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

BURR AND COMPANY, INC.,

Plaintiff/Counter-Defendant,

vs.

DANIEL L. BONNELL,

Defendant/Counter-Plaintiff.

_____/

Case No. 15-00849-CZB

HON. CHRISTOPHER P. YATES

CAPSURE INSURANCE GROUP, INC.,

Third-Party Plaintiff,

vs.

BURR AND COMPANY, INC.,

Third-Party Defendant.

_____/

ROBERT J. TERHORST,

Plaintiff,

vs.

BURR AND COMPANY, INC.,

Defendant.

_____/

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

Despite the caption chaos in these consolidated cases, the parties have presented to the Court a relatively straightforward dispute concerning enforcement of non-solicitation clauses in the classic

employer-employee setting. Consequently, the Court must apply "the standard articulated in MCL 445.774a, which is the proper framework to evaluate reasonableness of restrictive covenants between employers and employees." Innovation Ventures, LLC v Liquid Manufacturing, LLC, No 150591, slip op at 17-18 (Mich July 14, 2016). On February 8, 2016, the Court conducted a bench trial on the parties' claims. After reviewing the trial record, the Court shall render a verdict in favor of Burr and Company, Inc. ("Burr") on the principal dispute concerning the reasonableness of the restrictive covenants at issue, but against Burr and in favor of Daniel Bonnell and Robert TerHorst on all of the issues regarding damages and attorney fees demanded by Burr.

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, "the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." The Court must render "[b]rief, definite, and pertinent findings and conclusions on the contested matters" that may take the form of "a written opinion." See MCR 2.517(A)(2) & (3). Accordingly, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

Before this dispute arose, Daniel Bonnell and Robert TerHorst both worked in the insurance industry as producers for Burr. In 2015, the two men left Burr to form an insurance agency that they called CapSure Insurance Group, Inc. ("CapSure"). Because Bonnell and TerHorst each had signed an employment agreement with Burr that contained restrictive covenants, litigation broke out shortly after the two men formed CapSure and started operating that entity in the insurance industry. From the inception of this lawsuit, the two sides have disagreed about the manner in which the restrictive covenants limit the ability of Bonnell and TerHorst to operate CapSure.

Bonnell joined Burr as a salesman in 2008, but he did not execute an employment agreement until July 2, 2014.[1] See Trial Exhibit 1. That agreement had restrictive covenants binding Bonnell for a period of 36 months after his departure from Burr. See id. (employment agreement, § 11). Burr and Bonnell, however, signed an addendum to that employment agreement that reduced Bonnell's period of restriction from 36 to 24 months. Id. The agreement further required Bonnell to turn in all of his company property upon his departure from Burr. See id. (employment agreement, § 14). On June 18, 2012, TerHorst and Burr signed an employment agreement similar to Bonnell's contract with Burr, see Trial Exhibit C, but TerHorst's restrictive covenants bound him for a 36-month period after his departure from Burr, see id. (employment agreement, § 11), and the period of restriction was never shortened. See Trial Exhibit D (addendum with no reduction of period of restriction).

On January 15, 2015, Bonnell voluntarily resigned from Burr and left the company's offices for good. Five days later, on January 20, 2015, Burr's attorney sent Bonnell a letter reminding him of the restrictive covenants in his employment agreement and directing him to return Burr's property that was still in his possession. See Trial Exhibit 4. As it turned out, however, Bonnell had formed his new insurance agency, CapSure, on January 5, 2015, see Trial Exhibit 6, so he proceeded to run CapSure in spite of the restrictive covenants. Beyond that, Bonnell failed to return several items of property that belonged to Burr, and he transferred his Burr company telephone number to himself.[2]

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[1] The date on which Bonnell signed his employment agreement with Burr is hard to identify. The agreement itself bears the date of June 2, 2012, and it specifies an effective date of June 2, 2008, see Trial Exhibit A, but Terri McIntosh of Burr testified that Bonnell actually signed that agreement on July 2, 2014, which is the same date on which Bonnell executed an addendum to that agreement. See Trial Exhibit B.

[2] A Verizon Wireless e-mail states: "On 1/14/2015 the point of contact Dan Bonnell called in to have line 616-581-3632 released for assumption of liability from Burr & company account." See Trial Exhibit 3.

See Trial Exhibit 3. Not surprisingly, on January 29, 2015, Burr filed this action against Bonnell and sought a temporary restraining order, which the Court granted on January 30, 2015.

Shortly after the opening shots were fired in the battle between Burr and Bonnell, TerHorst filed a separate case against Burr on February 10, 2015, requesting, *inter alia*, declaratory relief that would pare back the restrictive covenants in his own employment agreement with Burr. As it turned out, TerHorst had left Burr on January 5, 2015 – ten days before Bonnell voluntarily resigned – with plans to work with Bonnell at CapSure. In an attempt to protect himself from Burr, TerHorst started a separate lawsuit to obtain authorization from the Court to engage in competition with Burr through CapSure in the insurance industry.

On February 11, 2015, Burr and Bonnell reached agreement on a preliminary injunction that the Court memorialized in an order. That injunctive order not only prohibited Bonnell from having contact with any of Burr's customers, but also instructed Bonnell to "return all paper and electronic files" to Burr.[3] In the fullness of time, Bonnell returned the lion's share of the disputed property to Burr, so there remains little to resolve on that front. In addition, Burr has not claimed or established that Bonnell or TerHorst actually took any clients of Burr, so the Court need not award damages for Burr's loss of business. The trial boiled down the issues to a few well-defined disagreements, which the Court must resolve before closing this case. First, the Court must decide the extent to which the restrictive covenants in the employment agreements of Bonnell and TerHorst are enforceable under MCL 445.774a. Second, the Court must determine whether Burr has established a right to damages from Bonnell in connection with his taking of Burr's company property. Third, the Court must rule

[3] A review of Bonnell's e-mail account at Burr revealed that he transferred all sorts of client information to himself shortly before he left the company to strike out on his own. Bonnell has not seriously challenged Burr's evidence on that point.

on Burr's request for attorney fees incurred by the company in connection with this litigation. Thus, Burr has asked the Court to conduct an evidentiary hearing on the reasonableness of its attorney-fee request. The Court shall address each of these three issues individually.

II. Conclusions of Law

The Court's analysis of the remaining issues begins on common ground. Everybody agreed at the conclusion of the bench trial that, in the lawsuit started by TerHorst and CapSure against Burr, neither side is seeking any monetary damages from anyone.[4] All the Court must resolve with regard to TerHorst and CapSure is the extent to which they are bound by the restrictive covenants set forth in TerHorst's employment agreement with Burr. But with respect to the dispute between Bonnell and Burr, the waters are substantially muddier. In addition to a dispute about declaratory relief with respect to the restrictive covenants, the Court must also decide whether Bonnell must pay damages to Burr for improperly taking property. And if the Court awards such damages, the Court must also determine whether Bonnell has a basis for a setoff.[5] Finally, the Court must decide whether Burr is entitled to attorney fees for its litigation costs. Having defined the issues requiring consideration, the Court shall resolve the three issues *seriatim*.

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[4] In the pleading entitled "Robert J. TerHorst and CapSure Insurance Group, Inc's Amended Complaint" filed on March 17, 2015, TerHorst and CapSure made a claim in Count Two for tortious interference with business relationships or expectancies. In order to sustain such a claim, however, the plaintiff "must demonstrate that the defendant acted both intentionally and either improperly or without justification." Dalley v Dykema Gossett PLLC, 287 Mich App 296, 323 (2010). Where "the defendant's actions were motivated by legitimate business reasons, its actions would not constitute improper motive or interference." Id. at 324. Here, the Court readily concludes that Burr acted out of legitimate concern about its client base, so TerHorst and CapSure cannot establish any claim for tortious interference with business relationships or expectancies.

[5] Any setoff cannot exceed the amount of damages awarded to Burr. See McCoig Materials, LLC v Galui Construction, Inc, 295 Mich App 684, 695 (2012).

A. The Duration of the Restrictive Covenants.

All participants in this litigation have asked the Court to decide whether the duration of the restrictive covenants imposed upon Bonnell and TerHorst can pass muster as reasonable under MCL 445.774a.[6] Bonnell agreed to a 24-month non-solicitation provision that prohibits him from having contact, either directly or indirectly, with any clients of Burr, see Trial Exhibits A & B, and TerHorst agreed to abide by a similar restriction for 36 months. See Trial Exhibit C (employment agreement, § 11). Significantly, Burr did not demand a noncompetition agreement from either one of its former employees, so Burr has not tried to bar Bonnell and TerHorst from opening and operating their own agency in the same industry and geographic area as Burr. As a result, the Court simply must decide whether the non-solicitation obligations to which Bonnell and TerHorst agreed are reasonable.

"An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business." See MCL 445.774a(1). Accordingly, under Michigan law, an employer may obtain from an employee a binding promise not to engage in competition in any form with the employer. Here, Burr did not extract such an onerous concession from Bonnell and TerHorst. Instead, Burr simply entered into an agreement that prohibits Bonnell and TerHorst from soliciting Burr's client base for a period of two years and three years, respectively. If the employment agreements closed both men out of the insurance industry entirely, the Court would be inclined to limit the duration of each man's

[6] The issue presented by the parties plainly constitutes an appropriate subject for declaratory relief. See MCR 2.605(A).

restrictive covenants to one year, which would enable Burr to spend one annual policy-renewal cycle shoring up its client base before facing potential competition from Bonnell and TerHorst. But Burr chose a much more modest course, permitting Bonnell and TerHorst to form their own agency and sell property and casualty insurance just as they had during their tenure with Burr. All Burr required was that Bonnell and TerHorst refrain for a period of years from soliciting the clients of their former employer. Such a restriction, aimed at keeping experienced former employees away from the clients of their past employer, protects Burr's reasonable competitive business interests, as required by MCL 445.774a. See Follmer, Rudzewicz & Co, PC v Kosco, 420 Mich 394, 402-407 (1984).

United States District Judge Nancy Edmunds drew this crucial distinction in a cogent – albeit unpublished – opinion by reasoning: "A prohibition against soliciting the plaintiff's customers whose identities became known to the defendant in confidence as a result of the parties' prior relationship is not the same as a prohibition against engaging in a lawful profession, trade, or business." Hodges v Schlinkert Sports Associates, Inc, No 94-72330, slip op at 5 (ED Mich April 21, 1995) (available at 1995 WL 418597). Thus, the argument of Bonnell and TerHorst "'would be far more compelling if the [employment] contract had contained a covenant not to compete, rather than the less onerous restriction on customer solicitation.'" Id. This reasoning, which applies with the same force to the instant case, forecloses the contention of Bonnell and TerHorst that the non-solicitation requirement imposed by their employment agreements is unreasonable, so the Court must reject the challenge by Bonnell and TerHorst to the duration of their non-solicitation obligations.[7]

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[7] In arriving at this conclusion, the Court does not rule out the possibility that a prohibition on solicitation could be too long or far-reaching to be reasonable under MCL 445.774a, but this case does not involve such an overly burdensome restriction. Bonnell and TerHorst have many potential clients to solicit, and Bonnell even succeeded in negotiating with Burr for a one-year reduction of his period of restriction, so he cannot argue that the duration he himself negotiated is unreasonable.

B. Burr's Demand for Damages from Bonnell.

Burr's claim concerning Bonnell's taking of company property has evolved over time. The claim was originally pleaded as statutory conversion under MCL 600.2919a in Count Two of Burr's original complaint. Shortly after Burr filed that complaint, however, Bonnell returned the property at issue to Burr. Thus, long before the bench trial began, Burr had received from Bonnell the laptop, iPad, cellular telephone, and files that Bonnell had kept when he left Burr. As a result, Burr's first claim in its "Trial Statement" alleges that "Bonnell has breached paragraph 14 of his Employment Agreement for failing to return the Company's equipment upon termination of his employment and is, therefore, responsible for damages incurred by the Company pursuant to the terms of the contract" between Burr and Bonnell. The Court agrees with Burr that its claim concerning the property that Bonnell took and then returned should be framed as a breach of contract, not conversion.[8] Thus, the Court shall analyze the claim under breach-of-contract principles.

To prevail on its claim for breach of contract, Burr must demonstrate "'(1) that there was a contract, (2) that [Bonnell] breached the contract, and (3) that [Burr] suffered damages as a result of the breach.'" Dunn v Bennett, 303 Mich App 767, 774 (2014). Bonnell's employment agreement

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[8] Common-law conversion requires "'"any distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his rights therein."'" See Aroma Wines & Equipment, Inc v Columbian Distribution Services, Inc, 497 Mich 337, 351-352 (2015). Statutory conversion is "a subset of common-law conversion[ ] in which the common-law conversion was to the other person's 'own use.'" Id. at 355. Even a temporary dispossession of personal property may constitute conversion, see Pamar Enterprises, Inc v Huntington Banks of Michigan, 228 Mich App 727, 734 (1998), so the fact that Bonnell promptly returned Burr's property does not absolve him of responsibility for conversion. But Burr cannot prove compensable damages for its conversion claim. As Burr's "Trial Statement" acknowledges, "[t]here is no way of knowing the extent of the damages that Burr will sustain as a result of the activities of Bonnell and TerHorst." See Trial Statement at 7. Because the Court cannot provide relief in the form of damages based upon mere speculation, see Health Call of Detroit v Atrium Home & Health Care Services, Inc, 268 Mich App 83, 96 (2005), the Court cannot render a meaningful verdict in Burr's favor on a conversion claim.

constitutes a valid contract with Burr, Bonnell breached section 14 of the contract by failing to return company-issued equipment to Burr when he resigned,[9] see Trial Exhibit A (employment agreement, § 14), and Burr incurred costs in addressing Bonnell's breach of that obligation. That is, Burr paid $1,265 to CPW Computer Systems, Inc., to search Bonnell's computer equipment for company files. See Trial Exhibit 9. Bonnell has not disputed that component of damages, but Bonnell has contested $4,000 claimed by Burr for time that its general manager, Terri McIntosh, spent tracking down and inspecting property Bonnell failed to return to Burr. See Trial Exhibit 10. The Court finds as a fact that McIntosh spent approximately 40 hours on the project, but the Court concludes that Burr cannot recover damages for that expenditure of time because McIntosh received a handsome salary, rather than an hourly wage, and she billed Burr nothing for the time she spent on the project. Accordingly, Burr is entitled to recover only $1,265 in damages from Bonnell.

Bonnell insists that even the $1,265 in uncontested damages available to Burr should be the subject of a setoff, and therefore reduced to nothing at all, because Burr failed to pay commissions to Bonnell that he had earned under his compensation agreement. See Trial Exhibit 19 (description of Bonnell's compensation). Bonnell "bears the burden of proving that [Burr] breached the contract from which [Bonnell] seeks a setoff or recoupment." McCoig Materials, Inc v Galui Construction, Inc, 295 Mich App 684, 695 (2012). The Court concludes that Bonnell has satisfied that burden, so he is entitled to a full setoff. Bonnell testified that Burr owed him approximately $12,000 in unpaid commissions, and he presented an exhibit listing $12,104 in allegedly unpaid commissions, see Trial

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[9] Section 14 of the employment agreement states: "It is agreed between these parties that all properties which the AGENCY furnishes, owns, and/or retains legal title to shall be returned to the AGENCY upon termination of the SALESPERSON." See Trial Exhibit A (employment agreement, § 14). The Court finds, as a matter of fact, that Bonnell breached that contractual obligation.

Exhibit K, which Burr never effectively contested. To be sure, Bonnell did not give Burr 30 days' notice of his departure, as required by his employment agreement, see Trial Exhibit 1 (employment agreement, § 15), but that provision did not affect Bonnell's right to unpaid sales commissions even in such extreme circumstances as termination "for fraud, embezzlement, or any other dishonest act." See id. (employment agreement, § 15(b)). Accordingly, based upon setoff, the Court concludes that Burr's award of damages must be reduced from $1,265 to nothing in order to account for Bonnell's unpaid sales commissions.[10]

C. Burr's Demand for Attorney Fees.

Burr has demanded reimbursement from Bonnell for all of the attorney fees that it has paid in connection with this case. "As a general rule, attorney fees are not recoverable from a losing party unless authorized by a statute, court rule, or other recognized exception." Great Lakes Shores, Inc v Bartley, 311 Mich App 252, 255 (2015). Burr cannot obtain attorney fees under MCL 600.2919a because it did not prevail on its statutory-conversion claim. Burr nonetheless asserts its employment agreement with Bonnell supports an award of attorney fees. "[W]hen attorney fees are recoverable pursuant to a contract between the parties[,]" the Court may make such an award. Great Lakes, 311 Mich App at 255. Therefore, the Court must review Bonnell's employment agreement to ascertain whether Burr has a viable claim for attorney fees under that contract.

Section 12 of Bonnell's employment agreement with Burr prescribes a remedy that includes attorney fees if Bonnell "shall engage in, accept or in any manner obtain . . . any insurance business from any customer of [Burr] within thirty-six (36) months of the date or [Bonnell's] termination[.]"

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[10] The setoff for more than $12,000 in unpaid commissions is large enough to eliminate the $4,000 in damages sought by Burr for Terri McIntosh's time spent retrieving property from Bonnell.

See Trial Exhibit 1 (employment agreement, § 12). Thus far, Bonnell has not engaged in, accepted, or obtained any insurance business from any client of Burr, so the Court cannot award attorney fees to Burr under section 12 of Bonnell's employment agreement, which simply states: "The costs and expenses of determining the violation or default, which shall also include actual attorney fees, shall be borne by the SALESPERSON." See id.

III. Verdict

For the reasons stated in the Court's findings of fact and conclusions of law, the Court hereby renders a verdict for Burr and Company, Inc., and against Daniel Bonnell and Robert TerHorst on the question of the validity of the restrictive covenants in the parties' employment agreements. The Court further finds that no party is entitled to recover damages or attorney fees from any other party based upon the record presented at this juncture. The Court invites Burr to submit a proposed final judgment memorializing these verdicts under the so-called seven-day rule. See MCR 2.602(B)(3). In addition, the Court hereby permits Burr to include in the final judgment an injunctive order that subjects Bonnell and TerHorst to the restrictive covenants in their employment agreements for two years and three years, respectively, from the dates of their resignations from Burr.

IT IS SO ORDERED.

Dated: July 19, 2016

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