

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

EMPLOYEE BENEFIT SOLUTIONS, INC.,
a Michigan corporation,

Plaintiff/Counter-Defendant,

Case No. 14-01782-CKB

vs.

HON. CHRISTOPHER P. YATES

WEADOCK & ASSOCIATES, LLC, a
Michigan limited liability company; JAMES M.
BLACKBURN, an individual; COURTNEY
BOX, an individual; and JOHN & JANE DOES
1-5,

Defendants,

and

JAMES M. BLACKBURN, an individual; and
AVALANCHE RANCH MANAGEMENT,
L.L.C., a Michigan limited liability company,

Counter-Plaintiffs,

vs.

EMPLOYEE BENEFIT SOLUTIONS, INC.,
a Michigan corporation,

Counter-Defendant.

OPINION AND ORDER GRANTING, IN PART, DEFENDANTS' VARIOUS
MOTIONS FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

This case presents a cornucopia of claims that constitute the standard fare of the Specialized Business Docket, *i.e.*, termination of employment relationships, competition with a former employer, and all of the causes of action that usually ensue. Two of the defendants in this case are former sales

representatives of Plaintiff Employee Benefit Solutions, Inc. (“EBS”), which accuses the defendants of wrongfully inducing EBS clients to transfer their business to a competing company. In particular, the claims of EBS – which sells group insurance packages – came to light following the departure of former EBS independent contractor James Blackburn and former EBS employee Courtney Box, who moved to a competing insurance agency, Defendant Weadock & Associates, LLC (“Weadock”), after leaving EBS. At the outset of this litigation, Blackburn moved for summary disposition under MCR 2.116(C)(8) and (10) and Weadock requested summary disposition under MCR 2.116(C)(10). Although it is too early to grant relief under MCR 2.116(C)(10), the Court can prune from the case a majority of EBS’s claims under MCR 2.116(C)(8).

I. Factual Background

The defendants’ early requests for summary disposition under MCR 2.116(C)(10) run counter to the purpose of that rule, which enables parties to “test[] the factual sufficiency of the complaint.” See Maiden v Rozwood, 461 Mich 109, 120 (1999). Because a summary-disposition motion under MCR 2.116(C)(10) requires the Court to weigh the strength of the evidence supporting the claims, the plaintiff ordinarily should be afforded an opportunity to conduct discovery and marshal evidence before facing a request for summary disposition under MCR 2.116(C)(10). See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 292-293 (2009). As our Court of Appeals has cautioned, “[a] motion under MCR 2.116(C)(10) is generally premature if discovery has not been completed unless there is no fair likelihood that further discovery will yield support for the non-moving party’s position.” See Liparoto Construciton, Inc v General Shale Brick, Inc, 284 Mich App 25, 33-34 (2009). Ecclesiastes and the Byrds recognized that there is a time to

every purpose under heaven. They could have added that the time for seeking summary disposition under MCR 2.116(C)(10) is *not* at the inception of a civil case.

So how should the Court treat the defendants' motions for summary disposition? Defendant Blackburn had the good sense to list MCR 2.116(C)(8) as a basis for summary disposition.¹ Such a motion plainly can be addressed at the outset of this action because it presents a challenge confined to "the legal sufficiency of the complaint." Maiden, 461 Mich at 119. "When reviewing a motion brought under MCR 2.116(C)(8), the court considers only the pleadings." Michigan ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 63 (2014). "[T]he Court must accept all factual allegations in the complaint as true, along with all reasonable inferences or conclusions that can be drawn from them." Id. Accordingly, the Court shall limn the facts from Plaintiff EBS's complaint.

Plaintiff EBS sells group insurance packages to businesses in the West Michigan area, see Complaint, ¶ 7, and Defendant Blackburn worked as an independent sales agent for EBS beginning as early as May 1, 2003, the date he signed an independent contractor agreement with EBS. See id., Exhibit 1. Pursuant to that agreement, EBS acknowledged that Blackburn would also be serving as a sales agent for competing insurance agencies, id., ¶¶ 1, 5, but Blackburn agreed that the business that he produced for EBS "shall be the exclusive property of [EBS] and shall continue to be so after termination of this Agreement[.]" See id., ¶ 6. Defendant Box worked as an EBS employee starting as early as April 23, 2012, when she signed an employee non-disclosure agreement. Id., Exhibit 2. That non-disclosure agreement obligated Box to keep confidential all of the information related to

¹ Defendant Weadock cited MCR 2.116(C)(7) as well as MCR 2.116(C)(10) in moving for summary disposition, but at oral argument Weadock disclaimed any basis for relief pursuant to MCR 2.116(C)(7), so the Court need not consider any of the grounds for summary disposition identified in MCR 2.116(C)(7).

the services provided by EBS, all of the information related to the cost structure for EBS products, all client information, and all employee information. Id., page 1 of 3. The non-disclosure agreement further decreed that Box's confidentiality restrictions would survive even after the termination of her employment relationship with EBS. Id., page 2 of 3.

In late 2013, Defendants Blackburn and Box terminated their relationships with Plaintiff EBS and began working for Defendant Weadock, which operates an insurance agency that competes with EBS. The complaint accuses Blackburn, Box, and Weadock of acting in concert to take EBS's client base. EBS accuses Blackburn and Box of misappropriating confidential client information and client accounts in contravention of their enforceable independent contractor and employment agreements, and alleges that Blackburn and Box made disparaging statements about Mark Sisson, the owner of EBS, in an attempt to dilute EBS's client base. Although EBS filed a nine-count complaint against Blackburn, Box, and Weadock, EBS subsequently dismissed its claims against Box, so what remains are the claims against Blackburn and Weadock. Both of those defendants have moved for summary disposition on all of EBS's claims against them.²

II. Legal Analysis

As the Court has already explained, the defendants' motions for summary disposition should be characterized as requests for relief under MCR 2.116(C)(8), rather than MCR 2.116(C)(10). As a result, the Court must grant relief to the defendants if Plaintiff EBS "has failed to state a claim on which relief can be granted." See Gurganus, 496 Mich at 62-63. Here, Plaintiff EBS has advanced

² Defendant Blackburn and an entity called Avalanche Ranch Management, L.L.C., have filed a document styled as a "Counter Complaint," but that pleading has not yet been challenged by EBS, so the Court need not concern itself with any counteclaims at this point. In addition, the Court need not address any claims against the John and Jane Doe defendants to resolve the pending motions.

eight claims against Defendant Blackburn, seven of which EBS has also asserted against Defendant Weadock. The Court shall consider the sufficiency of those claims *seriatim* in accordance with the standards for judging motions for summary disposition under MCR 2.116(C)(8).

A. Count One – Breach of Contract.

Plaintiff EBS opens its complaint with a basic claim for breach of contract against Defendant Blackburn. That is, EBS contends that Blackburn breached his independent-contractor agreement by retaining customers and customer information after he terminated his relationship with EBS. See Complaint, ¶ 20. Blackburn responds that the agreement did not bar him from retaining his customer accounts, so even if he did take customers with him, he did not thereby breach the agreement. But the language of the agreement provides that:

All business produced by the CONTRACTOR may be coded or otherwise identified to indicate its source of production. However, notwithstanding such identification, all such business, including the expiration data and all files and records in connection therewith, shall be the exclusive property of the AGENCY and shall continue to be so after the termination of this Agreement, however caused, and CONTRACTOR hereby waives and releases all claims of right or ownership thereto and covenants that he shall not make or retain copies of such property.

See id., Exhibit 1, ¶ 6. Under settled Michigan law, “unambiguous contracts are not open to judicial construction and must be *enforced as written.*” See Rory v Continental Ins Co, 473 Mich 457, 468 (2005). The independent-contractor agreement establishes that all business produced by Blackburn, at least during the course of his relationship with EBS, shall be the exclusive property of EBS. Thus, to the extent that EBS contends that Blackburn breached the agreement by taking business and client files that he produced while working as an independent contractor for EBS, the allegations in Count One of the complaint properly state a claim against Blackburn for breach of contract.

B. Count Three – Unjust Enrichment.

In Count Three of the complaint, Plaintiff EBS demands recovery from Defendants Weadock and Blackburn for unjust enrichment. To present a claim for unjust enrichment, a plaintiff must allege: “(1) the receipt of a benefit by the other party from the complaining party and (2) an inequity resulting to the complaining party because of the retention of the benefit by the other party.” Karaus v Bank of New York Mellon, 300 Mich App 9, 23 (2013). “If this is established, the law will imply a contract in order to prevent unjust enrichment.” Belle Isle Grill Corp v City of Detroit, 256 Mich App 463, 478 (2003). But “a contract will be implied only if there is no express contract covering the same subject matter.” Id. Here, EBS contends that Weadock and Blackburn have benefitted from stolen client accounts and client information at the expense of EBS. See Complaint, ¶¶ 27-29. Thus, EBS has properly stated a claim for unjust enrichment against Weadock. But because EBS’s claim for breach of contract against Blackburn covers the same subject matter that supports the unjust-enrichment claim, the Court must award summary disposition to Blackburn under MCR 2.116(C)(8) on EBS’s claim for unjust enrichment.

C. Count Four – Unfair Competition.

In Count Four, Plaintiff EBS has missed the mark on its claim for unfair competition, which rests upon the allegation that Defendants Blackburn and Weadock wrongfully took EBS’s client base. “Unfair competition ordinarily consists in the simulation by one person, for the purpose of deceiving the public, of the name, symbols, or devices employed by a business rival, or the substitution of the goods or wares of one person for those of another, thus falsely inducing the purchase of his wares and thereby obtaining for himself the benefits properly belonging to his competitor.” Moon Bros, Inc v Moon, 300 Mich 150, 162 (1942). In addition, a claim for breach of a restrictive covenant or breach of a fiduciary duty may be

premised upon allegations of unfair competition, see, e.g., St Clair Medical, PC v Borgiel, 270 Mich 260, 268 (2006), but EBS has not shown how either of those theories might apply here. Thus, both defendants are entitled to summary disposition under MCR 2.116(C)(8) on EBS’s unfair-competition claim.

D. Count Five – Business Defamation/Disparagement.

In Count Five, Plaintiff EBS faces an uphill battle to establish its claim for business defamation, but the Court cannot resolve that claim – at least as to Defendant Blackburn – under MCR 2.116(C)(8). “A corporation may successfully assert a cause of action for defamation if it operates for profit ‘and the matter tends to prejudice it in the conduct of its business or to deter others from dealing with it’” Northland Wheels Roller Skating Center, Inc v Detroit Free Press, Inc, 213 Mich App 317, 328 (1995). “Also, ‘language which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable.’” Id. To be sure, a corporation must establish the elements required for all defamation claims: “(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting to at least negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication.” Mitan v Campbell, 474 Mich 21, 24 (2005). But Count Five satisfies those requirements, at least at the pleading stage.

Plaintiff EBS has alleged in Count Five that Defendant Blackburn made the following defamatory statements: (1) “untrue allegations that the Agency’s President, Mark Sisson has made death threats and/or violent remarks”; (2) “untrue statements that Sisson was planning on and/or had already begun the process of selling the Agency”; and (3) “untrue remarks that Sisson was incompetent, disorganized, and incapable or [sic] running the Agency without [Courtney] Box.” See Complaint, ¶ 36. The first statement does not

cast any aspersions upon the honesty, credit, or efficiency of EBS, but the latter two statements surely do.³ Thus, EBS has stated a viable claim for business defamation against Blackburn. But EBS has not alleged that Defendant Weadock made disparaging statements, so the Court must grant summary disposition to Weadock with respect to EBS's defamation claim.⁴

E. Count Six – Misappropriation of Trade Secrets.

In Count Six, Plaintiff EBS pleads a claim for misappropriation of trade secrets that presumably traces its origin to the Michigan Uniform Trade Secrets Act, MCL 445.1901, *et seq.* (“MUTSA”). “To sustain a claim under MUTSA, it is incumbent on the plaintiff to identify with specificity the ‘trade secret’ allegedly misappropriated.” See Industrial Control Repair, Inc v McBroom Electric Co, Inc, No 302240, slip op at 8 (Mich App Oct 10, 2013) (unpublished decision). EBS has identified the trade secrets as “customers, clients, accounts, client needs, client information, client documentation, and expiration data.” See Complaint, ¶ 40. Our Court of Appeals has held that although information falling into the categories of “customer identity, customer information, and customer lists” may be “protectable by a confidentiality agreement,” such information “is not a trade secret under MUTSA.” See Industrial Control, No 302240, slip op at 8, citing McKesson Medical-Surgical, Inc v Micro Bio-Medics, Inc, 266 F Supp 2d 590, 594 (ED Mich 2006). Thus, EBS cannot sustain its claim for misappropriation of trade secrets.

³ Defendant Blackburn insists that the second statement is true, but that is a question of fact that cannot be determined pursuant to MCR 2.116(C)(8). The third statement constitutes more than a mere opinion because it encompasses assertions of objective fact about Sisson's capabilities. See Smith v Anonymous Joint Enterprise, 487 Mich 102, 128 (2010) (“[A] statement of ‘opinion’ is not automatically shielded from an action for defamation because ‘expressions of “opinion” may often imply an assertion of objective fact.’”).

⁴ Any implications that Defendant Weadock conspired with Defendant Blackburn to make disparaging remarks about Plaintiff EBS are encompassed in EBS's claim for civil conspiracy.

F. Count Seven – Tortious Interference With Contracts and Business Relationships.

Count Seven accuses Defendants Blackburn and Weadock of tortious interference with contracts and relationships between Plaintiff EBS and its clients. To establish tortious interference with a contract, EBS must demonstrate “(1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant.” See Health Call of Detroit v Atrium Home & Health Care Services, Inc, 268 Mich App 83, 90 (2005). Similarly, to establish tortious interference with a business relationship, EBS must demonstrate “(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. In both instances, EBS must overcome the high hurdle of proving that the defendants acted unlawfully or for an unlawful purpose, see Knight Enterprises, Inc v RPF Oil Co, 299 Mich App 275, 280 (2013); see also Dalley v Dykema Gossett PLLC, 287 Mich App 296, 324 (2010), and our Court of Appeals has held that “[w]here the defendant’s actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference.” Dalley, 287 Mich App at 324. The facts alleged in Count Seven do not even suggest that Blackburn or Weadock acted unlawfully or for an unlawful purpose by soliciting EBS clients to move their business to Weadock. Thus, the defendants are entitled to summary disposition under MCR 2.116(C)(8) on that count.

G. Count Eight – Civil Conspiracy.

Finally, Count Eight alleges that Defendants Blackburn and Weadock – in concert with Courtney Box – engaged in a civil conspiracy to accomplish a host of wrongful purposes. Under Michigan law,

civil conspiracy is “a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” Urbain v Beierling, 301 Mich App 114, 131 (2013). To prevail on a claim for civil conspiracy, “the plaintiff must establish some underlying tortious conduct.” Id. at 132. In this case, the only remaining tort claim alleges defamation against Blackburn, and the alleged defamatory statements in no way satisfy the high standard required to establish that Blackburn and Weadock conspired to commit an unlawful act or a lawful act by unlawful means. Accordingly, the Court must grant summary disposition under MCR 2.116(C)(8) on EBS’s claim for civil conspiracy.

III. Conclusion

For all of the reasons set forth in this opinion, the Court must grant summary disposition pursuant to MCR 2.116(C)(8) on the majority of the claims set forth in Plaintiff EBS’s complaint. As a result, only three claims remain: Count One alleging breach of contract against Defendant Blackburn; Count Three asserting unjust enrichment against Defendant Weadock; and Count Five for business defamation against Defendant Blackburn. Beyond that, the defendants have not yet challenged EBS’s request for exemplary damages, so that request remains at issue. Finally, the counterclaims have not yet been tested, so the Court must address those counterclaims at some point in the future.

IT IS SO ORDERED.

Dated: October 6, 2014



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