

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

BUILT SOLID RENOVATIONS, LLC,

Plaintiff,

vs.

Case No. 2015-1836-CB

STEVEN SIEKIERSKI, RON ELLIS,
CARL CARABELLO, KEITH POWERS,
and PREMIERE RENOVATIONS, LLC,

Defendants.

OPINION AND ORDER

Plaintiff has filed a motion for a temporary restraining order and preliminary injunction. Defendants have filed a response and request that the motion be denied. Both sides have also filed supplemental briefs in support of their positions.

I. Factual and Procedural History

Plaintiff is an insurance restoration contractor specializing in repairing storm damage to the exterior of both residential and commercial buildings. Specifically, Plaintiff specializes in going into areas ravaged by storms and utilizing insurance proceeds from the owners' insurance policies to fix the damage.

On May 29, 2015, Plaintiff filed its verified complaint in this matter ("Verified Complaint"). In the Verified Complaint, Plaintiff alleges that it hired Defendants Steven Siekierski, Ron Ellis and Carl Carabello (collectively, "Individual Defendants") as independent contractors to serve as its salespersons.

The Individual Defendants were hired in May/June 2014. Each of the Individual Defendants entered into a "Sub-Contract Agreement" (collectively, "Agreements") with Plaintiff. (See Plaintiff's Exhibits 3-5.) Each of the Agreements contained non-compete and non-solicitation provisions that provided that the Individuals Defendants shall not, for two years from the date of their termination:

- a. own, manage, operate, control, invest or acquire an interest in, or lend, afford, or furnish money or assistance, financial or otherwise, or organize, direct, counsel, or advise anyone or otherwise engage or participate in, whether as a proprietor, partner, stockholder, lender, director, officer, joint venture, investor, lesser, supplier, customer, or other participant, in any business that is competitive, whether directly or indirectly with that then being conducted by [Plaintiff], in any geographical area in which [Plaintiff] shall be doing business.
- b. Solicit, induce, influence or attempt to solicit, induce or influence for any business endeavor any employee, stockholder, partner, lesser, subcontractor, or supplier of the company to discontinue or reduce, modify the extent of their relationship with [Plaintiff] or otherwise divert or attempt to divert from [Plaintiff] any business whatsoever or interfere with any business relationship between [Plaintiff] or any other person.

(See Agreements, Plaintiff's Exhibits 3-5, at ¶2.)

In addition, the Individual Defendants signed identical confidentiality provisions providing:

Sub-Contractor understands and acknowledges that, as a result of working as a subcontractor for [Plaintiff], he or she will necessarily become informed of, any have access to, confidential information of [Plaintiff], including, without limitation, its computer programs and software, inventions, processes, trade secret, technical information, know-how, plans, specifications, identity of customers, needs and special requirements of customers and suppliers, customer satisfaction and feedback, sales, and cost of sales, margin discounts, and profits, and that such information, even though it may be developed or otherwise acquired by the sub-contractor, is the exclusive property of [Plaintiff] to be held by the sub-contractor in trust and solely for [Plaintiff's] benefit. Accordingly, sub-

contractor hereby agrees to not, at any time, either during or subsequent to providing sales services to [Plaintiff] or any of its subsidiaries or affiliated companies, use, copy, reveal, report, publish, transfer or otherwise disclose to any person, corporation or other entity any of the [Plaintiff's] confidential information without the written consent of [Plaintiff] except for use on behalf of [Plaintiff] in connection with [Plaintiff's] business.

(See Agreements, Plaintiff's Exhibits 3-5, at ¶1.)

Defendant Premiere Renovations, LLC ("Defendant Premiere") was incorporated on January 23, 2015 by Defendant Keith Powers ("Defendant Powers"). Plaintiff alleges that Defendant Premiere is owned by Defendant Powers and Defendant Siekierski, and that Defendant Caraballo and Defendant Ellis work for Defendant Premiere.

On or about March 25, 2015, Plaintiff allegedly learned that Defendant Siekierski had become employed by Defendant Premier. Plaintiff also alleges that Defendant Siekierski has refused to return some of its documents, and has solicited Plaintiff's current customers, as well as some customers it had been attempting to obtain business from. On March 25, 2015, Plaintiff sent Defendant Siekierski, Defendant Premiere and Defendant Keith Powers cease and desist letters. (See Plaintiff's Exhibits 7 and 8.)

On March 26, 2015, Defendant Siekierski returned to work for Plaintiff, and Plaintiff believed that he, as well as Defendants Powers and Premier had stopped attempting to solicit Plaintiff's customers. Defendant Siekierski's last day of employment with Plaintiff was April 27, 2015.

Plaintiff alleges that it has since learned that Defendant Caraballo and Defendant Siekierski have, from at least fall 2013 to winter 2014, taken Plaintiff's

documents, know-how, technical information, and trade secrets, and used said property in connection with their activities for Defendant Premiere in an effort to compete against Plaintiff. On or about May 1, 2015, Plaintiff learned that Defendants Ellis and Caraballo were working for Defendant Premiere. Plaintiff alleges that Defendant Siekierski is still in possession of many of its files, contracts and customer leads and referrals.

On May 29, 2015, Plaintiff filed its verified complaint in this matter ("Complaint"), as well as its instant motion for a temporary restraining order and preliminary injunction. The Complaint contains the following claims: Count I- Breach of Confidentiality Provision of the Agreements against Defendants Sierkierski and Carabello, Count II- Breach of Non-Compete Provision of Agreements against Defendant Siekierski, Ellis and Carabello, Count III- Breach of Non-Solicitation Provision of Agreements against Defendants Siekierski, Ellis and Caraballo, Count IV- Unjust Enrichment against Defendant Siekierski, Count V- Unjust Enrichment against Defendant Ellis, Count VI- Unjust Enrichment against Defendant Caraballo, Count VII- Intentional Interference with Contractual Relations against Defendant Premiere and Powers, Count VIII- Civil Conspiracy against all Defendants, Count IX- Conspiracy to Commit Fraud against all Defendants, Count X- Fraudulent Misrepresentation against all Defendants, and Count XI- Permanent Injunction against all Defendants.

On July 9, 2015, Defendants filed their response to the motion for temporary restraining order and preliminary injunction. On August 20, 2015, Plaintiff filed a supplemental brief in support of its motion. On September 9,

2015, the parties stipulated to the dismissal of Plaintiff's claims against Defendants Carabello and Ellis without prejudice. On October 9, 2015, the remaining Defendants filed a supplemental brief in support of their opposition to Plaintiff's motion. The Court has since concluded a hearing in connection with the motion. At the conclusion of the hearing the Court took the matter under advisement.

II. 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).

III. Arguments and Analysis

In its motion, Plaintiff contends that it will be irreparably harmed without injunctive relief because the remaining Defendants are actively competing with

Plaintiff and using Plaintiff's confidential and proprietary information to do so. In response, Defendants assert that even if their competitive actions are found to have violated the Agreements, any loss of business can be remedied through monetary damages. As a result, Defendants maintain that Plaintiff has not been irreparably harmed because it has an adequate remedy at law.

"[I]njunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury." discretion. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). (citation and internal quotation marks omitted). Pursuant to a longstanding principle, "a particularized showing of irreparable harm ... is ... an indispensable requirement to obtain a preliminary injunction." *Id* at 9 (citation and internal quotation marks omitted). Accordingly, "a preliminary injunction should not issue where an adequate legal remedy is available." *Id*.

In this case, Plaintiff concedes that it is able, through discovery, to determine what customers Defendants have obtained since Defendant Premiere started conducting business. However, Plaintiff contends that Defendants do not utilize the same referral program as it uses, which results in Defendants obtaining less business from the same clientele as Plaintiff would have. Further, Plaintiff asserts that the extent of business Defendants has failed to obtain cannot be determined, and that as a result the scope of damages caused by Defendants' actions cannot be easily determined. The Court is convinced that Plaintiff's position is illogical and amounts to an argument that Defendants could

have wrongfully obtained more business had they utilized the exact same practices as Plaintiff. The primary basis for Plaintiff's sought damages in this matter is its argument that Defendants have stolen work they would not have obtained if Defendants were not engaged in the same business. However, the basis for Plaintiff's irreparable harm argument is not that the amount of business Defendants have obtained is indeterminable; rather, it is the amount of business that Defendants could have obtained is incapable of being calculated. However, by failing to obtain more customers, Defendants' actions actually benefit Plaintiff by creating a larger pool of available potential customers. For all of these reasons, the Court is convinced that Plaintiff's irreparable harm argument is without merit. Consequently, Plaintiff has failed to establish an indispensable prerequisite for obtaining a preliminary injunction. *Pontiac Fire*, 482 Mich 8. Accordingly, Plaintiff's motion must be denied.

While Plaintiff's motion is properly denied based on its failure to establish that it will be irreparably harmed if an injunction is not entered, the Court also notes that the injury caused to Defendants if a preliminary injunction is entered is greater than the potential injury to Plaintiff if its motion is denied. Defendants' entire business and way of making a living would be made impossible if they are enjoined from competing with Plaintiff, as both sides appear to be engaged in the same industry. In comparison, Plaintiff's task in obtaining customers may be more difficult with an additional competitor in the market, but it is nevertheless able to continue to operate and seek additional work. Accordingly, the Court is

convinced that the danger of harm factor also weighs in favor of denying Plaintiff's motion.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for a temporary restraining order and preliminary injunction is DENIED. 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.

Date: DEC 04 2015

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