

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ZODIAC ENTERTAINMENT, INC.,

Plaintiff,

vs.

Case No. 2015-4561-CB

JULIE DILWORTH,

Defendant.

OPINION AND ORDER

Plaintiff has filed a motion for a preliminary injunction. Defendant has filed a response and requests that the motion be denied.

I. Factual and Procedural History

Plaintiff is in the business of providing disc jockey and karaoke hosting services to bars and restaurants. Defendant is one of Plaintiff's former independent agents. Specifically, Defendant worked for Plaintiff for fourteen years, primarily as a karaoke host. For multiple years leading up to her termination, Defendant hosted a karaoke event at Mr. B's Royal Oak restaurant on Wednesday nights.

On December 1, 2015, Defendant advised Plaintiff's president, Katherine L. Butler that she intended to pursue a solo career not related to karaoke. After multiple discussions, Plaintiff terminated its contract with Defendant.

Defendant's contract with Plaintiff included a non-competition provision ("Non-Compete"). In its complaint, Plaintiff alleges that Defendant has violated the Non-Compete by, *inter alia*, (1) directly or indirectly performing disc jockey

services and/or hosting karaoke parties at Mr. B's Royal Oak after her termination, and (2) calling on, soliciting, or attempting to call, solicit, or attempt to take away Plaintiff's customers and patrons through social media postings. Plaintiff now seeks a preliminary injunction to enjoin Defendant from engaging in the alleged improper conduct.

On December 22, 2015, Plaintiff filed its instant motion for a temporary restraining order and preliminary injunction. On the same day, the Court entered a temporary restraining order ("TRO") enjoining Defendant from engaging in certain activities. On January 15, 2016, Defendant filed her response to Plaintiff's motion. Over January 22, 2016 and January 28, 2016, the Court held an evidentiary hearing with respect to Plaintiff's motion for a preliminary injunction, and Defendant's request to dissolve the TRO. At the conclusion of the hearing the Court took the matters 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

A. Plaintiff's likelihood of prevailing on the merits of its claim

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 claims. *Campau*, 185 Mich App at 729. Plaintiff's motion is based on its position that Defendant's actions have violated the Non-Compete.

As a preliminary matter, the parties dispute whether Mr. B's remains a customer with Mr. B's, and if not, when Mr. B's was no longer considered to be Plaintiff's customer. The Non-Compete defines "customers" as

The term "customers" of [Plaintiff] as used in this Agreement shall be defined and construed to mean any and all persons, partnerships, corporations, firms, or other entities engaged by or representing [Plaintiff's] business, whether as an employee, agent, independent contractor, or otherwise, notwithstanding that such persons, partnership, corporations, firms, or other entities may have been induced to become customers and give their patronage to [Plaintiff] by the efforts and solicitation of [Defendant], or of someone on [Defendant's] behalf, regardless of the time of the solicitation.

(See Plaintiff's Exhibit 1, at p.2.)

At the hearing in connection with this motion, Plaintiff's principal, Katherine L. Butler, testified that she received a call from Mr. B's owner on December 8, 2015 during which he advised her that Mr. B's was terminating its relationship with Plaintiff. While Ms. Butler also testified that her understanding at the end of

the conversation was that Plaintiff may be able to get Mr. B's business back, she provided no testimony evidencing that the termination had been revoked as a result of the conversation. Further, Ms. Butler testified that on December 15, 2015 she received a certified letter from Mr. B's owner in which he confirmed that Mr. B's relationship with Plaintiff was terminated, and in which he referred to Mr. B's as Plaintiff's ex-customer. (See Defendant's Exhibit D.)

"A contract must be interpreted according to its plain and ordinary meaning." *Holmes v Holmes*, 281 Mich App 575, 593; 760 NW2d 300 (2008). "Under ordinary contract principles, if contractual language is clear, construction of the contract is a question of law for the court. If the contract is subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties. If the contract, although inartfully worded or clumsily arranged, fairly admits of but one interpretation, it is not ambiguous. The language of a contract should be given its ordinary and plain meaning." *Id.* at 594.

In this case, there is a question as to at what point, if any, Mr. B's ceased being a part of "Plaintiff's business", thereby taking Mr. B's outside of the definition of Plaintiff's customers. Based upon Ms. Butler's testimony and the December 15, 2015 letter, the Court is convinced that the trier of fact, if presented with the same evidence at trial, is likely to find that Mr. B's ceased being one of Plaintiff's customer no later than December 15, 2015 when Plaintiff received an unequivocal letter from Mr. B's owner terminating its relationship with Plaintiff. While Ms. Butler testified that entities routinely come back to Plaintiff

after terminating their relationship with Plaintiff for a time, and that because of that she considers those entities to be customers even during the time when Plaintiff is not providing them services, the Court is persuaded that such entities would likely not be considered customers within the meaning of the Non-Compete for those period of time Plaintiff is not regularly providing services to those entities. Rather, at best such entities would likely be considered potential customers/entities that could potentially resume being a part of Plaintiff's business, aka customers, in the future.

In its complaint and motion, Plaintiff alleges that Defendant has violated subparagraphs 2(a)-(c) of the Non-Compete. Subparagraph 2(a) provides:

(2) While acting as a representative of [Plaintiff], and for one (1) year thereafter, [Defendant] shall not and agrees that he will not directly or indirectly, do any of the following:

- (a) Own an interest in, operate, join, control, or participate in, or be connected as an officer, employee, agent, independent contractor, partner, shareholder, or principal of or in any corporation, partnership, proprietorship, firm, association, or other entity, soliciting orders from, selling, distributing, or otherwise marketing services which directly results in the loss of current and existing customers of the company;

(See Plaintiff's Exhibit 1.)

Plaintiff alleges that Defendant has violated the subsection by causing/encouraging Mr. B's Royal Oak to terminate its relationship with Plaintiff. It appears undisputed that subsection (a) precludes Defendant from engaging in conduct which directly results in Plaintiff losing an existing customer. Given the Court's holding that a trier of fact would likely determine that Mr. B's ceased being a customer no later than December 15, 2016, the issue before the Court is

whether Defendant likely engaged in conduct, on or before December 15, 2015, which directly resulted in Mr. B's terminating its relationship with Plaintiff. At this point in the proceedings, Plaintiff has not presented any evidence of such activities. Consequently, the trier of fact is likely to find that Defendant did not violate subsection (a).

With respect to subsection (b), the provision provides that Defendant may not, for 1 year following termination:

- (b) Induce or influence, or seek thereto, any person who is engaged as an employee, agent, independent contractor, or otherwise by [Plaintiff] to terminate his or her engagement or to engage or otherwise participate in business activity directly or indirectly competitive with [Plaintiff's] business; (See Plaintiff's Exhibit 1.)

Plaintiff contends that subsection (b) precludes Defendant from, *inter alia*, engaging or otherwise participating in business activity which directly or indirectly competes with Plaintiff's business. Specifically, Plaintiff contends that subsection (b) bars Defendant from hosting karaoke or any other event at Mr. B's that Plaintiff could provide. In response, Defendant asserts that subsection (b) merely prohibits Defendant from inducing or influencing, or attempting to induce or influence, anyone engaged by Plaintiff to participate in a business activity that indirectly or directly competes with Plaintiff. In particular, Defendant avers that subsection (b) prevents her from causing or encouraging others from competing with Plaintiff, but does not restrict her own ability to engage in competitive activities.

The issue with respect to subsection (b) is whether the portion of the subsection following the second "or" applies only to those engaged by Plaintiff

following Defendant's termination, or whether that portion of the subsection (b) applies to those individuals and Defendant.

A contract is ambiguous "when its provisions are capable of conflicting interpretations." *Klapp v. United Ins. Group Agency, Inc.*, 468 Mich 459, 467; 663 NW2d 447 (2003). It is well settled that the meaning of an ambiguous contract is a generally question of fact that must be decided by the jury. *Id.* at 469. As discussed above, the parties have each presented a different interpretation of subsection (b). The Court is satisfied that the trier of fact could side with other party on this issue.

If the trier of fact were to side with Defendant's interpretation of subsection (b), then it would follow that Defendant has not breached that subsection as Plaintiff has not presented any evidence that Defendant has caused, or attempted to cause another engaged by Plaintiff to leave Plaintiff or engage in a competitive activity.

If the trier of fact agrees with Plaintiff's interpretation, the question becomes whether Defendant has engaged in a business activity which competes with Plaintiff. Plaintiff has presented evidence that Defendant has encouraged others to come to events put on by Plaintiff's competitors. (See Plaintiff's hearing Exhibits 4, 5, 7, 9-11.) Based on those exhibits, the Court is convinced that a trier of fact is likely to find that Defendant has breached the terms of subsection (b) if it is found that Plaintiff's interpretation of subsection (b) is correct.

For the reasons discussed above, the Court is convinced that the question of whether Plaintiff is likely to prevail on the merits of its claim with respect to

subsection (b) probably depends of which interpretation of the subsection is adopted. As neither party has established that they are likely to prevail on that issue, the first prong of the *Campau* factors does not weigh for or against granting relief as to subsection (b).

The final subsection at issue is subsection 2(c). That provision provides that Defendant may not from, for 1 year after her termination:

(c) Either for himself or for any other person, firm, or corporation, divert or take away or attempt to divert or take away, and during the stated period following termination, call upon or solicit, or attempt to call upon or solicit, any of the customers or patrons of [Plaintiff], including but not limited to those upon who he called or whom he solicited or to whom he catered or with whom he became acquainted while engaged as a representative in [Plaintiff's] business.

(See Plaintiff's Exhibit 1.)

Plaintiff asserts that Defendant has repeatedly breached paragraph (2)(c) of the Non-Compete by calling on, soliciting, or attempting to call on or solicit Plaintiff's patrons. Specifically, Plaintiff alleges that Defendant has posted on Facebook invitations to individuals who have attended events hosted by Plaintiff, and that doing so violates the Non-Compete. In support of its position, Plaintiff relies on printouts of Defendant's Facebook posts invitations to her "friends" on Facebook that she would be at Mr. B's each Wednesday night and that they should join her. (See Plaintiff's Exhibits 4, 5, 7, 10 and 11.)

In her response, Defendant contends that posting that she would be at Mr. B's on Facebook is not a violation of the Non-Compete because Mr. B's was no longer one of Plaintiff's customers after December 9, 2015, and because the

individuals she tagged in her Facebook posts are patrons of Mr. B's, not of Plaintiff.

It appears undisputed that the issue with respect to subsection (c) boils down to whether those individuals Defendant has invited to events are considered Plaintiff's "patrons". Unlike "customers", the term "patron" is not defined by the Non-Compete. Plaintiff's president testified that she defines "patrons" as including those individuals who have attended events they have hosted. In response, Defendant relies on the dictionary definition of "patron", which provides, in pertinent part, that a "patron is: "a regular client or customer." (See Webster's Collegiate Dictionary (2014)).

Where a term is not defined by the contract in question, the Court may consult a dictionary in order to ascertain the plain meaning of the term. *Holland v Trinity Health Care Corp*, 287 Mich App 524, 527-528; 791 NW2d 724 (2010). However, a Court must interpret each term in a manner which does not render it surplusage or nugatory. *Altman v Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992). In this case, the subsection (2)(c) of the Non-Compete precludes Defendant from calling upon or soliciting, or attempting to call upon or soliciting "any of the customers or patrons of [Plaintiff]". (See Plaintiff's Exhibit 1.) While consulting the dictionary is permissible where a term is not defined by a contract, the dictionary definition of "patron" would result in the term "patron" being rendered surplusage. Specifically, subparagraph (c) already provides that Defendant may not solicit, call upon or attempt to solicit or call upon Plaintiff's customers. If the term patron was interpreted to be a synonym for "customer" then it would result

in the term patron being excessive and meaningless. Consequently, the Court is satisfied that consulting the dictionary definition of patron is not determinative.

Since the dictionary definition of “patron” is not formative in this case, and because the term is not defined by the Non-Compete, the term is ambiguous, as it is susceptible to multiple meanings. See *D’Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997). As discussed above, where a term is ambiguous, factual development is needed in order to ascertain the parties’ intent. *Id.* at 320. Where the merits of a claim turn on the interpretation of an ambiguous term, neither party is likely to prevail on the merits for the purpose of deciding a motion for preliminary injunction. *Blue Planet Software, Inc. v Games Intern., LLC*, 334 F Supp 2d 425 (SD NY 2004).

In this case, the term “patron” is ambiguous, and the merits of Plaintiff’s breach of contract claim will be decided based on its interpretation. However, such questions of interpretation are to be left for the trier of fact. *Cole v Auto-Owners Ins Co*, 272 Mich App 50, 53; 723 NW2d 922 (2006). Accordingly, neither party has established that they are likely to prevail on the merits with respect to subsection (c). As a result, this factor does not weigh in either party’s favor.

B. Irreparable Harm

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 its motion, Plaintiff contends that it will suffer irreparable harm in the form of lost customer confidence, loss of goodwill, loss of profits and loss of business reputation. “[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). In this matter, Ms. Butler has testified that it is impossible to determine how much business Plaintiff has lost as a result of Defendant’s actions. Based on *Kelly Services* and Ms. Butler’s testimony, the Court is convinced that Plaintiff has established that Defendant’s breach(es) of the Non-Compete, if any, would result in Plaintiff being irreparably harmed.

C. Balance of Harm

The next factor requires this Court to weigh the harm that each party will suffer depending on whether the relief requested is granted or denied. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008) In its motion, Plaintiff contends that an injunction merely prevents Defendant from acting in a manner she has contractually agreed that she would not engage in. In comparison, Plaintiff asserts that its reputation and goodwill will be irreparably harmed if Defendant is permitted to continue to breach the terms of the Non-Compete.

In her response, Defendant contends that injunctive relief would cause her the loss of legitimate employment opportunities with entities that are not Plaintiff’s customers.

In this case, Defendant has represented to the Court that she does not desire to work as a DJ or karaoke host at this time; rather, Defendant appears to be focusing on her career as a singer a band. Consequently, an injunction barring Defendant from causing any of Plaintiff's customers to terminate its/their relationships with Plaintiff and/or barring Defendant from competing with Plaintiff has a low risk of harming Defendant. In comparison, failing to provide injunction relief leaves open the possibility to Defendant engaging in competitive activities and/or causing Plaintiff to lose business. The Court is convinced that the risk of harm with respect to these activities weighs in favor of injunctive relief.

With respect to soliciting/attempting to solicit the individuals that had attended Plaintiff's events at Mr. B's, both sides have established a potential risk of harm. Plaintiff avers that it could be harmed by Plaintiff's tagging individuals inviting them to attend events because those individuals may have gone to one of Plaintiff's events instead had Defendant not posted or otherwise invited them to events not hosted by Plaintiff. Defendant asserts that she will be harmed if she is not allow to invite people to her events because her social life and success of her band will be negatively impacted if she is not permitted to tell people what she will be doing.

The Court is convinced that both sides have pointed to a risk of harm that is equally speculative and severe. Consequently, the Court is satisfied that the third element with respect to tagging/inviting individuals to events not hosted by Plaintiff neither weighs in favor or against injunctive relief.

D. Public Interest

Neither party has cited to any public interest that will be substantially impacted by the Court's decision in this case. As a result, the Court is satisfied that the fourth element neither weighs in favor or against injunctive relief.

As discussed above, the Court is persuaded that a Plaintiff is not likely to prevail on the merits of the portion of their claim related to subparagraph 2(a) of the Non-Compete. With respect to subparagraphs (b) and (c), both sides are equally likely to prevail on the merits.

With respect to irreparable harm, the Court is convinced that this factor weighs in favor of injunctive relief as to all three subparagraphs.

In regards to risk of harm, the Court is satisfied that this factor weighs in favor of injunctive relief with respect to subparagraphs (a) and (b), and that the factor neither weighs for or against injunctive relief with respect to subparagraph (c).

Finally, the public interest factor does not weigh for or against injunctive relief.

In sum, the Court is convinced that the factors set forth in *Campau*, as a whole, weigh in favor of injunctive relief. While factor 1 weighs against injunctive relief as to subparagraph (a), factors 3, and in particular 2, weigh in favor of injunctive relief. With regards to subparagraph (b), factors 2 and 3 weigh in favor of relief, with the other two factors neither weighing in favor or against such relief. Lastly, factor 2 weighs in favor of relief with respect to subparagraph (c), while

the other favors neither weigh for or against relief. Consequently, the factors weigh in favor of relief as to all three subsections.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for a preliminary injunction is GRANTED. Specifically, Defendant is prohibited from:

- (1) Engaging in any conduct which directly results in Plaintiff losing the business of any existing customer, which shall be defined as any individual/entity with whom Plaintiff regularly provides services that has not terminated its relationship with Plaintiff;
- (2) Participating in any business activity that is directly or indirectly competitive with Plaintiff, or causing or encouraging anyone currently engaged by Plaintiff from participating in such activities. This provision does not restrict Defendant's ability to perform with her band unless such activities violate other portions of this Opinion and Order; or
- (3) Diverting or soliciting, or attempting to divert or solicit, any of Plaintiff's existing customers, as defined in section (1) above, or those individuals with whom Defendant became acquainted with by virtue of her job responsibilities with Plaintiff. This includes tagging or otherwise inviting such individuals to events not hosted by Plaintiff.

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: FEB 29 2016

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