

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

CHECKLIST BUILDING SERVICES, INC.,

Plaintiff,

Case No. 13-01483-CKB

vs.

HON. CHRISTOPHER P. YATES

KRYSTAL KLEAR CLEANING SERVICES,
LLC; CHAD SALISBURY; and LOUIS
PIRTLE,

Defendants.

and

CHAD SALISBURY,

Counter-Plaintiff,

vs.

CHECKLIST BUILDING SERVICES, INC.,

Counter-Defendant.

_____ /

OPINION AND ORDER GRANTING PARTIAL SUMMARY DISPOSITION
IN FAVOR OF THE DEFENDANTS PURSUANT TO MCR 2.116(C)(10)

This dispute between competitors in the janitorial-services market has reached the point at which the Court must determine whether either side is entitled to summary disposition pursuant to MCR 2.116(C)(10). Although the case presents genuine issues of material fact that must be resolved at trial, the Court nonetheless can tidy up the action by scrubbing several claims from the lawsuit. Accordingly, the Court shall grant partial summary disposition in favor of Defendants Krystal Klear Cleaning Services, LLC (“Krystal Klear”), Chad Salisbury, and Louis Pirtle.

I. Factual Background

Both sides have requested summary disposition under MCR 2.116(C)(10), which “tests the factual sufficiency of the complaint.” Maiden v Rozwood, 461 Mich 109, 120 (1999). To resolve the competing motions, the Court must consider “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties[.]” Id. Here, the Court has a wealth of materials from which to draw the factual background of this case, but the recitation of the supporting facts can be kept to a minimum because the Court has twice before explained the factual underpinnings of this dispute in written decisions.

Defendants Salisbury and Pirtle both worked for Plaintiff Checklist Building Services, Inc. (“Checklist”) in supervisory capacities. Salisbury, who was the business-development manager for Checklist, signed an employment agreement on March 24, 2011, containing broad non-solicitation and confidentiality clauses. See Plaintiff’s Brief in Support of its Motion for Summary Disposition, Exhibit 1 (Employment Agreement – Sales, §§ 7-8). Pirtle, who rose to the position of director of training and supervision at Checklist, executed an employment contract at the inception of his tenure with Checklist in April 2008 that included a broad “agreement not to compete.” See id., Exhibit 19. In late November 2012, Salisbury voluntarily left his job at Checklist, see id., Exhibit 6 (e-mail of resignation), and shortly thereafter opened Defendant Krystal Klear, which competes with Checklist in the janitorial-services industry. In January 2013, Pirtle left Checklist to join Salisbury at Krystal Klear, where Pirtle provided services to former Checklist customers.

In Defendant Krystal Klear’s first few months of operations, Defendant Salisbury succeeded in recruiting several current and former clients of Plaintiff Checklist. For example, Krystal Klear took over cleaning responsibilities for a collection of Buffalo Wild Wings restaurants. In addition,

Krystal Klear obtained a cleaning contract with Menards, which had received cleaning services from Checklist until Checklist ended that business relationship. The evidence unearthed by Checklist in this lawsuit includes a collection of e-mails from Salisbury to current and former Checklist clients that can be characterized as business solicitations. See Plaintiff's Brief in Support of its Motion for Summary Disposition, Exhibits 9-11, 13. Also, Defendant Pirtle persuaded a significant number of Checklist workers to join him at Krystal Klear. Consequently, Krystal Klear built its business in part by using former Checklist employees to provide cleaning services to former Checklist clients.

In response to the erosion of its client base and work force, Plaintiff Checklist filed this suit against Defendants Krystal Klear, Salisbury, and Pirtle on February 14, 2013, setting forth claims for breach of contract, business defamation, misappropriation of trade secrets, tortious interference with contracts and business expectancies, and civil conspiracy. On March, 26, 2013, Salisbury filed a counterclaim seeking \$1,210.50 in unpaid commissions from Checklist. Then, after conducting an evidentiary hearing, the Court granted a preliminary injunction on July 30, 2013, at the behest of Checklist. Now, after the completion of discovery, both sides have moved for summary disposition under MCR 2.116(C)(10).

II. Legal Analysis

In addressing the parties' competing summary-disposition motions under MCR 2.116(C)(10), the Court must view "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." Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). "Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment

as a matter of law.” Id. “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.” West v General Motors Corp, 469 Mich 177, 183 (2003). Applying these legal standards, the Court shall consider Plaintiff Checklist’s eight claims *seriatim*.

A. Breach of Contract Against Defendants Salisbury and Pirtle.

Plaintiff Checklist alleges that Defendants Salisbury and Pirtle breached their employment agreements by operating a competing business, *i.e.*, Defendant Krystal Klear, soliciting customers of Checklist, and enticing Checklist employees to leave their jobs to join Krystal Klear. The Court concludes that genuine issues of material fact preclude the award of summary disposition for Pirtle, who almost certainly violated the provision in his Checklist employment contract that prohibited him from competing with Checklist and hiring Checklist employees. See Plaintiff’s Brief in Support of its Motion for Summary Disposition, Exhibit 19. The claim for breach of contract against Salisbury, however, presents much thornier issues.

The non-solicitation provision in Defendant Salisbury’s employment agreement includes a two-year ban on “call[ing] upon any customer or customers of Checklist Building Services/Arrow Restoration for the purpose of soliciting or selling disaster restoration services or similar services.” See Plaintiff’s Brief in Support of its Motion for Summary Disposition, Exhibit 1 (Employment Agreement – Sales, § 7). Salisbury contends that his new company, Defendant Krystal Klear, merely solicited Checklist clients for routine cleaning services, as opposed to the more specialized “disaster restoration services or similar services” forbidden by his Checklist employment agreement. One of the cardinal rules of contract interpretation in Michigan requires that “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) (emphasis in original). Here, the reference to “disaster restoration services and other services” manifestly does not encompass ordinary cleaning services. Checklist’s principal, Matthew Penny, formed two separate companies: (1) Checklist to provide “janitorial services”; and (2) Arrow of Michigan, Inc., to offer “restoration services – fire, smoke, water damage.” See Brief in Support of Defendants’ Motion for Partial Summary Disposition, Exhibit 2 (documents filed with Michigan Department of Licensing and Regulatory Affairs). Therefore, even Checklist’s principal has treated “janitorial services” and “restoration services” as distinct activities. As a result, the Court must grant summary disposition to Salisbury under MCR 2.116(C)(10) on Checklist’s claim that he breached his employment agreement by soliciting Checklist clients for janitorial services.¹

In contrast, the Court cannot award summary disposition to Defendant Salisbury on the claim by Plaintiff Checklist that Salisbury breached his employment agreement by violating the clause that prohibits the use or communication of confidential information. See Plaintiff’s Brief in Support of its Motion for Summary Disposition, Exhibit 1 (Employment Agreement – Sales, § 8). Indeed, the record suggests that Salisbury may well have used sensitive information he obtained at Checklist in his endeavor to launch Defendant Krystal Klear by luring clients away from Checklist. Such actions would constitute a breach of Salisbury’s employment agreement with Checklist, so the Court must deny summary disposition to Salisbury on that aspect of Checklist’s claim for breach of contract.

¹ To the extent that Plaintiff Checklist contends that “janitorial services” constitute “similar services” under the employment-agreement ban on “disaster restoration services or similar services,” the Court must reject that argument. The doctrine of *ejusdem generis* provides that “where a general term follows a series of specific terms” in a statute, “the general term is interpreted ‘to include only things of the same kind, class, character, or nature as those specifically enumerated.’” See Wilkes v Neal, 470 Mich 661, 669 (2004). Applying that principle here, “similar services” can only include those activities “of the same kind, class, character, or nature” as “disaster restoration services.” Id.

B. Business Defamation.

Count Two of Plaintiff Checklist's complaint states a claim for business defamation against all three of the defendants. "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). "[L]anguage which casts an aspersion upon its honesty, credit, efficiency or other business character may be actionable." Id. "The elements of a defamation claim are: (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). To be considered defamatory, a statement "must assert facts that are 'provable as false.'" Ghanam v John Does, 303 Mich App 522, 545 (2014). Moreover, "a defamatory statement . . . must have a specific application to the plaintiff." Siddiqui v General Motors Corp, No 302446, slip op at 7 (Mich App Feb 2, 2012) (unpublished decision), citing McGraw v Detroit Free Press Co, 85 Mich 203, 209-210 (1891).

Plaintiff Checklist has presented a collection of e-mails from Defendant Salisbury in which he told Checklist's customers that Checklist "just lost Menards and several other accounts primarily due to lack of insurance and several bounced payroll checks." See Plaintiff's Brief in Support of its Motion for Summary Disposition, Exhibits 9-11, 13. To be sure, Salisbury can defend against the defamation claim at trial by establishing the truth of his assertions that Checklist had "issues with back taxes, payroll and not paying vendors," see id., Exhibit 11, but Checklist has offered sufficient evidence to create a genuine issue of material fact on its defamation claim against Salisbury and his

company, Defendant Krystal Klear. Similarly, Defendant Pirtle told Checklist clients that Checklist was in dire straits financially and might be forced out of business. See id., Exhibit 4 (Deposition of Jeff Carmody at 34-35). Pirtle has an absolute defense to the defamation claim if what he said was true, but the trier of fact will have to sort out the veracity of Pirtle's assertions. In sum, the Court must deny the defendants' motion for summary disposition under MCR 2.116(C)(10) with respect to the business-defamation claim in its entirety.

C. Misappropriation of Trade Secrets.

In Count Three of its complaint, Plaintiff Checklist asserts that all of the defendants took the trade secrets of Checklist in contravention of the Michigan Uniform Trade Secrets Act ("MUTSA"), MCL 445.1901, *et seq*, which defines a "trade secret" as follows:

(d) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain secrecy.

See MCL 445.1902(d). Even before the enactment of the MUTSA, our Supreme Court recognized the importance of protecting true trade secrets. See Hayes-Albion Corp v Kuberski, 421 Mich 170, 179-184 (1984). But as our Court of Appeals has cautioned, albeit in an unpublished decision, "it is incumbent on the plaintiff to identify with specificity the 'trade secret' allegedly misappropriated." Industrial Control Repair, Inc v McBroom Elec Co, Inc, No 302240, slip op at 8 (Mich App Oct 10, 2013) (unpublished decision). Here, Checklist alleges that the defendants took trade secrets in the

forms of “customer lists, pricing information, employee information, contract information, customer contact information, [and] billing and payment information which qualify as ‘trade secrets’ under” the MUTSA, see Complaint, ¶ 29, but Checklist has offered scant evidence to support its allegation. And beyond that, “[t]o the extent that plaintiff identified any specific information it believes was a trade secret, such information falls into the category of customer identity, customer information, and customer lists.” See Industrial Control Repair, No 302240, slip op at 8. “Such information, although protectable by a confidentiality agreement, is not a trade secret under MUTSA.” Id. Accordingly, the Court must grant summary disposition to the defendants under MCR 2.116(C)(10) with respect to Checklist’s claim for misappropriation of trade secrets.

D. Tortious Interference with Contractual Relationships and Business Expectancies.

Plaintiff Checklist has appropriately pleaded separate claims for tortious interference with its contractual relationships and with its business expectancies. “In Michigan, tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy.” Health Call of Detroit v Atrium Home & Health Care Servs, Inc, 268 Mich App 83, 89 (2005). To prevail on its claim for tortious interference with a contract, Checklist must establish that the defendants engaged in the “‘intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law’” Knight Enterprises, Inc v RPF Oil Co, 299 Mich App 275, 280 (2013). Similarly, to support a claim for tortious interference with a business relationship, Checklist must demonstrate that the defendants “‘did something illegal, unethical or fraudulent.’” Dalley v Dykema Gossett PLLC, 287 Mich App 296, 324 (2010). There is nothing in the record that even approaches those high standards. At most, Checklist has shown

that Defendants Salisbury and Pirtle solicited clients and employees of Checklist by bad-mouthing Checklist. While those actions may give rise to other cognizable claims, they cannot support a claim for tortious interference with a contract or tortious interference with business expectancies. Thus, the Court must award summary disposition to all three defendants on both of those claims.

E. Civil Conspiracy.

Count Seven of Checklist's complaint accuses all three defendants of civil conspiracy. Our Court of Appeals "has defined a civil conspiracy as '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). Nothing in the record even remotely suggests that Defendants Salisbury and Pirtle engaged in any "criminal or unlawful" actions before or after their departure from Checklist. Any breach of their employment agreements with Checklist cannot support a civil-conspiracy claim, which requires "some underlying *tortious* conduct." See id. at 132. And although defamation most assuredly constitutes a tort, see Kollenberg v Ramirez, 127 Mich App 345, 353 (1983), nothing supporting the defamation claim in this case approaches "criminal or unlawful" activity. Accordingly, the Court must award summary disposition under MCR 2.116(C)(10) to the defendants on Checklist's civil-conspiracy claim.

F. Equity.

Plaintiff Checklist's strangest claim appears as Count Eight and is simply entitled "Equity." In a single paragraph, Checklist states that "[i]f for some reason the acts committed wrongfully by Defendants are not actionable or recoverable in law by Plaintiff, then Plaintiff is entitled to damages and recourse by this Court's equitable powers to prevent an injustice." See Complaint, ¶ 52. This

absurd formulation of equity as some sort of public-policy backstop for meritless legal claims finds no support whatsoever in Michigan jurisprudence. “[T]he procedural distinctions between law and equity have been abolished in this State since January 1, 1963,” Fenestra Inc v Gulf American Land Corp, 377 Mich 565, 593 (1966), but “the substantive elements of a cause of action and the kind of remedy available must still be determined by reference to the substantive law of actions in law and equity as they existed before the merger.” Id. Thus, there exists no freestanding claim for “equity” as a convenient alternative when no legal claim can survive. Because Checklist has failed to plead an equitable claim with any specificity whatsoever, the Court must grant summary disposition to the defendants under MCR 2.116(C)(10) on Checklist’s claim for “equity.”²

III. Conclusion

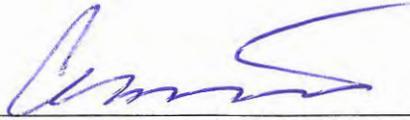
For the reasons stated in this opinion, the defendants are granted summary disposition under MCR 2.116(C)(10) on Counts Three, Four, Five, Seven, and Eight of Plaintiff Checklist’s complaint, which comprises claims for misappropriation of trade secrets, tortious interference with contractual relationships and business expectancies, civil conspiracy, and equity. Also, Defendant Salisbury is awarded summary disposition under MCR 2.116(C)(10) on the claim for breach of contract in Count One insofar as that cause of action rests upon the theory that Salisbury breached his non-solicitation obligation to Checklist. Thus, the Court must conduct a trial on the balance of the breach-of-contract claim in Count One, the entire business-defamation claim in Count Two, and Defendant Salisbury’s counterclaim for unpaid commissions. At the conclusion of the trial, the Court shall also consider

² In reaching this result, the Court must nonetheless acknowledge that Plaintiff Checklist may proceed with its request in Count Six for a permanent injunction, which constitutes equitable relief. See Forest City Enterprises, Inc v Leemon Oil Co, 228 Mich App 57, 79-80 (1998).

converting the existing preliminary injunction into some form of permanent injunction. The Court shall schedule trial on the earliest available date.³

IT IS SO ORDERED.

Dated: June 30, 2014



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

³ The Court recognizes that the specter of bankruptcy hangs over this case like the Sword of Damocles. Consequently, the Court shall proceed to trial with great haste unless a stay is issued by a United States Bankruptcy Court.