

STATE OF MICHIGAN
IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET

414 Washington Street
Grand Haven, Michigan 49417
(616) 846-8320

NETWERKS, LLC,

Plaintiff/Counter-Defendant,

v

KYLE SCHOLTEN,

Defendant/Counter-Plaintiff.

OPINION AND ORDER
GRANTING SUMMARY DISPOSITION

Case No.: 15-04177-CZ

Hon. Jon A. Van Allsburg

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At a session of said Court, held in the Ottawa County
Courthouse in the City of Grand Haven, Michigan,
on the 21st day of July, 2015.

This action was filed by plaintiff Netwerks, LLC, on May 1, 2015, against its former employee, Kyle Scholten, seeking damages and injunctive relief for breach of contract and business torts. Netwerks alleges breach of a 2013 non-competition and non-disclosure agreement between the parties. Netwerks requested and received a Temporary Restraining Order (TRO) on May 1, 2015. The court heard evidence on Netwerks's motion for a preliminary injunction on May 21 and 27, 2015, and granted the motion for preliminary injunction by an Opinion and Order entered on May 27, 2015.

Scholten counter-claimed, alleging tortious interference with business relationship and abuse of process in filing suit and obtaining the TRO. Netwerks now seeks summary disposition on the counter-complaint pursuant to MCR 2.116(C)(8) and (10). For the reasons stated below, the Court grants Netwerks' motion.



FACTUAL BACKGROUND

The factual background of this case is recounted in detail in the May 27 Opinion and Order. At the crux of this case is a non-competition agreement that Netwerks maintains was signed by Scholten and was found to be missing from his employee file after he left Netwerks' employment. The court held that the terms of the non-competition agreement were reasonable and enforceable. Based on preliminary findings of fact, the court held that the parties had entered into the agreement on July 18, 2013, and that Scholten was in violation of the agreement when he went to work for one of Netwerks' clients on or before May 3, 2015. In addition to holding that the four-factor preliminary injunction analysis supported a preliminary injunction in this instance, the court also found Scholten in contempt of court for his violation of the TRO.

LEGAL ANALYSIS

1. Standard of Review

Netwerks' motion under MCR 2.116(C)(8) "tests the legal sufficiency of the complaint." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* When deciding a (C)(8) motion, a court considers only the pleadings. MCR 2.116(G)(5); *Maiden*, 461 Mich at 119. "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.*, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Netwerks's motion under MCR 2.116(C)(10) tests the factual basis for Scholten's counter-complaint. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Haliw v City of Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001), citing *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, this Court must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5). Granting the nonmoving party, Scholten, the benefit of any reasonable doubt regarding material facts, this court must then

determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). A party moving for summary disposition has the initial burden of supporting his position with affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. If the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rely on mere allegations or denials in his pleadings, but must set forth specific facts which show that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto*, 451 Mich at 362.

Affidavits offered in support of or in opposition to a motion for summary disposition must be considered to the extent that the content or substance would be admissible in evidence to establish or deny the grounds stated in the motion. The evidence contained in the affidavits need not be admissible in form, but must be admissible in content. An affidavit filed in support of or in opposition to a motion must be made on personal knowledge, state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion, and show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. *Dextrom v Wexford County*, 287 Mich App 406; 789 NW2d 211 (2010).

Generally, a motion for summary disposition is premature if granted before the completion of discovery regarding a disputed issue, but a party opposing a motion for summary disposition on the ground that discovery is incomplete must assert that a dispute does exist and support that allegation by some independent evidence. Mere conjecture does not entitle a party to discovery. If the party opposing summary disposition fails to provide minimal evidence in support of its position, summary disposition is not premature. *Davis v Detroit*, 269 Mich App 376; 711 NW2d 462 (2005).

2. Tortious Interference with a Business Relationship

The elements of tortious interference with a business relationship are 1) the existence of a valid business relationship or expectancy, 2) knowledge of the relationship or expectancy on the part of the offending party, 3) an intentional interference by the offending party inducing or

causing a breach or termination of the relationship or expectancy, and 4) resultant damage to the claimant.¹

To prove the third element, intentional interference inducing or causing a breach of a business relationship, a claimant must demonstrate that the offending party acted both intentionally and either improperly or without justification.² To establish that the conduct of Networks' owner lacked justification and showed malice, Scholten "must demonstrate, with specificity, affirmative acts by the [offending party] that corroborate the improper motive of the interference."³

Michigan caselaw provides that enforcement of a valid non-competition agreement is a not an improper motive. As the court held in *Dalley v Dykema Gossett*, "[w]here the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference."⁴ In *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, the Court of Appeals held that "preventing the anticompetitive use of confidential information is a legitimate business interest."⁵

Networks argues for summary disposition on this intentional interference with business relationship claim on the grounds that Scholten cannot meet its burden to show that Networks' actions were improper or lacked justification.

Scholten argues that Networks' action in contacting Scholten's new employer, Seelye Automotive Group, was improper because Networks lacked a valid non-competition agreement. Scholten alleges that Networks intentionally and improperly interfered with his post-Networks employment with Seelye by claiming to Seelye that Scholten had signed a non-competition agreement when Networks knew or should have known that he had not signed the agreement and knew that it did not have a non-competition agreement signed by Scholten. Considering these pleadings on their face, as required under MCR 2.116(C)(8), Scholten's allegation that Networks

¹ *Dalley v Dykema Gossett*, 287 Mich App 296, 323; 788 NW2d 679 (2010), citing *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 698–699; 552 NW2d 919 (1996).

² *Id.*, citing *Bonelli v Volkswagen of America, Inc.*, 166 Mich App 483, 498; 421 NW2d 213 (1988).

³ *Id.* at 324, quoting *BPS Clinical Laboratories*, 217 Mich App at 699.

⁴ *Id.* (citation omitted).

⁵ 276 Mich App 146, 158; 742 NW2d 409 (2007).

knew the agreement was not valid states a claim for intentional interference with business relationship sufficient to withstand summary disposition under MCR 2.116(C)(8).

Considering summary disposition under MCR 2.116(C)(10) the critical issue of material fact in Scholten's claim of intentional interference with business relationship claim is whether Networks' owner, Paul Gust, who contacted Seelye, knew that Scholten did not sign the non-competition agreement and thus acted improperly by falsely claiming that Networks had a valid noncompetition agreement with Scholten.

Networks supported its motion for summary disposition with evidence of a proper motive for contacting Seelye by attaching an affidavit by Paul Gust in which he attests that he contacted Seelye to enforce a valid non-compete agreement that Scholten had signed on July 18, 2013. Gust also testified at the preliminary injunction hearing that Scholten had signed the non-compete agreement and that, after he terminated Scholten's employment, he discovered that documents had been removed from Scholten's personnel file and that the signed non-compete agreement was missing.

Scholten, on the other hand, failed to provide any evidence of a material dispute on the issue of Networks' motive. He did not attach an affidavit to his response to the summary disposition motion. Moreover, he does not and cannot point to any testimony at the summary disposition hearing that called into question Networks' motive or its understanding that it had a valid noncompetition agreement with Scholten. "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence."⁶ Under MCR 2.116(H)(1), "[a] party may show by affidavit that the facts necessary to support the party's position cannot be presented because the facts are known only to persons whose affidavits the party cannot procure."

Scholten correctly argues that the issues of whether he signed a non-competition agreement and what terms it contained are factual questions for determination by the jury, despite the fact that a preliminary determination was made by the court at the preliminary injunction hearing that Scholten signed the agreement with the terms provided in Networks

⁶ *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994).

standard form. The question of whether Networks approached Seelye with knowledge that it did not have a valid non-competition agreement and, thus, with an improper purpose is, however, a different question. Networks addressed this question with an affidavit and testimony regarding its understanding that it had a valid agreement with Scholten. Scholten only addressed by citing caselaw to the effect that summary disposition is not appropriate in cases involving intent, credibility, or state of mind.⁷ Scholten incorrectly argues that a jury determination that Networks did not have an enforceable non-competition agreement with Scholten would “almost by itself” prove his claim.⁸ Such a determination would establish only that Networks had not met its burden of proof as to the existence or terms of a contract. To support his counterclaim, Scholten must prove that Networks acted with knowledge that it did not have an agreement.

While this court recognizes that summary disposition is rarely appropriate in cases involving questions of intent or state of mind,⁹ a party must have at least some factual basis to allege, as Scholten does, that Networks made fraudulent statements to Seelye. Networks’ motion for summary disposition placed the burden, pursuant to MCR 2.116(G)(4), on Scholten to present his facts. As the Court of Appeals has explained:¹⁰

If the party opposing a motion for summary judgment cannot present competent evidence of a disputed fact because his or her discovery is incomplete, the party must at least assert that such a dispute does indeed exist and support the allegation by some independent evidence, even if hearsay. An unsupported allegation which amounts solely to conjecture does not entitle a party to an extension of time for discovery, since under such circumstances discovery is nothing more than a fishing expedition to discover if any disputed material fact exists between the parties.

In this case, Scholten has failed to provide minimal evidence to support his claim that Networks acted with an improper motive. Summary disposition is thus warranted under MCR 2.116(C)(10) on count I.

⁷ Citing *Rosenberg v Rosenberg Bros Special Account*, 134 Mich App 342, 353; 351 NW2d 563 (1984).

⁸ Response Bf at 8.

⁹ *Murphy v Bradford-White Corp*, 166 Mich App 195, 201; 420 NW2d 101 (1987).

¹⁰ *Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983).

3. Abuse of Process

In count II of the counterclaim, defendant alleges that plaintiff abused the legal process by improperly requesting a TRO, failing to comply with court rules in its TRO request, and lacking a good-faith basis to claim a likelihood of success on the merits for filing a TRO.

The elements of the tort of abuse of process are “(1) an ulterior purpose and (2) an act in the use of process which is improper in the regular prosecution of the proceeding.”¹¹ As the Court of Appeals has explained:¹²

A meritorious claim of abuse of process contemplates a situation where the defendant has availed himself of a proper legal procedure for a purpose collateral to the intended use of that procedure, e.g., where the defendant utilizes discovery in a manner consistent with the rules of procedure, but for the improper purpose of imposing an added burden and expense on the opposing party in an effort to conclude the litigation on favorable terms. Thus, in *Three Lakes Ass'n v Whiting*, 75 Mich App 564, 569-575; 255 NW2d 686 (1977), it was held that abuse of process was properly pled by an allegation that the defendant offered to dismiss an action for damages without the need to pay compensation if the plaintiff would cease opposition to the development of a condominium project. The ulterior purpose of stifling opposition was collateral to the defendant's maintenance of a lawsuit for the recovery of damages as compensation. Cf. *Young v Motor City Apartments Limited Dividend Housing Ass'n No. 1 & No. 2*, 133 Mich App 671, 678-683; 350 NW2d 790 (1984).

Furthermore, the improper ulterior purpose must be demonstrated by a corroborating act; the mere harboring of bad motives on the part of the actor without any manifestation of those motives will not suffice to establish an abuse of process. *Young, supra*, 682-683, 350 NW2d 790; *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 629-630; 403 NW2d 830 (1986).

In this case, Scholten alleged in his counterclaim that Networks abused the process by improperly requesting and drafting a TRO without a good-faith basis in the likelihood of success on the merits of its claim. This count fails to state a claim on which relief can be granted. Scholten has failed to plead that Networks has used a proper legal procedure for a purpose collateral to the intended use of that procedure, but instead alleged errors in compliance with court rules. Moreover, “the ulterior purpose alleged must be more than harassment, defamation,

¹¹ *Friedman v Dozorc*, 412 Mich 1, 30; 312 NW 585 (1981).

¹² *Vallance v Brewbaker*, 161 Mich App 642, 646; 411 NW2d 808 (1987).

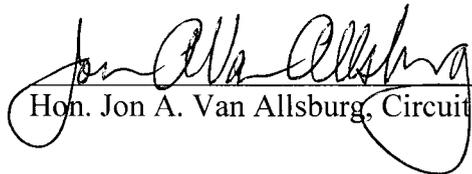
exposure to excessive litigation costs, or even coercion to discontinue business.”¹³ This claim also fails under MCR 2.116(C)(10) because the court has ruled that Network does have a likelihood of success on the merits of its claim.

4. Conclusion

Networks’ motion for summary disposition is GRANTED as to count I pursuant to MCR 2.116(C)(10). It is GRANTED as to count II pursuant to MCR 2.116(C)(8) and (10).

IT IS SO ORDERED.

Dated: July 21, 2015



Hon. Jon A. Van Allsburg, Circuit Judge

¹³ *Early Detection Ctr, PC, v New York Life Ins Co*, 157 Mich App 618, 629-30; 403 NW2d 830 (1986).