

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

HERITAGE SERVICES, LLC,

Plaintiff/Counter-Defendant,

vs.

Case No. 2013-788-CK

HERITAGE SERVICES NORTH and
RONALD T. FULLER,

Defendants/Counter-Plaintiffs.

OPINION AND ORDER

Plaintiff/Counter-Defendant Heritage Services, LLC (“Plaintiff”) has filed a motion for reconsideration of the Court’s January 22, 2015 Opinion and Order dismissing its claims.

Factual and Procedural History

Plaintiff’s claims in this matter arise from Defendant Fuller’s alleged breach of a non-compete agreement entered into by the parties (“Non-Compete”), as well as Defendant Fuller’s alleged use of Plaintiff’s confidential information without authorization.

On February 19, 2013, Plaintiff filed its complaint in this matter asserting claims for: Count I: Breach of Contract, Count II: Quantum Meruit, and Count III: Injunctive Relief. Plaintiff’s claims against Defendant Heritage Services North, LLC, as well as the counterclaim filed against Plaintiff have since been dismissed.

On August 13, 2013, Defendant Fuller obtained a discharge from the United States Bankruptcy Court. While it appears undisputed that Plaintiff’s monetary claim in

this matter is barred by the discharge pursuant to 11 USC 524(a)(2), Plaintiff contends that its claim for injunctive relief remains viable. Defendants' motion, and Plaintiff's response, addressed the issue and requested a determination by the Court.

On January 13, 2015, the Court held a hearing in connection with the instant motion and took the matter under advisement. On January 22, 2015, the Court entered its Opinion and Order granting Defendant/Counter-Plaintiff's ("Defendant") motion to dismiss. Plaintiff has since filed the instant motion for reconsideration of the January 22, 2015 Opinion and Order.

Standard of Review

Motions for reconsideration must be filed within 21 days of the challenged decision. MCR 2.119(F)(1). The moving party must demonstrate a palpable error by which the Court and the parties have been misled and show that a different disposition of the motion must result from correction of the error. MCR 2.119(F)(3). A motion for reconsideration which merely presents the same issue ruled upon by the Court, either expressly or by reasonable implication, will not be granted. *Id.* The purpose of MCR 2.119(F)(3) is to allow a trial court to immediately correct any obvious mistakes it may have made in ruling on a motion, which would otherwise be subject to correction on appeal but at a much greater expense to the parties. *Bers v Bers*, 161 Mich App 457, 462; 411 NW2d 732 (1987). The grant or denial of a motion for reconsideration is a matter within the discretion of the trial court. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 6-7; 614 NW2d 169 (2000).

Arguments and Analysis

In its motion, Plaintiff contends that its claim for injunctive relief should not have been dismissed because the Non-Compete was not terminated by Defendant's bankruptcy discharge. In support of its position, Plaintiff relies on *In re Prentice* ___ BR ___ (Bankr SD Mich, 2012).

In *Prentice*, the debtor signed a non-compete in 2009 precluding him from competing with his employer, The Best Team Ever, Inc. ("Best Team") for 5 years following termination of the debtor's employment. In 2011, the debtor filed for bankruptcy. The bankruptcy trustee did not assume or reject the non-compete within the 60 day time limit provided by 11 USC §365(d)(1). In 2012, the debtor resigned his employment and began competing with Best Team. Best Team then sought to lift the bankruptcy stay in order to pursue injunctive relief under the non-compete. In opposing the Best Team's request, debtor contended that the trustee's failure to assume or reject the non-compete rendered it null and void, and unenforceable.

In granting Best Team's motion, the bankruptcy court held that the non-compete was an executory contract, that the trustee's failure to assume or reject the non-compete rendered it rejected pursuant to Section 365(d)(1) of the Bankruptcy Code. Further the court, in citing *In re DMR Fin. Serv.*, 274 BR 465, 472 (Bankr ED Mich 2002), held that rejection will not relieve a debtor of any future obligations, burdensome, substantial or otherwise. Accordingly, the court granted Best Team's motion and allowed it to pursue its state law claims for injunctive relief.

In *Prentice*, unlike this case, employer sought to lift the bankruptcy stay in order to pursue injunctive relief under a non-compete that had not expired. In this matter, there was only roughly one month remaining under the Non-Compete at the time the

bankruptcy petition was filed, and the Non-Compete has now been expired for over 18 months. While *Prentice* provides authority for an employer to lift a bankruptcy stay in order to enforce a still valid non-compete agreement, *Prentice* does not provide authority for an employer to obtain injunctive relief retroactively after the non-compete has expired. Rather, Plaintiff requests that the Court extend term of the Non-Compete under pursuant to *Thermatool Corp v Borzym*, 227 Mich App 336; 575 NW2d 334 (1998).

In *Thermatool* the Court of Appeals held that “under appropriate circumstances, an agreement not to compete can be extended beyond its stated expiration date as a remedy for a breach of the agreement.” *Id.* at 374. Specifically, the Court held:

In cases where a party has flouted the terms of a noncompetition agreement, the court should be able to fashion appropriate equitable relief despite the fact that the parties did not expressly provide for such relief in their agreement. Furthermore, as courts allowing extensions of the terms of noncompetition agreements have found, it may not be possible to determine monetary damages with any degree of certainty. Where this is the case, the breaching party should not be rewarded because the agreement has already expired.

Id. at 375.

While this Court recognizes that it, under *Thermatool*, has the authority to extend the term of a non-compete provision under certain circumstances, it declines to do so under the facts presented in this case. In this case, the term of Defendant Fuller’s post-petition obligation under the Non-Compete was roughly 1 month. While Plaintiff could have sought to enforce that obligation by seeking to have the stay lifted or by filing a motion for an injunction shortly after the bankruptcy case was closed, it did neither. Based on the prolonged period of time that has expired since the Non-Compete has expired, the Court is convinced that the term of the Non-Compete should not be extended in this case. Consequently, Plaintiff’s motion for reconsideration must be denied.

