

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.

\_\_\_\_\_ /

OPINION AND ORDER GRANTING IN PART, AND DENYING IN  
PART, DEFENDANTS' MOTION FOR SUMMARY DISPOSITION

This acrimonious dispute should probably be assigned to Richard Dawson or Steve Harvey, rather than the Court, because those two gentlemen have much more experience hosting the Family Feud. With trial looming on September 21, 2015, the defendants moved for summary disposition on all eleven claims set forth in the first amended complaint of Plaintiff Thermal-Tec/Michigan, Inc. ("Thermal-Tec"). During oral argument on July 23, 2015, the Court disposed of many of the claims, awarding summary disposition to the defendants under MCR 2.116(C)(10) as to Counts Three, Five, Six, Seven, Eight, Eleven, and a portion of Ten, but leaving all of the other claims for consideration in a written opinion. Now, after more thorough review, the Court shall additionally award summary disposition to the defendants pursuant to MCR 2.116(C)(10) on all that remains of Count Ten, but the Court shall allow Thermal-Tec to proceed on Counts One, Two, Four, and Nine.

## I. Factual Background

The defendants have requested summary disposition under MCR 2.116(C)(10),<sup>1</sup> which “tests the factual sufficiency of the complaint[.]” Corley v Detroit Board of Education, 470 Mich 274, 278 (2004), and obligates the Court to consider “the entire record in the light most favorable to the party opposing the motion, including affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Id. The parties have provided the Court with a mountain of evidence, so the Court must distill all of that evidence into a workable explanation of the factual background of this dispute.

For 30 years, Plaintiff Thermal-Tec has provided commercial roofing services as a family-owned business. In the 1990s, Thermal-Tec hired Defendants Joseph McInnis, John Blain Dayton, and Timothy DeVries to work for the company in various capacities. McInnis, the brother-in-law of Thermal-Tec’s co-owners, started as an operations manager in 1998, but made a transition to the sales staff in 2009. Dayton began as a laborer in 1991, but quickly rose to the level of a crew leader within six months, and ultimately moved to the sales force in 2001. DeVries was hired as a sales representative in 1995 and remained in that role until his termination on December 26, 2009. Dayton was fired on February 18, 2013, and McInnis voluntarily resigned on August 30, 2013. Thus, all of the individual defendants no longer work for Thermal-Tec.

---

<sup>1</sup> Actually, Defendant John Blain Dayton and his company, Defendant Commercial Coating Systems, LLC, have not joined the other defendants’ motion because Dayton and his company find themselves in the maw of litigation without the assistance of counsel. Although Dayton retained an attorney, his attorney recently withdrew from the case, so Dayton now must go it alone unless he can persuade another attorney to take up his cause on the eve of trial. His company is truly in dire straits at this point because, under Michigan law, a corporation “can appear only by attorney regardless of whether it is interested in its own corporate capacity or in a fiduciary capacity.” Peters Production, Inc v Desnick Broadcasting Co, 171 Mich App 283, 287 (1988). Therefore, Dayton’s company has no authority to defend itself at trial unless an attorney appears on its behalf.

In March of 2013, several months before Defendant McInnis left Thermal-Tec, Defendants DeVries, Dayton, and McInnis decided to form a company that would compete with Thermal-Tec. On March 13, 2013, the three men filed articles of organization creating Defendant Commercial & Industrial Building Maintenance, LLC (“CIBM”). See First Amended Complaint, Exhibit C. Their business plan was straightforward: McInnis, Dayton, and DeVries would serve as independent sales representatives for roofing, flooring, lighting, and insulation subcontractors, who would remit sales commissions to CIBM for contracts secured through CIBM’s sales efforts. Each sales commission payment would flow through CIBM for distribution to the CIBM member who made the sale. When McInnis resigned from Thermal-Tec on August 30, 2013, CIBM had already begun operating under the system designed by the three men.

On September 3, 2013, Plaintiff Thermal-Tec filed this lawsuit against Defendants McInnis, Dayton, DeVries, and CIBM. Several weeks later, after a contentious evidentiary hearing, the Court issued an opinion and order granting a preliminary injunction on October 9, 2013, prohibiting all of the defendants from soliciting Thermal-Tec’s clients. Because the Court applied that restriction to McInnis, DeVries, and CIBM only because of their affiliation with Dayton, who remained bound by a noncompetition obligation, Dayton left CIBM to form his own company, Defendant Commercial Coating Systems, LLC (“CCS”). Based upon that development, the Court modified the injunction on May 8, 2014, by lifting the restriction on McInnis, DeVries, and CIBM soliciting the customers of Thermal-Tec.<sup>2</sup>

---

<sup>2</sup> As the Court stated, because Defendants “McInnis and DeVries were engaged in a business relationship with Defendant Dayton – who was bound by a noncompetition agreement with Thermal Tec, all three men were barred from soliciting Thermal Tec’s clients through their business, CIBM. See Owens v Hatler, 373 Mich 289, 292 (1964).” But “no basis would exist for such a restraint upon McInnis and DeVries if those two defendants discontinued their association with Dayton.”

On October 31, 2014, Plaintiff Thermal-Tec filed a first amended complaint naming all four original defendants in a passel of counts and pleading claims against Defendant Dayton's company, CCS. In the fullness of time, Defendants McInnis, DeVries, and CIBM sought summary disposition under MCR 2.116(C)(10) on all of Thermal-Tec's claims. The Court dismissed many of the claims on the record during the oral argument on July 23, 2015, but the Court took the thornier claims under advisement and permitted the parties to file supplemental briefs on the issues raised by those claims. Now, the Court can complete the process of addressing the defendants' summary-disposition motion and shape the case for trial on September 21, 2015.

## II. Legal Analysis

Defendants McInnis, DeVries, and CIBM have moved for summary disposition pursuant to MCR 2.116(C)(10), which enables the defendants to test "the factual sufficiency of the complaint." Maiden v Rozwood, 461 Mich 109, 120 (1999). "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). Such "[a] genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Accordingly, the Court must review the remaining claims under these well-known standards.

### A. Breach of Non-Disclosure and Noncompetition Obligations By DeVries and Dayton.

Count One of Plaintiff Thermal-Tec's first amended complaint accuses Defendants DeVries and Dayton of breaching non-disclosure and noncompetition obligations imposed by the employment agreements they signed. Michigan law permits enforcement of such contractual obligations if those

obligations are “reasonable as to . . . duration, geographical area, and the type of employment or line of business.”<sup>3</sup> See, e.g., Coates v Bastian Bros, Inc, 276 Mich App 498, 506 (2007), quoting MCL 445.774a(1). DeVries and Dayton signed noncompetition agreements that bound them “for a period of 5 years following termination of employment[.]” See First Amended Complaint, Exhibit H. In addition, both men signed broad non-disclosure agreements. See id. Thermal-Tec claims that both men breached those agreements in forming and operating Defendant CIBM.

On February 18, 2013, Plaintiff Thermal-Tec fired Defendant Dayton, who promptly began setting up Defendant CIBM in March of 2013 with Defendants McInnis and DeVries. Although the five-year noncompetition obligation imposed upon Dayton almost certainly should be pared down to a more reasonable length of time, Dayton plainly should be held to his noncompetition agreement for the entire duration of his involvement in CIBM, which began less than a month after Dayton left Thermal-Tec and ran through April 7, 2014, when he withdrew from CIBM. The Court concludes that Thermal-Tec has presented ample evidence to support its claim that CIBM acted in competition with Thermal-Tec and used the company’s proprietary information, so the Court must deny summary disposition with respect to Thermal-Tec’s claim that Dayton breached his noncompetition and non-disclosure obligations.

Plaintiff Thermal-Tec terminated Defendant DeVries’s employment on December 26, 2009. By all accounts, DeVries stayed away from the roofing industry, and thereby abided by his agreement to refrain from competing with Thermal-Tec, until March 2013, when he joined Defendants Dayton and McInnis in forming and operating Defendant CIBM. The Court has not unearthed any decision,

---

<sup>3</sup> Although Michigan law has not yet clearly established a “reasonableness” requirement for contractual non-disclosure obligations, that requirement is standard fare in most jurisdictions. See, e.g., Overholt Crop Ins Service Co v Travis, 941 F2d 1361, 1366-1367 (8th Cir 1991).

published or unpublished, from any Michigan court that has enforced a noncompetition agreement against a mere former employee for a period longer than three years.<sup>4</sup> Thus, the Court concludes that it would be unreasonable to hold DeVries to his noncompetition obligation for more than the three-year period that he completed on December 26, 2012. Nevertheless, Thermal-Tec may proceed on its claim against DeVries for violating the noncompetition requirement derivatively imposed upon him by dint of his business relationship with Dayton, who labored under a noncompetition obligation throughout his tenure with CIBM from March 2013 until April 7, 2014. See Owens v Hatler, 373 Mich 289, 292 (1964). Thus, the Court must deny DeVries's request for summary disposition under MCR 2.116(C)(10) on Thermal-Tec's claim in Count One of its first amended complaint.

**B. Breach of Contract By McInnis.**

In Count Two, Plaintiff Thermal-Tec claims that Defendant McInnis breached a contract he had with Thermal-Tec. The document supporting this claim is an "Equipment Use Policy" McInnis signed on July 12, 2013. See First Amended Complaint, Exhibit B. Although that policy broadly governs "using e-mail, the Internet and other company equipment[,]" see id. (Equipment Use Policy, § 1(C)), the policy includes the following language that Thermal-Tec has cited to support its claim:

Staff further agrees all information, including technical information, methods, processes, formulae, compositions, systems, techniques, inventions, machines, computer programs, research projects, business information, customer lists, pricing data, sources of supply, financial data and marketing production, or merchandising systems and plans and other information confidential to the Thermal-Tec is proprietary in nature and not to be shared, disclosed or divulged with anyone outside the organization.

---

<sup>4</sup> To be sure, Michigan courts have indicated that a noncompetition period longer than three years may be enforced against a former owner who sells a company and agrees not to compete with the buyer of the company. See, e.g., Thermatool Corp v Borzym, 227 Mich App 366, 369 (1998).

Id. (Equipment Use Policy, § 1 – Confidentiality). According to Thermal-Tec, the policy “expressly prohibits McInnis from disclosing or divulging trade secrets or other confidential information.” See First Amended Complaint, ¶ 72. Thus, Thermal-Tec asserts that McInnis breached that agreement by disclosing confidential information to Defendants Dayton, DeVries, CIBM, and CSS.

Although Plaintiff Thermal-Tec’s reliance upon the equipment policy to support its claim for breach of contract seems like a stretch, the language cited by Thermal-Tec appears to constitute an enforceable non-disclosure obligation. Thus, the breach-of-contract claim can survive the summary-disposition request by McInnis even though Thermal-Tec never required McInnis to sign any formal employment contract or noncompetition agreement. Moreover, McInnis ran Defendant CIBM with Defendant Dayton for more than a year while Dayton was bound by a noncompetition obligation to Thermal-Tec, so the breach-of-contract claim against McInnis can rest upon his liability for taking part in Dayton’s breach of his noncompetition agreement with Thermal-Tec. See Owens, 373 Mich at 292. In sum, Thermal-Tec has two potentially viable theories to support its claim for breach of contract against McInnis, so the Court must deny summary disposition on Count Two.

C. Misappropriation and Misuse of Trade Secrets and Confidential Information.

Count Four alleges that all of the defendants took trade secrets and proprietary information from Plaintiff Thermal-Tec and then used that protected information in their business at Defendant CIBM. Because Count Four includes a citation to MCL 445.1903, the Court presumes that Thermal-Tec’s claim rests upon the Michigan Uniform Trade Secrets Act (“MUTSA”), MCL 445.1901 *et seq.* The first amended complaint broadly defines Thermal-Tec’s protected information as “its specialty roofing systems and services, the needs of its customers, processes, procedures, formulations,” and

“business information relating to its methods of operations and its customers, including the identity of its customers and the particular technical requirements of its customers, and the pricing of those products and services and other aspects of its business . . . .” See First Amended Complaint, ¶ 100. Items such as “customer identity, customer information, and customer lists” do not constitute trade secrets under MUTSA, but they may be “protectable by a confidentiality agreement.” See Industrial Control Repair, Inc v McBroom Electric Co, Inc, No 302240, slip op at 8 (Mich App Oct 10, 2013) (unpublished decision). All three individual defendants signed strict non-disclosure agreements, see First Amended Complaint, Exhibits B & H, so Thermal-Tec can proceed against all of the defendants on its claim that they disclosed protected information in violation of those agreements, even if that information does not fall within the ambit of MUTSA. Accordingly, the Court must deny summary disposition to the defendants under MCR 2.116(C)(10) on Count Four.

D. Breach of Fiduciary Duty By McInnis

In Count Nine, Plaintiff Thermal-Tec accuses Defendant McInnis of breaching his fiduciary duty to the enterprise. Because McInnis worked against the interests of Thermal-Tec by setting up Defendant CIBM as a competing business while he was still employed by Thermal-Tec, the viability of Thermal-Tec’s claim for breach of fiduciary duty depends entirely upon whether McInnis owed a fiduciary duty to Thermal-Tec. Generally, a mere employee owes no fiduciary duty to an employer, see Bradley v The Gleason Works, 175 Mich App 459, 463 (1989), but a manager owes a fiduciary duty to an employer. See Shwayder Chemical Metallurgy Corp v Baum, 45 Mich App 220, 224-225 (1973). The record reveals a genuine issue of material fact as to McInnis’s role during his tenure at Thermal-Tec. McInnis has presented evidence that he was not a manager, officer, or director even

though he was a trusted member of the family that operates the company. In contrast, Thermal-Tec has offered evidence that McInnis served in a managerial capacity with significant authority. Thus, the Court must deny summary disposition to McInnis on Count Nine under MCR 2.116(C)(10) and allow a jury to resolve the dispute.

E. Unfair Competition.

The Court has resolved most of the unfair-competition claim in Count Ten, but there remains an issue as to Plaintiff Thermal-Tec's claim that CIBM designed its business in a manner "calculated to mislead the public and cause general confusion in the marketing of the type of product involved." See First Amended Complaint, ¶ 169. Under Michigan law, "either actual or probable deception and confusion must be shown, for if there is no probability of deception," unfair competition cannot exist. Burns v Schotz, 343 Mich 153, 156 (1955). Here, Thermal-Tec has provided no evidence of actual or probable deception or confusion. Indeed, CIBM sold a much broader line of products, and CIBM operated on a completely different business model than Thermal-Tec. When confronted with a motion for relief under MCR 2.116(C)(10), Thermal-Tec bears an obligation to "set forth specific facts at the time of the motion showing a genuine issue of material fact." Maiden, 461 Mich at 121. Thermal-Tec's failure to meet that obligation requires the Court to award the defendants summary disposition on all that remains of Count Ten.

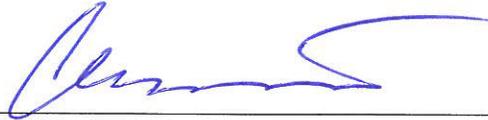
III. Conclusion

For all of the reasons set forth in this opinion, the Court shall deny summary disposition to the defendants under MCR 2.116(C)(10) on Counts One, Two, Four, and Nine of Plaintiff Thermal-Tec's first amended complaint, but the Court shall award summary disposition to the defendants on

all that remains of Count Ten. Accordingly, at the trial scheduled to begin on September 21, 2015, a jury shall be impaneled to consider whether the defendants should be held accountable to Thermal-Tec on the remaining claims.

IT IS SO ORDERED.

Dated: September 2, 2015



---

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