

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

JM POLYMERS, LLC, a Michigan limited liability company,

Plaintiff,

vs.

Case No. 2013-3899-CK

SPARTAN POLYMERS, LLC, a Michigan limited liability company and MICHAEL A. KIRTLEY,

Defendants.

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OPINION AND ORDER

Plaintiff has filed a motion for a preliminary injunction. Defendants have filed a response seeking denial of the motion. Plaintiff also requests that the Court impose a constructive trust to preserve certain assets.

Facts and Procedural Background

Defendant Spartan Polymers, LLC (“Defendant Spartan”) is a company owned and operated by Defendant Michael A. Kirtley (“Defendant Kirtley”). Defendant Spartan is a manufacturer’s sales representative in the plastic and resin industry. On or around September 30, 2004, Plaintiff entered into a manufacturer’s representative agreement with Defendant Spartan whereby Spartan agreed to act as Plaintiff’s exclusive sales representative for 27 specific customer accounts (the “Agreement”). According to Plaintiff, Defendants have since repeatedly breached the Agreement.

On September 27, 2013 Plaintiff filed its verified complaint and motion for a temporary restraining order. In its complaint, Plaintiff asserts claims against Defendants for: Count I-

Breach of Contract, Count II- Breach of Fiduciary Duty, Count III- Tortious Interference with Contractual and Business Relations, Count IV- Violation of Michigan Uniform Trade Secrets Act (MUTSA), Count V- Attorneys' Fees as Authorized under the Michigan Uniform Trade Secrets Act, and Count VI- Civil Conspiracy.

On September 27, 2013, the Court entered a temporary restraining order ("TRO"). On October 3, 2013, Defendants filed a motion to dissolve the TRO. On October 7, 2013, the Court granted Defendants' motion to dissolve the TRO and set a date for an evidentiary hearing in connection with Plaintiff's motion for a preliminary injunction. On October 17th and 28th 2013, the Court held an evidentiary hearing in connection with motion for preliminary injunction. At the conclusion of the hearing, the Court took the matter under advisement. The Court has reviewed the materials and testimony provided and is now prepared to render its decision.

Standard of Review

Injunctive relief is an extraordinary remedy that is ordered by a court only when justice requires, there is no adequate remedy at law, and there is real and imminent danger of irreparable harm. *Acer Paradise, Inc v Kalkaska County Rd Comm'n*, 262 Mich App 193; 684 NW2d 903 (2004). In determining whether to issue a preliminary injunction, a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. *Campau v McMath*, 185 Mich App 724, 729; 463 NW2d 186 (1990). The moving party has the burden to establish that a preliminary injunction should be granted. MCR 3.310(A)(4).

Arguments and Analysis

1) Plaintiff's motion for a preliminary injunction

a. Plaintiff's likelihood of prevailing on the merits of its claims.

With regards to Plaintiff's motion for a preliminary injunction, the Court must first determine whether it is likely to prevail on the merits of its claim that Defendants breached the Agreement. *Campau, supra*, at 729. The initial question is whether the Agreement constitutes a valid and binding contract. In this matter, the parties agree that the Agreement is a valid and binding contract. Rather, the parties dispute whether Defendants terminated the Agreement in 2008. Section 6 of the Agreement provides:

- A. This agreement, upon execution by both parties, will continue in effect for a period of three (3) years from the date first above-written. This Agreement shall thereafter continue in effect for additional one year periods until canceled by either party on ninety (90) days written notice in advance of renewal of the agreement.

Further, Section 12 of the Agreement governs the manner in which notice must be provided. Specifically, Section 12 provides:

All notices which are required to be given by either party under the terms of this Agreement shall be in writing *and sent pre-paid by registered mail* or by telegram followed by registered mail to the address indicated in Appendix B or the last known address if different than above.

Defendants contend that they sent a termination notice ("Notice") in 2008, but concede that the Notice was not sent by registered mail. Moreover, Defendants have failed to cite to any authority that would allow them to terminate their contractual relationship in a manner other than by complying with the procedure set forth in the Agreement. Accordingly, the Court is convinced that Defendants did not terminate the Agreement in 2008.

Further, Defendants do not appear to dispute that Defendant Spartan is a direct competitor to Plaintiff. In addition, Plaintiff has presented evidence that Defendant Spartan's

largest client is one of the accounts that it has with Plaintiff, that Defendant Spartan, through Defendant Kirtley, has been selling some of Plaintiff's other competitors' products, and obtaining supplies from one of Plaintiff's suppliers. (See Exhibit A to Plaintiff's response to Defendants' motion to dissolve the TRO; Plaintiff's Exhibit B to its Evidentiary Hearing Summary.) Plaintiff asserts that because the Agreement has remained in full force and effect at all times at issue in this case, Defendants' actions violate sections 5 and 11 of the Agreement.

Those sections provide, in pertinent part:

5. At the accounts listed in Appendix A, [Defendant Spartan] agrees not to act as a manufacturer's representative and/or distributor for any third party which manufactures or distributes plastic materials which in the opinion of [Plaintiff] is competitive with Products distributed by [Plaintiff].

11. [Plaintiff] has retained [Defendant Spartan] only for the purposes set forth in this Agreement, his relationship to [Plaintiff] is that of an independent contractor. During the term hereof, [Defendant Spartan] shall not, directly or indirectly, enter into, or in any manner take part in, any business, profession or other endeavor which directly competes with [Plaintiff] in the sale of their plastic material lines during the term of this Agreement. [Defendant Spartan] shall not compete whether as an employee, agent, independent contractor, owner or otherwise.

At a minimum, the above-referenced provisions bar Defendant Spartan acting as a manufacturer rep to any of the accounts listed in Appendix A of the Agreement. One of those accounts is Creative Techniques. During his deposition, Defendant Kirtley admitted that Defendant Spartan's largest account is Creative Techniques. Accordingly, Plaintiff is likely to prevail on the merits of its breach of contract claim as Defendant Kirtley has conceded that Defendant Spartan, through his actions, has been engaged in business with at least one of the entities listed in Appendix A of the Agreement.

b. Irreparable Harm

Next, the Court will address whether Plaintiff has established it will suffer irreparable harm if the preliminary injunction is not issued. See *Campau, supra*, at 729. An injunction should not be entered “upon a mere apprehension of future injury or where the threatened injury is speculative or conjectural.” *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974). Plaintiff contends that if an injunction is not entered it will suffer additional harm in the form of lost customers and damage to its goodwill and reputation and that such harm is not easily quantifiable. “[L]oss of customer goodwill can be considered irreparable injury because the damages that come from that loss are difficult to estimate.” *Kelly Services v Eidnes*, 530 F Supp 2d 940, 951 (ED Mich 2008) (citation omitted). In this case, the goodwill Plaintiff had built will likely continue to be diminished so long as Defendant Kirtley continues to contact Plaintiff’s current and former clients on behalf of Defendant Spartan, one of Plaintiff’s direct competitors. Accordingly, the Court is satisfied that the second element weighs in favor of entering a preliminary injunction.

c. Risk of Harm

With respect to risk of harm, Defendants will be harmed to the extent that they will be unable to contact or otherwise conduct business with the 27 entities listed in Appendix A of the Agreement. However, there are hundreds of potential clients in Michigan alone that Defendants could attempt to obtain business from. Moreover, if a preliminary injunction is not entered Plaintiff will continue to be harmed in the form of losing its goodwill with 27 of its former or current clients. Accordingly, the Court is satisfied that this factor also weighs in favor of entering a preliminary injunction.

d. Public interest

The final factor this Court must address is whether granting or denying the motion is in the public interest. *Campau, supra*, at 729. Plaintiff contends that granting the requested relief promotes the public's interest in protecting contractual relationships. The parties do not appear to dispute that the Agreement is a valid and enforceable contract or that the non-compete provisions are reasonable. Further, the Agreement remained in effect, at a minimum, well after Defendant Kirtley began soliciting business for Defendant Spartan. Indeed, the Court, by issuing a preliminary injunction, will be acting in the public's interest by enforcing a valid contractual relationship. See *Superior Consulting Co, Inc v Walling*, 851 F Supp 839 (ED Mich 1994). Consequently, the fourth factor also weighs in favor of entering a preliminary injunction.

For the reasons discussed above, the Court is convinced that all four factors weigh in favor of entering a preliminary injunction. Accordingly, Plaintiff has met its burden and its motion for a preliminary injunction must be granted.

2) Plaintiff's request for a constructive trust

Plaintiff also requests that the Court impose a constructive trust to preserve the "certain assets" received by Defendants under the Agreement as to the entitled list in Appendix A. Under Michigan law "[a] constructive trust may be imposed 'where such trust is necessary to do equity or to prevent unjust enrichment.'" *Kammer Asphalt Paving Co, Inc et al v East China Tp Schools*, 443 Mich 176, 188; 504 NW2d 635 (1993). "[S]uch a trust may be imposed when property "has been obtained through fraud, misrepresentation, concealment, undue influence, duress, taking advantage of one's weakness, or necessities, or any other similar circumstances which render it unconscionable for the holder of the legal title to retain and enjoy the property...."

In this case, Plaintiff has established that Defendant Spartan has not terminated the Agreement by using the proscribed procedure of registered mail. Further, Defendant Kirtley has admitted that Defendant Spartan's largest account is one of the 27 accounts that they worked with for Plaintiff. Moreover, any funds obtained from the 27 entities in Appendix A of the Agreement while representing Defendant Spartan have been obtained in violation of the Agreement. Further, Defendants actions in violation of the Agreement are the reason necessitating a constructive trust in this matter. Given that any funds Defendants have obtained from the 27 entities in question were received as a direct result of their breach(es) of the Agreement, the Court is convinced that a constructive trust is appropriate in this case.

Conclusion

Based on the evidence and testimony presented by the parties, the Court finds that Plaintiff has established that a preliminary injunction should be granted. Therefore, Plaintiff's request for a preliminary injunction is GRANTED. Defendants are hereby enjoined and restrained, directly and indirectly, whether alone or in concert with others, including any officer, agent, employee, and/or representative, until further order of this Court, from:

- (1) Selling products competitive with Plaintiff to the 27 customer listed in Appendix A of the Agreement;
- (2) Using or disclosing any of Plaintiff's property or confidential, proprietary or trade secret information;
- (3) Interfering, in any way, with any customer, prospect or employee relationship with Plaintiff; and
- (4) Otherwise breaching any of their obligations under the Agreement.

Further, all funds received by Defendants in connection with any of the 27 accounts listed in Appendix A of the Agreement since July 11, 2008 and going forward shall be held in constructive trust until further order of this Court. This Opinion and Order shall remain in full

force and effect until the Court specifically orders otherwise. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 2, 2013

JCF/sr

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