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STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

ROCKET ENTERPRISE, INC.

Plaintiff,

Case No. 2014-4890-CB

vs.

JERRY A. BOWERS, PENNY BOWERS,
formerly d/b/a LIBERTY FLAG SERVICE
LLC, REVOLUTION FLAG SERVICE,
CONSTANCE L. SOVIAK, and MICHAEL
SOVIAK,

Defendants.

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OPINION AND ORDER

Defendants Jerry and Penny Bowers (collectively, "Bowers Defendants") have filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is a flag sales and maintenance company. The Bowers Defendants are two of Plaintiff's former employees. Defendant Jerry Bowers worked for Plaintiff until 2008 and Defendant Penny Bowers worked for Plaintiff until 2005. In 2008, the Bowers Defendants began their own flag business, Liberty Flag Group ("Liberty").

In 2009 Plaintiff filed case no. 2009-530-CZ in this Court against the Bower Defendants and Liberty ("2009 Matter"). In the 2009 Matter, Plaintiff asserted claims for breach of fiduciary duty, tortious interference with business relationship or expectancy, violation of the uniform trade secrets act, conversion, civil conspiracy, and injunctive

relief against the Bower Defendants and Liberty. The 2009 Matter was ultimately resolve through the entry of a June 9, 2009 Order titled "Covenant Not To Compete, Injunction Prohibiting Contact of Plaintiff's Customers and Prohibition Against Contacting Plaintiff's Employees During Business Hours and Other Relief" ("2009 Order").

On December 26, 2014, Plaintiff filed its verified complaint in this matter ("Complaint"). In the Complaint, Plaintiff alleges that the Bower Defendants have violated the 2009 Order by contacting Plaintiff's customers and/or assisting Defendants Constance L. Soviak, Michael Soviak, and Revolution Flag Service (collectively, "Soviak Defendants") in soliciting Plaintiff's clients utilizing Plaintiff's customer list. The Complaint contains a request for an order: 1) Declaring that Defendant have directly or indirectly violated the 2009 Order by using, selling, providing or otherwise disseminating Plaintiff's confidential information; 2) Enjoining Defendants from continued use, sale or dissemination of Plaintiff's confidential information and/or the future solicitation of Plaintiff's clientele who are indentified in its customer list; 3) Awarding it damages; 4) Enjoining Defendants from contacting or soliciting Plaintiff's current or former employees; and 5) Awarding any other relief the Court deems appropriate. In addition, the Complaint contains a claim for misappropriation of trade secrets under the Michigan Uniform Trade Secrets Act (MUTSA) (Count II), and a claim for tortious interference with a business relationship or expectancy (Count III).

On April 27, 2015, the Bowers Defendants filed their instant motion for summary disposition. On July 13, 2015, Plaintiff filed its response. In addition, on July 16, 2015, the Bowers Defendants filed a reply brief in support of their motion. On July 20, 2015,

the Court held a hearing in connection with the motion and took the matter under advisement.

II. Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR 2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

The only count the Bowers Defendants challenge under MCR 2.116(C)(8) is Plaintiff's count II - misappropriation of trade secrets under MUTSA which alleges that

Defendant Jerry Bowers allegedly took Plaintiff's customer list and subsequently provided and/or sold the list to the other Defendants. The Bowers Defendants contend that Plaintiff's misappropriation claim fails because the customer list at issue is not a trade secret under MUTSA.

Under MUTSA:

"Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

A claim for misappropriation of trade secrets under this act requires the following:

(i) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means.

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b); see also *McKesson Medical-Surgical, Inc v Micro Bio-Medics, Inc*, 266 F Supp 2d 590, 596-597 (ED Mich 2003).]

With respect to customer lists, the Michigan Court of Appeals has held that customer lists are subject to trade secret protection where they are not easily ascertainable and are “developed and nurtured from much investigation.” *Kubik, Inc v Hull*, 56 Mich App 335, 365; 224 NW2d 80 (1974); *Schwayder Chemical Metallurgy Corp v Baum*, 45 Mich App 220, 225; 206 NW2d 484 (1973). In this case, Plaintiff’s president, Chuck Bowers (“C. Bowers”), testified that Plaintiff has compiled, expanded and maintained a customer database over the past 33 years. (See Plaintiff’s Exhibit 1.) Specifically, C. Bowers testified that the database includes the customers’ names, address, email and phone numbers, service locations, flag/flagpole sizes and types, the agreed-up pricing information and contract renewal month. (Id. at ¶12.) Further, C. Bowers testified that access to the database is restricted to a few people in sales management. (Id. at ¶14.) Based on C. Bowers’ testimony, the Court is convinced that the contents of the customer database are not easily ascertainable; rather, the customer database is the result of decades of Plaintiff making efforts to create new business while retaining their current customers.

In their motion, the Bowers Defendants contend that customer list is not a trade secret because the information within it could be easily ascertained through publicly available means. However, even if the information could be ascertained through publically available means, which the Bowers Defendants have not established, the Michigan Court of Appeals has held that even if information can be obtained by a fair and legal means it does not justify obtaining the information by conversion or other unfair means. *Kubik*, 56 Mich App at 354-355. Accordingly, the availability of the customer lists through fair means does not negate the lists’ status as a trade secret or

excuse Defendants' alleged misappropriation of the lists. For these reasons, the Court is convinced that the Bower Defendants' contention is without merit.

In addition, the Bower Defendants contend that customer lists are not trade secrets under the Michigan Court of Appeals' decision in *Indus Control Repair v McBroom Elec Co*, unpublished per curium opinion of the Court of Appeals, decided October 13, 2013 (Docket No. 302240), the United States District Court for the Eastern District of Michigan's decision in *McKesson Medical-Surgical, Inc v Micro Bio-Medics, Inc*, 266 F Supp 2d 590,594 (ED Mich 2003), and the Michigan Supreme Court's decision in *Hayes-Albion v Kuberski*, 421 Mich 170, 183-84; 364 NW2d 609 (1984). However, in all three of those cases, the defendants had compiled the lists in question themselves. See *Indus Control*, unpub. op. at 6-7; *McKesson*, 266 F Supp 2d at 593-594; *Hayes-Albion* 421 Mich at 183.

In this case, unlike *Indus Control*, *McKesson* and *Hayes-Albion*, Plaintiff alleges that Defendant Jerry Bowers stole its customer database. While the cases relied upon by Defendants do stand for the proposition that customer information is not a trade secret if it is independently compiled by the individual at issue, the Michigan Court of Appeals in *Kubick* has held that customer lists can be trade secrets where the list is compiled and nurtured through the effort of the plaintiff, not the independent efforts of the individual being sued, and where the list is stolen. *Kubick*, 56 Mich App at 365. In this case, Plaintiff's allegations, if proven, would provide for trade secret protection of Plaintiff's customer list under *Kubick*. Consequently, the Bowers Defendants' motion for summary disposition of Plaintiff's misappropriation of trade secrets claim under MCR 2.116(C)(8) must be denied.

The remainder of the Bowers Defendants' motion is brought under MCR 2.116(C)(10). The Bowers Defendants challenge all three of Plaintiff's claim on the basis that they contend that Plaintiff has failed to present any evidence that any of the Defendants stole Plaintiff's customer list, or that they gave/sold the list to Revolution. In their response, Plaintiff contends that summary disposition under MCR 2.116(C)(10) is premature in this matter as discovery remains open.

A grant of summary disposition is premature if granted before discovery on a disputed issue is complete. *Dep't of Social Services v Aetna Casualty & Surety Co.*, 177 Mich App 440, 446; 443 NW2d 420 (1989). However, a party opposing summary disposition under (C)(10) on the grounds that further discovery is needed must "at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). In this case, the parties dispute whether Defendant Jerry Bowers stole Plaintiff's customer database, and whether he provided the database to the Sowiak Defendants/Revolution.

With respect to the first issue, i.e. whether Defendant Jerry Bowers stole Plaintiff's customer database, Plaintiff has produced evidence that as of January 2009 it had 153 flag maintenance customers with February 2009 renewal dates. (See Plaintiff's Exhibit 1, at ¶18.) Plaintiff's president has also testified that each of those customers contacted Plaintiff in January or February 2009 and advised it that they had received flyers from Liberty with detailed estimates that included information that is maintained in Plaintiff's database. (*Id.* at ¶19.) Further, it is undisputed that Defendant Jerry Bowers left his employment with Plaintiff in January 2009. Based on the close proximity of time

between Defendant Jerry Bowers leaving his employment with Plaintiff, the fact that the customers solicited by Liberty were the same customers whose contracts would be expiring shortly, and the fact Defendant Jerry Bowers had access to Plaintiff's customer database, the Court is convinced that Plaintiff has presented sufficient evidence to entitle it to engage in additional discovery.

With respect to whether one or both of the Bowers Defendants gave/sold Plaintiff's customer database to the Sowiak Defendants/Revolution, it is undisputed that Revolution did not begin operating until after the 2009 Matter was resolved and Liberty ceased its operations. Moreover, Revolution has utilized a "switch-to" campaign that is similar to the campaign Liberty engaged in while it operated. Finally, Plaintiff has represented to the Court that it still has yet to receive the documents it has requested from the Sowiak Defendants/Revolution, and has yet to depose the Sowiak Defendants, as well as other third party deponents that have knowledge material to the issue in this matter. (See Plaintiff's Response, at p. 11-12.) Given the timing of Revolution's incorporation, the similarity of its sales tactics to those implemented by Liberty, and well as the amount of relevant discovery that has yet to be completed, the Court is convinced that Defendant Bowers' motion for summary disposition pursuant to MCR 2.116(C)(10) is premature and must be denied without prejudice.

IV. Conclusion

For the reasons set forth above, Defendants Jerry and Penny Bowers' motion for partial summary disposition pursuant to MCR 2.116(C)(8) is DENIED. Further, Defendants Jerry and Penny Bowers' motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED, WITHOUT PREJUDICE.

Pursuant to MCR 2.602(A)(3), the Court states this Opinion and Order neither resolves the last pending claim nor closes the case.

IT IS SO ORDERED.

Date: AUG 28 2015

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge