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

TERMINIX OF WEST MICHIGAN, INC.,
a Michigan corporation,

Plaintiff,

vs.

MANUEL ARIZOLA, an individual; and
BUG ASSASSIN, LLC, a Michigan limited
liability company,

Defendants.
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Case No. 13-04797-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION AGAINST DEFENDANT ARIZOLA, BUT IN FAVOR OF DEFENDANT BUG ASSASSIN

Since our Legislature placed its imprimatur upon noncompetition agreements in the 1980s, see MCL 445.774a, those restrictive covenants have found their way into every nook and cranny of Michigan business. While many states have gone to great lengths to eradicate such anti-competitive pacts, e.g., Nitro-Lift Technologies, LLC v Howard, 133 S Ct 500, 502 (2012) (noting decision that "noncompetition agreements were 'void and unenforceable as against Oklahoma's public policy'"), we in Michigan live with those creatures in every business endeavor known to mankind. Indeed, no job is too menial or mundane to escape noncompetition agreements. Thus, it seems fitting that the first request for final enforcement of a noncompetition agreement in the Specialized Business Docket comes in the pest-control industry. Applying settled principles of Michigan law, the Court concludes that Plaintiff Terminix of West Michigan, Inc. ("Terminix") is entitled to summary disposition under MCR 2.116(C)(10) against Defendant Manuel Arizola. In contrast, the Court shall grant summary disposition to Defendant Bug Assassin, LLC ("Bug Assassin") pursuant to MCR 2.116(I)(2).

I. Factual Background

"'A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint.'" Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). "In evaluating such a motion, the court considers 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. Accordingly, the Court must set forth the facts underlying this dispute in a manner favorable to the defendants.

On June 28, 2004, Plaintiff Terminix hired Defendant Arizola as a pest-control technician. In conjunction with his hiring, Arizola signed an employment agreement containing noncompetition clauses governing his activities while employed by Terminix and after his departure from Terminix. See Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit 1. The noncompetition clause applicable during Arizola's tenure at Terminix stated:

> 3. The Employee agrees that during the term of the agreement, or during employment with the Company, that he will not either directly or indirectly through the activities or efforts of any third person, either as an employee, employer, consultant, agent, principal, partner, stockholder, corporate officer, director, or any other individual of representative capacity, engage or participate in any business that is in competition in any manner whatsoever with the business of the Company, or solicit work for, or accept any business from any person who was, or is, a customer of the Company, on behalf of the Employee or for any other person or business entity.

See id. The provision applicable to his activities after his departure from Terminix stated:

> 4. The Employee further agrees and covenants as a part of this agreement that for a period of twelve (12) months following termination of the Employee's employment with the Company, the Employee shall not for any reason, directly or indirectly, on behalf of the Employee, or for any other person or business entity, do any of the following:
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> A. Solicit work, or accept business, from any current or formers [sic] customer of the Company in any of the services provided by the Company within a radius of 100 miles from Grand Rapids, Michigan; or

B. Induce, entice, hire, or attempt to hire or employ any employee of the Company; or

C. Either directly or through the activities or efforts of any person or business entity, make known or in any manner make available, or in any manner reveal, the names, address or data for any customer or customers of the Company to any person or organization for any reason; or

D. Compete in any way with the Company in any of its business activities, or engage in, or contribute knowledge to, any work or activity that involves a product, process, service or development which is competitive with or similar to a product, process, service or development which is competitive with or similar to a product, process, service or development which is regularly used in the operation of the business of the Company, and within a radius of 100 miles from Grand Rapids, Michigan.[1]

See id. For eight years, Arizola worked for Terminix and abided by the restrictions imposed upon him by his employment agreement.

In 2012, Defendant Arizola apparently became disenchanted with Plaintiff Terminix. Thus, in August of 2012, Arizola filed articles of incorporation for a new entity – Defendant Bug Assassin. See Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit 4. Arizola thereafter obtained liability insurance and a pesticide application business license for his new venture. See id., Exhibits 5-6. Once every aspect of his new business was in place, Arizola began soliciting business and entering into contracts with Terminix customers, see id., Exhibits 8-9, even though Arizola was still on the Terminix payroll. In early 2013, Terminix officials confronted Arizola about his actions, and on February 4, 2013, Arizola resigned from Terminix.[2]

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[1] The Court recognizes that this final restriction is worded in a way that makes little sense. It appears that the drafter became carried away with the use of the phrase "which is competitive with or similar to a product, process, service or development."

[2] Defendant Arizola's departure from Plaintiff Terminix apparently was quite acrimonious. He submitted a "charge of discrimination" alleging "[u]nequal wages" and constructive discharge. See Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit 7.

On May 23, 2013, Plaintiff Terminix filed this action against Defendant Arizola and his new company, Defendant Bug Assassin, alleging that Arizola's activities during and after his tenure with Terminix constituted a breach of his employment agreement. On June 27, 2013, the parties agreed to the terms of a preliminary injunction, which the Court entered on that date. That injunction gave Arizola the authority to service his current customers, but it provided no guidance on the subject of damages available to Terminix for Arizola's commercial endeavors. After the close of discovery, Terminix moved for summary disposition pursuant to MCR 2.116(C)(10), contending that liability for breach of contract is indisputable. The defendants have opposed the motion, advancing a passel of arguments aimed at invalidating Arizola's employment agreement.

II. Legal Analysis

According to MCR 2.116(C)(10), the Court must award summary disposition if, "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." See also Maiden v Rozwood, 461 Mich 109, 120 (1999). "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). Here, the Court must determine whether any genuine issue of material fact precludes the entry of summary disposition on the claim by Plaintiff Terminix for breach of Defendant Arizola's employment contract.

Plaintiff Terminix's argument against Defendant Arizola is straightforward and persuasive. Defendant Arizola signed an employment agreement that prohibited him from competing with his employer during his tenure with Terminix and for 12 months after his departure from the company.

See Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit 1. Even before Arizola left Terminix, he entered into contracts for Defendant Bug Assassin to provide pest-control services to at least two Terminix customers – Bissell Homecare, Inc., and Worthen Coated Fabrics. See id., Exhibits 8-9. In doing so, Arizola committed flagrant violations of the noncompetition obligations imposed by his employment agreement.

Defendant Arizola argues that the noncompetition provisions in his employment agreement should not be enforced. Michigan law empowers the Court to limit the scope of a noncompetition clause "[t]o the extent any such agreement or covenant is found to be unreasonable in any respect[.]" See MCL 445.774a(1). But nothing in the applicable clauses here strikes the Court as unreasonable. To the contrary, Terminix has elected to rely primarily upon the language proscribing competition while Arizola was employed by the company. In that context, the restrictions imposed by Terminix to prevent the employees on its payroll from poaching the company's customers seems manifestly reasonable and designed to "protect [Terminix]'s reasonable competitive business interests[.]" See St Clair Medical, PC v Borgiel, 270 Mich App 260, 266 (2006). Moreover, Arizola's "continuation of employment" with Terminix served as ample consideration to support the noncompetition clauses in Arizola's employment agreement. See QIS, Inc v Industrial Quality Control, Inc, 262 Mich App 592, 594 (2004). Finally, even insofar as Terminix must rely upon the post-tenure noncompetition language in Arizola's employment contract to obtain redress for its loss of customers, the Court finds that provision reasonable in terms of its temporal and geographic scope as well as the activities that it proscribes.[3] See Coates v Bastian Brothers, Inc, 276 Mich App 498, 508 (2007). Consequently,

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[3] To the extent Defendant Arizola relies upon an unclean-hands theory to challenge Plaintiff Terminix's right to enforce the employment agreement, the Court notes that such a defense "is only relevant in equitable actions." Rose v National Auction Group, 466 Mich 453, 468 (2002).

the Court not only concludes that Arizola breached his restrictions on competition, but also finds that those noncompetition obligations are reasonable and, therefore, enforceable by Terminix.

The claim for breach of contract against Defendant Bug Assassin presents a whole different problem. That is, Bug Assassin was not a signatory to Defendant Arizola's employment agreement with Plaintiff Terminix, so the terms of that employment agreement cannot be enforced against Bug Assassin. "'It goes without saying that a contract cannot bind a nonparty.'" AFSCME Council 25 v Wayne County, 292 Mich App 68, 80 (2011), quoting EEOC v Waffle House, Inc, 534 US 279, 294 (2002). The complaint in this case contains two counts: (1) a claim for breach of contract; and (2) a request for injunctive relief predicated upon that alleged breach of contract. Because neither of those claims can support relief against Bug Assassin as a non-signatory to Arizola's employment agreement, the Court shall award summary disposition to Bug Assassin on all of the claims pursuant to MCR 2.116(I)(2).[4]

III. Conclusion

In light of the Court's conclusion that Plaintiff Terminix is entitled to summary disposition against Defendant Arizola pursuant to MCR 2.116(C)(10) on the breach-of-contract claim, the Court shall schedule an evidentiary hearing to establish damages for Arizola's breach of his employment

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[4] When a court grants summary disposition under MCR 2.116(C)(10), the court ordinarily must afford the losing party the opportunity to amend its complaint "unless the evidence then before the court shows that amendment would not be justified." See MCR 2.116(I)(5). For example, an amendment "would not be justified if it would be futile." Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004). Here, although the Court has chosen to award summary disposition to Defendant Bug Assassin, as the non-moving party, pursuant to MCR 2.116(I)(2), the Court's analysis flows from the analytical framework of MCR 2.116(C)(10). Therefore, the Court must allow Terminix 14 days to amend its claims against Bug Assassin. But in permitting Terminix to amend, the Court observes that the assertion of a claim against Bug Assassin for breach of the employment agreement between Terminix and Defendant Arizola would be futile, so Terminix may not assert such a claim.

agreement.[5] But because Defendant Bug Assassin did not sign the employment agreement, the Court shall enter summary disposition in favor of Bug Assassin on all claims under MCR 2.116(I)(2) and grant Terminix 14 days' leave to amend its claims against Bug Assassin.

IT IS SO ORDERED.

Dated: March 12, 2014

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

[5] The Court need not consider whether Plaintiff Terminix or Defendant Arizola can request that a jury determine damages. Neither party timely requested trial by jury, see MCR 2.508(B)(1), so the Court shall be the finder of fact with respect to damages. See MCR 2.509(B).