaintiff. After they left and founded their own company manufacturing similar products, the plaintiff sued for breach of the employment agreements, misappropriation of trade secrets, and interference with plaintiff’s economic relationships and future economic advantage. In affirming the jury’s verdict that the defendants did not interfere with the plaintiff’s business expectancy, the Court of Appeals approvingly cited Restatement 2d Agency, §393, comment e, p 218:

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Similarly, employees may incur liability if they fail to follow up on or consummate a lead identified during the time of the employment relationship but pursue the lead after leaving the employer. *Digital Commerce Ltd v Sullivan (In re Sullivan)*, 305 BR 809 (Bankr WD Mich 2004)^[5]; *Prudential Ins Co v Diemer*, 637 F Supp 313, 316-317 (ND Ind 1986), *aff'd*, 810 F2d 1167 (CA 7, 1987)^[6]; *Economation, Inc v Automated Conveyor Sys, Inc*, 694 F Supp 553, 557 (SD Ind 1988)^[7].

Here, recognizing the defendants' particular emphasis on Wisconsin frac sand opportunities in this aspect of their motion, the court purposes to apply these legal principals to what it understands to be undisputed facts:

- Eric was only an employee of the LLC (or one of the affiliated Sargent Family Companies), not a member/manager (E Strang dep, vol 1, p 20; (Defendants' MSD No. 1, Exhibit 1)

"Even before the termination of the agency, [the agent] is entitled to make arrangements to compete . . . Thus, before the end of his employment, he can properly purchase a rival business and upon termination of employment immediately compete;" the agent may not, however, "solicit customers for such rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business."

⁵ In *Sullivan*, in the context of a bankruptcy adversary proceeding to determine dischargeability of a debt, the debtor was originally the president of Digital Commerce, a corporation specializing in "business internet solutions". At a time when Digital was experiencing financial difficulties, the debtor contacted a new potential client, ASR Corporation, but instead of pursuing the opportunity on behalf of Digital, the debtor advised ASR *not* to work with Digital. A few months later, after resigning from Digital and starting his own technology company, the debtor resumed his dialogue with ASR, ultimately diverting the opportunity to work with ASR for his own benefit. The debtor argued that, because his fiduciary duties to Digital ended with his resignation, the subsequent signing of a contract with ASR could not possibly constitute a breach of his duty of good faith to Digital. However, the court rejected this argument because the Debtor's solicitation of ASR began while he was still serving as president of Digital, thus constituting a breach of his fiduciary duty of good faith, and confirmed that "[t]he resignation of an officer will not sever liability for transactions completed after termination of the officer's association with the corporation for transactions which . . . began during the existence of the relationship".

⁶ In *Diemer*, when the defendant resigned his position as a district agent for Prudential to work for a new employer, Prudential sued for breach of fiduciary duty and implied covenant of good faith. The court granted the defendant's motion to dismiss, holding that the fiduciary duty which Diemer owed to Prudential only prohibited him "from *negotiating* any sale (either original sale or renewal) of a life insurance policy *during* his *employment* with Prudential and then *completing* the sale *after* his *resignation*."

⁷ In *Economation*, when salesmen it had previously terminated migrated to a competitor and sold products to some of the same customers they had formerly called on for the plaintiff, the plaintiff sued the competitor on claims of misappropriation of trade secrets and tortious interference business relationship (the latter giving rise to a discussion regarding the parameters of an employee's continuing fiduciary duty to a former employer). In granting the defendant's motion for summary judgment, the court held that, particularly in the context of an employee's termination rather than resignation, "the [continuing fiduciary] duty only extends to prevent an employee from appropriating firm agreements away from his former employer. Where, as here, the contracts have not reached the point of completion, the desire to maintain an open and competitive marketplace prevails and the employee is not foreclosed from pursuing the sale."

- Eric was not subject to a noncompetition or confidentiality agreement with the LLC (or any of the Sargent Family Companies) (E Strang dep, vol 1, p 105)
- in July 2008, Bill, Tom, and Eric all traveled together to Wisconsin to investigate potential sites for mining frac sand, which resulted in meeting landowner Kevin Griffin (K Griffin dep, pp 7-13, 41)
- in the next two years, Tom visited Griffin in Wisconsin, Bill “less” (K Griffin dep, p 43-44)
- Griffin personally visited Michigan twice because Bill and Tom wanted to show him that the LLC was “legit” (K Griffin dep, pp 44-45)
- Griffin understood that Bill and Tom were in charge of the LLC (i.e. “Eric [did not] come into play until he was gone”) (K Griffin dep, p 32)
- although Griffin’s sand was tested, no sand was purchased from him (Wm Webber dep, vol 2, p 174)
- in 2009 or 2010 (no more specific date available), Griffin introduced Tom and Eric to fellow Wisconsin landowner Claude Ringlemon (MSD No. 1, Ex 15, C Ringlemon dep, pp 10-11, 68).
- Tom and Eric offered to purchase sand from Ringlemon, but he declined because he was unable to perform excavation requirements (C Ringlemon dep, p 90)
- there was subsequent contact with Ringlemon, including Tom’s return the next Spring (C Ringlemon dep, p 70)
- although the LLC had Ringlemon’s sand tested, no sand was purchased from him (Wm Webber dep, vol 2, pp 173-174)
- from Ringlemon’s perspective, Tom and Eric “vanished” (C Ringlemon dep, pp 12, 22, 67-68, 86-87)
- on July 6, 2010 Eric was terminated retroactively, effective July 1, 2010 (notably, Eric did not resign from the LLC) (Defendants’ MSD No. 1, Ex 16)
- on September 27, 2010, Eric filed Articles of Organization for Chippewa Sand Company LLC with the State of Wisconsin (Defendants’ MSD No. 2, Ex 2)
- in Fall 2010, Eric contacted Ringlemon, indicating he had left the LLC and wanted to purchase sand through Marcellus Energy (C Ringlemon dep, pp 26-30)
- Eric coordinated excavation and hauling operations of Ringlemon’s sand from late April 2011 until abruptly shut down in late September 2011 (C Ringlemon dep, pp 75-76), although Ringlemon was never paid (C Ringlemon dep, pp 80-81, 89)
- from Griffin’s perspective “nothing developed” until Eric approached him in Spring 2011 (K Griffin dep, pp 15, 20-26, 32, 43-48, 51, and 57)
- Eric informed Griffin he was no longer associated with the LLC (K Griffin dep, p 51)
- Griffin subsequently entered into two successive contracts to sell sand to Eric (Chippewa Sand) (K Griffin dep, pp 20-26; E Strang dep, vol 2, p 115)
- sometime following a December 2012 investigative newspaper article (C Ringlemon dep, Ex 1), Bill contacted Ringlemon, acknowledged Tom and Eric’s prior contact with Ringlemon (through Griffin), and “recall[ed] the incredible test results from my property” (C Ringlemon dep, pp 106 and 111)

Under these circumstances (e.g. the absence of a non-compete agreement; the absence of evidence that the employee, during his tenure of employment, told prospective clients to not conduct business with the employer; the lack of any firm, continuing, or incomplete transaction between the employer and prospective clients; the employee's forced termination; and the absence of evidence that the employee prevented or hindered the employer from pursuing the business opportunity), there is no legal justification to extend fiduciary duties beyond the employee's termination of employment. *Digital Commerce, supra*; *Diemer, supra*; and *Economation, supra*.

The court is left then, with application of the general rule that a fiduciary's duties end when the relationship giving rise to the duty expires (or the principal revokes the fiduciary's authority to act). Pappas, McNeill, and Quick, *Michigan Business Torts*, 2d ed, § 8.6, p 208. And in the absence of any continuing duty (or a restrictive agreement), there is nothing improper in an employee establishing his own business and communicating with buyers or sellers with whom he had conducted business in his previous employment (even if the employee learned about the "peculiar needs" of particular clients during his former employment). *Hayes-Albion, supra*, at 183.⁸

To hold otherwise would effectively eradicate Michigan's public policy "of protecting and encouraging the right of the individual to pursue his livelihood in the vocation he chooses, including the right to migrate from one job to another . . .". *Hayes-Albion*, at 188.

Accordingly, the court is persuaded that, based on the evidence presented, no reasonable person could conclude that Eric's conduct with Kevin Griffin and/or Claude Riglemon extended his fiduciary duty to the LLC beyond termination of his employment.^{9, 10}

Post-Transition Agreement

As part of a combined motion, the defendants additionally assert that there is no evidence that the LLC ceased business due to their actions and, therefore, "all claims against them

⁸ During March 23, 2015 oral arguments (Trans, pp 41-47), plaintiffs' counsel emphasized the importance of a 5-year Sand Purchase Agreement Eric apparently signed with CUDD on August 15, 2008 (Plaintiffs' Ex 7), that indicated "[the LLC] wishes to sell sand to CUDD [and] CUDD wishes to purchase sand from [the LLC]", including "the following fractions of sand[]: Wisconsin: 30% 20/40, 40% 40/70, 30% 100 Mesh". With due respect, whatever the import of the Agreement to other issues (assuming the agreement's validity and enforceability), the court fails to understand how securing the opportunity to *sell* sand (apparently to what became the LLC's dominant customer) extends the duration of a claim against Eric, post-termination, for usurpation of the opportunity to *purchase* sand.

⁹ This specific ruling, limited to opportunities to purchase frac sand from two Wisconsin cranberry farmers, obviously does not affect other aspects of the plaintiffs' claims of post-termination business usurpation, including the supply of sand to the Marcellus: the latter issue, while seemingly included in the issue framed by the defendants' motion (i.e. seeking dismissal of all [post]termination claims against [Eric], Logistics and Marcellus"), was not adequately briefed for the court to seriously consider and, in any event, given the legal principals discussed here, would seem sufficiently clothed with continuity to make summary disposition problematic.

¹⁰ The court's ruling renders unnecessary an analysis regarding the defendant's liability for post-termination damages that might be proximately caused by breach of a duty.

premised on actions or alleged damages incurred by [p]laintiffs after December 31, 2010 [should be, pursuant to MCR 2.116(C)(10), dismissed] as a matter of law”.

The defendants’ argument is premised on the LLC’s historical dependence on the Corporation’s supply of sand, the Corporation’s decision to begin selling sand directly rather than through the LLC, the parties’ Transition Agreement (effectively transferring the LLC’s “40/70” and “30/50” sand business with Cudd and Universal to the Corporation, with a covenant that the LLC, its members and agents, not interfere with those relations) (Defendants’ MSD No. 2, Ex 4), and the fact that the LLC ceased active operations as of December 31, 2010 (Plaintiffs’ Answer to Defendants’ Requests for Admission 1).

The plaintiffs counter that the LLC didn’t cease business operations because of the Corporation’s decision to discontinue using the LLC to market sand – a product the LLC could have potentially procured elsewhere (presumably including from Wisconsin cranberry farmers Griffin and Ringlemon) – but because the defendants misappropriated the LLC’s business opportunities.

Taken to its extreme, the defendants effectively argue that fiduciaries are completely insulated from claims of business usurpation if their offensive conduct achieves total destruction of their principal’s business, but remain potentially liable if they are only partially successful. Not surprisingly, the defendants cite no case in support of their requested relief.

In any event, the court questions what is a “cause” and what is an “effect” in this case: i.e. did the Corporation’s election to reorganize and assume processing and sale of sand (as documented by the Transition Agreement) prompt the LLC’s demise, or did the demise, arguably resulting from Tom/Eric breaching fiduciary duties due the LLC, requiring the Corporation to step in to salvage their relationship with Cudd/Universal. And regardless of the LLC’s exit from the sand sale business (for whatever reason), does it necessarily preclude post-termination claims/damages related to “logistics” business the defendants arguably usurped pre-termination and continued post-termination?

In summary, the court concludes there are genuine issues of material fact that preclude summary dismissal of “all claims against the defendants premised on actions or alleged damages incurred by [p]laintiffs after December 31, 2010”.

Conclusion

The plaintiffs’ amended complaint states several causes of action against the defendants premised, in part, on actions occurring or damages accruing after termination of defendant Strang’s employment with, or termination of business by, the LLC. The defendants present motion requests dismissal of the portions of the plaintiffs’ claims that post-date the stated events.

Having reviewed the pleadings and available documentary evidence, as well as counsels’ written and oral arguments, the court concludes that the defendants’ Motion for Summary Disposition No. 2 should be granted in part and denied in part:

- defendant Strang’s motion to dismiss “all claims against him, Logistics and Marcellus premised on his actions or alleged damages incurred by [p]laintiffs after his severance from the [LLC] on July 1, 2010” is **GRANTED** under MCR 2.116(C)(10) to the extent of opportunities to purchase sand from Kevin Griffin and/or Claude Riglemon, but is otherwise denied; and, except as affected by this ruling,
- the defendants’ motion to dismiss “all claims against the defendants premised on actions or alleged damages incurred by [p]laintiffs after December 31, 2010” is **DENIED**.

IT IS SO ORDERED.

Date: August 7, 2015

_____/s/_____
M. Randall Jurrens, Circuit Judge (P27637)