

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") d/b/a Liberty Flag Services have filed a motion for summary disposition pursuant to MCR 2.116(C)(7) and (10). Plaintiff has filed a response and requests that the motion be denied.

In addition, Defendants Revolution Flag Services, LLC ("Revolution"), Constance L. Soviak ("Defendant C. Soliak") and Michael Soviak ("Defendant C. Solviak") have filed a joint motion for summary disposition pursuant to MCR 2.116(C)(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 resolved 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".

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 first motion for summary disposition. On August 28, 2015, the Court issued its Opinion and Order denying the motion.

On April 8, 2016, the Sowiak Defendants filed their instant motion for summary disposition. On April 25, 2016, Plaintiff filed its response.

On April 12, 2016, the Bowers Defendants filed their instant motion for summary disposition. On April 26, 2016, Plaintiff filed its response.

On May 2, 2016, the Court held a hearing in connection with both motions and took the matters under advisement.

## II. Standard of Review

MCR 2.116(C)(7) permits summary disposition where the claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action. In reviewing a motion under MCR 2.116(C)(7), the Court accepts as true the plaintiff's well-pleaded allegations, construing them in the plaintiff's favor. *Hanley v Mazda Motor Corp*, 239 Mich App 596, 600; 609 NW2d 203 (2000). The Court must consider affidavits, pleadings, depositions, admissions, and documentary evidence filed or submitted by the parties when determining whether a genuine issue of material fact exists. *Id.* Where a material factual dispute exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Kent v Alpine Valley*

*Ski Area, Inc*, 240 Mich App 731, 736; 613 NW2d 383 (2000). Where no material facts are in dispute, whether the claim is barred is a question of law. *Id.*

A motion under MCR 2.116(C)(10) 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

#### A. Bowers Defendants' Motion for Summary Disposition

In their motion, the Bowers Defendants first contend that Counts I-III should be dismissed based on the doctrines of res judicata and collateral estoppel. Specifically, the Bowers Defendants contend that Plaintiff in the 2009 matter brought some of the same claims as it did in the Complaint.

The doctrine of res judicata bars a subsequent action when "(1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first." *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004). With regards to the first element, the 2009 matter was resolved via a consent judgment. While Plaintiff concedes that res judicata applies to consent judgment (See *Ditmore v Michalik*, 244 Mich App 569, 576;

625 NW2d 462 (2001), a voluntary dismissal pursuant to a settlement agreement constitutes a decision on the merits only so long as the dismissal is “with prejudice.” *In re Koernke Estate*, 169 Mich App 397, 400; 425 NW2d 795 (1988). In this case, the consent judgment executed in connection with the 2009 matter (“Consent Judgment”) does not specify whether that case was being dismissed without prejudice. (See Bowers Defendants’ Exhibit E.) Pursuant to MCR 2.504(A)(1), a stipulated dismissal is without prejudice unless it states otherwise. Accordingly, since the Consent Judgment does not specify whether it was with or without prejudice it is deemed to be without prejudice. Consequently, the Consent Judgment does not amount to a decision on the merits of the 2009 matter. As a result, the Bowers Defendants have not established that the first element of res judicata is met. Consequently, their request for summary disposition based on res judicata must be denied.

With respect to collateral estoppel, in order for collateral estoppel to bar a claim, three elements must be satisfied: (1) “a question of fact essential to the judgment must have been actually litigated and determined by a valid and final judgment”; (2) “the same parties must have had a full [and fair] opportunity to litigate the issue”; and (3) “there must be mutuality of estoppel.” *Monat v. State Farm Ins. Co.*, 469 Mich 679, 682-84, 677 NW2d 843, 845-46 (2004); quoting *Storey v. Meijer, Inc.*, 431 Mich 368, 373, 429 NW2d 169 (1988). In their motion, the Bowers Defendants contend that Counts I-III are all based on the following issue: whether Defendants wrongfully utilized/disclosed Plaintiff’s confidential information.” Further, the Bowers Defendants aver that the issue was previously litigated and decided in connection with the 2009 matter. However, for the reasons discussed above, the Bowers Defendants have failed to establish that the

2009 matter was resolved on the merits. Consequently, they have failed to establish the first element of their collateral estoppel defense.

The Bowers Defendants also contend that Counts II (MUTSA) and III (Tortious Interference) of the Complaint are barred by the applicable statutes of limitations. The statute of limitations for a claim of misappropriation of a trade secret is set forth in MCL 445.1907, which provides:

An action for misappropriation must be brought within 3 years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this section, a continuing misappropriation constitutes a single claim.

Accordingly, the key issue for determining when the statute began to run is when the alleged misappropriation was discovered, or when it should have been discovered. While Plaintiff concedes that it knew that its customer database was taken in 2009, it avers that it did not know that the Bowers Defendants provided the database to the Sowiak Defendants until 2012. Further, Plaintiff asserts that providing the database to the Sowiak Defendants amounts to a misappropriation that is separate and distinct from when the Bowers Defendants allegedly misappropriated the database by taking it from Plaintiff. The Court is convinced that Plaintiff's position is without merit.

"The misappropriation of trade secrets is not a continuing offense. The wrong occurs at the time of the improper acquisition." *Shatterproof Glass Corp v. Guardian Glass Co*, 322 F Supp 854, 869 (ED Mich, 1970), citing *Russell v. Wall Wire Products Co*, 346 Mich 581; 78 NW2d 149 (1956). Jurisdictions applying the "single claim" rules rather than the "continuing act" hold that "it is the relationship between the parties at the time the secret is disclosed that is protected, and that the fabric of the relationship once rent is not torn anew with each added use or disclosure, although the damage suffered

may thereby be aggravated.” See *Kehoe Component Sales, Inc v Best Lighting Products, Inc.*, 796 F3d 576 (6<sup>th</sup> Cir 2015). In *Kehoe*, the Court held that the statute of limitations under the single claim rule “runs not from each time that a trade secret is used, but from the first moment of its reasonably discoverable misappropriation.” *Id.* at 583.

In this case, Plaintiff has conceded that it was aware of the original misappropriation of its customer database back in 2009. Accordingly, under the “single claim” rule adopted by this state the statute of limitations as to Plaintiff’s misappropriation claim began to run in 2009. Moreover, the Bower Defendants’ alleged additional misappropriations do not constitute separate offenses for statute of limitations purposes. Consequently, the Court is convinced that Plaintiff’s misappropriation claim against the Bowers Defendants must be dismissed.

With regards to Plaintiff’s tortious interference claim, the statute of limitations for that claim is three years. *James v Logee*, 150 Mich App 35; 388 NW2d 294 (1986). In its response, Plaintiff asserts that it did not know that Revolution was using its customer database to interfere with its customer relationships until 2012. Further, Plaintiff has presented various pieces of evidence that indicates that Revolution solicited its customers from 2012 into the future. (See Plaintiff’s Exhibits 1, 22, 27-30.) While the evidence Plaintiff relies upon may indicate that Revolution was attempting to solicit Plaintiff’s customers, none of the evidence Plaintiff has presented evidences any the Bower Defendants interfered with Plaintiff’s expectancies in any way. Consequently, the Court is convinced that Plaintiff has failed to provide any evidence that the Bowers Defendants have interfered with its business expectancies within three years of the date

it filed the Complaint. Consequently, the Court is convinced that the Bowers Defendants' motion for summary disposition of Count III must be granted.

B. Soviak Defendants' Motion for Summary Disposition

1. Declaratory and Injunctive Relief-Violation of a Court Order (Count I); and Misappropriation of Trade Secrets (Count II).

In Count I of the Complaint, Plaintiff alleges that the Soviak Defendants violated the Consent Judgment by accepting Plaintiff's customer list from the Bowers Defendants and using, selling or otherwise disseminating Plaintiff's confidential information to solicit Plaintiff's clientele with offers of identical services for lower prices. (See Complaint, at ¶¶32.) Further, in Count II of the Complaint, Plaintiff alleges that the same behavior that forms the basis for Count I also constitutes misappropriation of its trade secret(s). (Id. at ¶¶44-49.)

In their motion, the Soviak Defendants contend that they have not at any time been in possession of, or used, Plaintiff's confidential information. In support of their position, the Soviak Defendants rely on the affidavit of Defendant C. Soviak, in which she testified that she has not received any confidential information, customer lists, customer pricing, marketing techniques, marketing strategies and/or any other documentation, computer print outs, customer software, programs and/or any other protected information from any of the co-Defendants as it relates to Plaintiff. (See Soviak Defendants' Exhibit C, at ¶10.) Further, Defendant C. Soviak testified that she has not individually, or on behalf of Revolution, been in possession of any of Plaintiff's confidential information, has not relied on any confidential information in generating sales, and is not aware of any other parties doing so. (Id. at ¶¶11-13.)

In addition, the Soviak Defendants rely on Defendant M. Soviak's deposition testimony. (See Soviak Defendants' Exhibit D.) Specifically, the Soviak Defendants rely on Defendant M. Soviak's testimony that he has not had any discussions with the Bowers Defendants regarding obtaining Plaintiff's confidential information, has not solicited any customers that he knew were Plaintiff's customers, has not received any of Plaintiff's confidential information from third parties, is not aware of any instance(s) in which Revolution has used Plaintiff's confidential information for sales or marketing. (Id. at 120-121.)

Further, the Soviak Defendants rely on the testimony of the Bowers Defendants that they did not give any of Plaintiff's confidential information, including its customer list, to the Soviak Defendants. (See Soviak Defendants' Exhibits F&G.)

In response, Plaintiff contends that its position that the Soviak Defendants obtained and utilized its confidential information is supported by the fact that Revolution used a "switch to" marketing campaign that the Bowers Defendants used in connection with Liberty. (See Plaintiff's Exhibit 10, 22). Further, Plaintiff relies on email that it contends establishes that the Bowers Defendants sent some customer information to the Soviak Defendants. (See Plaintiff's Exhibit 17.) Moreover, Plaintiff's president, Charles Bowers, testified that in 2014 many of Plaintiff's customers were not renewing their contracts because they had been contacted by Revolution shortly before their contracts with Plaintiff were to renew, and that the flyers they received from Revolution contained the information that was contained within Plaintiff's customer database. (See Plaintiff's Exhibit 1.)

Upon reviewing the parties' pleadings, as well as the evidence they rely upon, the Court is convinced that a genuine issue of material fact exists as to whether the Soviak Defendants obtained and utilized Plaintiff's customer list and other materials in order to solicit Plaintiff's customers. While Defendants C. Soviak and M. Soviak testified that they did not individually or on behalf of Revolution obtain Plaintiff's customer list, Plaintiff has presented evidence that their customers were contacted shortly before their contracts with Plaintiff were to expire in a manner that included several pieces of information that was contained in the customer list. The Court is satisfied that the credibility of the testimony presented by both parties should be determined by the trier of fact, as should the weight of the other conflicting evidence the parties have presented. Consequently, the Court is convinced that the Soviak's motion for summary disposition of Counts I and II must be denied.

## 2. Count III- Tortious Interference

Tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts under Michigan law. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843 (2005). The Court in *Health Call* summarized the elements needed to establish the torts as follows:

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

*Id.*, at 89-90 [internal citations omitted]

In their motion, the Sowiak Defendants assert that Plaintiff has failed to present any evidence that the alleged interference caused Plaintiff's customers to leave Plaintiff for Revolution. Further, the Sowiak Defendants aver that Plaintiff's reduction in advertising was the cause of the lost customers. While the Sowiak Defendants have presented evidence that Plaintiff has reduced its advertising efforts from 2002 to 2014 (See Sowiak Defendants' Exhibits K and L.), Plaintiff has presented evidence that several of their customers left Plaintiff for Revolution due to being contacted by Revolution shortly before their contracts were to expire. (See Plaintiff's Exhibits 1, 10, 17 and 22.) Consequently, the Court is convinced that at a minimum a genuine issue of material fact exists as to whether the Sowiak Defendants' actions caused Plaintiff's customers to leave.

Finally, the Sowiak Defendants assert that Plaintiff has failed to present any evidence that the Sowiak Defendants had knowledge of Plaintiff's relationships with its customers or that they acted with wrongful intent. However, merely arguing that Plaintiff will be unable to meet its burden at trial is not sufficient to warrant summary disposition. *Lowrey v LMPS & LMPJ, Inc.*, --- Mich App ---; --- NW2d --- (2015). "Rather, the moving party must present evidence that if left un rebutted, would permit a reasonable finder of fact to find in the nonmoving party's favor." *Id.* In their motion, the Sowiak Defendants identify several elements of Plaintiff's tortious interference claim that they assert Plaintiff has failed to establish; however, they have also failed to cite to any evidence in support of their own position. Consequently, the Court is satisfied that the Sowiak Defendants have failed to establish that they are entitled to summary disposition of Count III.

#### IV. Conclusion

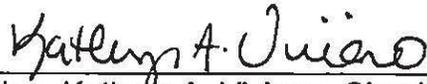
For the reasons set forth above, Defendants Jerry and Penny Bowers' motion for summary disposition pursuant to MCR 2.116(C)(7) and (10) is GRANTED, IN PART and DENIED, IN PART. Specifically, the Bowers Defendants' motion for summary disposition of Counts II and III is GRANTED, and their motion for summary disposition of Count I is DENIED.

In addition, the Soviak Defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) is DENIED.

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: JUN 17 2016

  
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Hon. Kathryn A. Viviano, Circuit Court Judge