

STATE OF MICHIGAN  
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

THERMAL-TEC/MICHIGAN, INC., a  
Michigan corporation,

Plaintiff,

vs.

Case No. 13-08339-CKB

HON. CHRISTOPHER P. YATES

JOSEPH McINNIS; JOHN BLAIN DAYTON;  
TIMOTHY DEVRIES; COMMERCIAL &  
INDUSTRIAL BUILDING MAINTENANCE,  
LLC, a Michigan limited liability company;  
and COMMERCIAL COATING SYSTEMS,  
LLC, a Michigan limited liability company,

Defendants.

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OPINION AND ORDER DENYING ALL MOTIONS FOR ATTORNEY FEES

On October 30, 2015, the jury trial in this case ended in a split verdict. Specifically, the jury found Defendants Joseph McInnis and Commercial & Industrial Building Maintenance (“CIBM”) responsible for “misappropriat[ing] or misus[ing] trade secrets or proprietary information of Thermal Tec,” but the jury found that none of the other defendants bore any liability to Plaintiff Thermal-Tec/ Michigan, Inc. (“Thermal Tec”). In the wake of the jury verdict, each and every party moved for an award of attorney fees, primarily based upon language in the Michigan Uniform Trade Secrets Act (“MUTSA”), MCL 445.1905, and also for alleged discovery violations. See MCR 2.302(E) & MCR 2.313(B). On February 2, 2016, the Court held a hearing on the various motions for attorney fees and afforded the parties the opportunity to present evidence in support of those motions. See B&B Investment Group v Gitler, 229 Mich App 1, 15-17 (1998). Now, after careful consideration, the Court shall explain why none of the parties is entitled to an award of attorney fees.

Under Michigan law, attorney fees ordinarily “are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract.” See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 297 (2009). In this case, all of the parties have chosen to rely upon a MUTSA provision that allows for attorney fees, but only in the following limited circumstances:

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorney fees to the prevailing party.

See MCL 445.1905. Moreover, the MUTSA provision states that “the court *may* award attorney fees to the prevailing party,” id. (emphasis added), so the Court retains discretion to deny attorney fees even in the narrow circumstances where the MUTSA allows for attorney fees. See Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 303 Mich App 441, 449 (2013), aff’d, 497 Mich 337 (2015). Here, nothing in the record justifies an award of attorney fees to any party under the MUTSA.

Although Plaintiff Thermal Tec has requested attorney fees under the MUTSA, Thermal Tec went to great lengths at trial to emphasize that the defendants could be held responsible if they took trade secrets, proprietary information, or both. Indeed, the verdict form specifically referred to both types of information. Under Michigan law, the concepts of trade secrets and proprietary information are not coterminous. Industrial Control Repair, Inc v McBroom Electric Co, Inc, No 302240, slip op at 8 (Mich App Oct 10, 2013) (unpublished decision). Accordingly, the jury verdict, which found that Defendants McInnis and CIBM “misappropriate[d] or misuse[d] trade secrets or proprietary information,” does not establish a MUTSA violation, much less a “willful and malicious” violation, as required for attorney fees under MCL 445.1905. Beyond that, the Court sat through the trial and

saw no evidence of “willful and malicious misappropriation” of trade secrets. To be sure, McInnis kept and stored materials and information that belonged to Thermal Tec, but none of those materials constitute trade secrets that McInnis willfully and maliciously misappropriated. Therefore, the Court shall deny Thermal Tec’s request for attorney fees under MCL 445.1905.

Defendant Timothy DeVries has the most viable claim for attorney fees under the MUTSA, but even he cannot meet the high threshold for attorney fees under that statute. To obtain attorney fees under the MUTSA, DeVries must demonstrate that Plaintiff Thermal Tec pursued the MUTSA claim against him in bad faith. See MCL 445.1905. In order “to demonstrate bad faith, a defendant must show ‘clear evidence that the action [was] entirely without color and taken for other improper purposes amounting to bad faith.’” See Degussa Admixtures, Inc v Burnett, 471 F Supp 2d 848, 857 (WD Mich 2007). DeVries forthrightly conceded that he kept Thermal Tec’s binders at his house long after his termination on December 26, 2009. Although the jury apparently concluded that his retention of Thermal Tec’s binders was innocuous, Thermal Tec’s decision to file a MUTSA claim against DeVries cannot be characterized as an act done “in bad faith” given the fact that DeVries still had the Thermal Tec binders in his possession years after his employment with Thermal Tec ended.

Defendant John Blain Dayton and his company, Commercial Coating Systems, LLC, plainly cannot establish an entitlement to attorney fees under the MUTSA. As soon as Dayton’s tenure with Plaintiff Thermal Tec ended in February 2013, Dayton used information obtained from Thermal Tec to bid on roofing jobs against Thermal Tec. That conduct warranted Thermal Tec’s MUTSA claim, at least insofar as the Court’s review for “bad faith” is concerned. See MCL 445.1905. Dayton not only succeeded in securing some of that business, but also forged the signature of Zac McCuaig on at least one bid. The notion of awarding attorney fees to anyone who engages in forgery is anathema,

so the Court emphatically denies attorney fees to Dayton and his company under MCL 445.1905 as a matter of law and discretion.\* See Aroma Wines, 303 Mich App at 449 (in addressing attorney-fee request, Court stated: “The term ‘may’ is permissive and indicates discretionary activity.”).

As a final matter, Plaintiff Thermal Tec has requested attorney fees under MCR 2.302(E) and MCR 2.313(B) for alleged discovery violations by the defendants. Both of those rules empower the Court to impose sanctions for discovery abuses, but the Court ordinarily imposes discovery sanctions only in cases where just one side of the dispute commits transgressions. Here, the discovery process was bitter, protracted, and largely ineffective because of both sides’ behavior. The level of acrimony in civil litigation never ceases to amaze the Court, but this lawsuit gave rise to an entirely new level of spite and intransigence by all of the parties. Consequently, the Court ought not provide either side with attorney fees flowing from the broken discovery process that resulted from the actions of all of the parties involved. Fortunately, this contentious litigation has come to an end. The Court can only hope that the parties will now move forward in their business endeavors and refrain from the costly, self-defeating practice of trying to destroy one another through the court system.

IT IS SO ORDERED.

Dated: February 11, 2016



HON. CHRISTOPHER P. YATES (P41017)  
Kent County Circuit Court Judge

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\* This ruling applies with equal force to the demand by Defendant Dayton and his company for attorney fees based upon the alleged litigant misconduct of Plaintiff Thermal Tec’s principals. Of course, it was not constructive for Thermal Tec’s principals to publish post-trial accounts gloating about the justice purportedly meted out by the jury, especially when Thermal Tec obtained, at best, mixed results from the jury. But the Court need not respond to any of those ill-advised publications with an award of attorney fees to undeserving litigants such as Defendant Dayton.