

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

USI MIDWEST LLC,

Plaintiff,

Case No. 15-05840-CBB

vs.

HON. CHRISTOPHER P. YATES

ALAN K. BOOSE; M&O AGENCIES
INCORPORATED d/b/a The Mahoney
Group; and TRIBAL RISK INSURANCE
SOLUTIONS, LLC,

Defendants.

OPINION AND ORDER GRANTING IN PART, AND DENYING IN PART,
DEFENDANTS' SUMMARY-DISPOSITION MOTION UNDER MCR 2.116(C)(10)
AND GRANTING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

The Solicitor General of the United States is almost certainly the most powerful government official nobody knows. The Solicitor General's principal responsibility involves advocating for the United States in matters before the Supreme Court,¹ so the title of Solicitor General literally bespeaks the obligation to ask for results in our country's most significant cases. In the instant case, the Court must assess the meaning of the term "indirect solicitation" to decide whether Defendant Alan Boose has acted as an indirect "solicitor" of the clients of his former employer, Plaintiff USI Midwest LLC ("USI"). Because the Court concludes that USI has made a colorable showing of indirect solicitation by Boose, the Court shall permit USI to proceed on a claim against Boose for breach of contract and grant USI's motion for a preliminary injunction barring such activity.

¹ For much of our nation's history, the Solicitor General not only advocated on behalf of the United States in matters before the Supreme Court, but also advised Executive Branch officials on matters of constitutional concern. Ultimately, however, the responsibility for providing advice was given to the Office of Legal Counsel in the United States Department of Justice.

I. Factual Background

The procedural posture of this case is relatively complicated. First, all three of the defendants have moved for summary disposition under MCR 2.116(C)(10), so the Court must weigh that aspect of the parties' dispute by reviewing affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to Plaintiff USI. Maiden v Rozwood, 461 Mich 109, 120 (1999). Second, USI has requested a preliminary injunction, so the Court must determine whether USI has presented sufficient evidence to carry its "burden of establishing that a preliminary injunction should be issued[.]" See MCR 3.310(A)(4). The parties have developed a comprehensive record, which reveals very few disagreements about the underlying facts. Therefore, the parties have presented two motions that the Court can resolve on common ground.

Defendant Boose built his business reputation working in risk management for the Saginaw Chippewa Indian Tribe and then for several tribal clients. In 2013, Wells Fargo Insurance Services ("Wells Fargo") hired Boose as a producer in its Grand Rapids office. At that point, Boose had no real experience selling insurance policies, but he had deep connections in the tribal community that he presumably could parlay into a substantial portfolio of tribal clients. In 2014, Plaintiff USI took over Wells Fargo's insurance business in Grand Rapids, so Boose became an employee of USI. In conjunction with his transition from Wells Fargo to USI, Boose signed an employment agreement that contained restrictive covenants. See Plaintiff's Brief in Support of Its Motion for Preliminary Injunction, Exhibit D. Specifically, Boose's employment agreement prohibited him from "directly or indirectly" soliciting or attempting to solicit USI's clients for a period of two years after leaving his employment with USI. Id. (Employment Agreement, § 7.1). The outcome of both motions turns upon the meaning of that restriction.

By all accounts, Defendant Boose participated in USI’s successful efforts to obtain insurance business from the Saginaw Chippewa Tribe and the Bay Mills Tribe. But in February 2015, Boose chose to leave USI to take a new job with Defendant M&O Agencies, Incorporated, which conducts business as The Mahoney Group (“Mahoney Group”). And shortly thereafter, The Mahoney Group began to reach out to several tribes – including the Saginaw Chippewa Tribe and the Bay Mills Tribe – for insurance business. In doing so, however, The Mahoney Group did not turn to Boose for direct involvement in making sales pitches. Instead, Steve Goble of the The Mahoney Group met with the tribal representatives, informed the tribal representatives that Boose was employed by The Mahoney Group but working under a non-solicitation restriction, and assured those tribal representatives that Boose would be able to work with them when his period of restriction ended. See Plaintiff’s Brief in Support of Its Motion for Preliminary Injunction, Exhibit E (Deposition of Steve Goble at 28-31). As a result of Goble’s sales efforts, two clients of USI – the Saginaw Chippewa Tribe and the Bay Mills Tribe – purchased insurance through The Mahoney Group, see id. (Deposition of Steve Goble at 29), which prompted USI to file this lawsuit against Boose, The Mahoney Group, and Defendant Tribal Risk and Insurance Solutions, LLC (“TRIS”) on June 25, 2015.²

II. Legal Analysis

Because each side has requested relief, the Court must engage in two separate analyses. First, the Court shall decide whether the defendants are entitled to summary disposition pursuant to MCR 2.116(C)(10) on each of the four counts set forth in Plaintiff USI’s first amended complaint. Second, the Court shall consider whether USI has demonstrated a right to injunctive relief.

² Defendant TRIS allegedly “is a division of The Mahoney Group, which tailors its products to the Native American Gaming and Hospitality industry[.]” See First Amended Complaint, ¶ 4.

A. The Defendants' Motion for Summary Disposition.

All of the defendants have moved for summary disposition under MCR 2.116(C)(10) on each of the claims in Plaintiff USI's first amended complaint. "Summary disposition is appropriate under MCR 2.116(C)(10) if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "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." Id. Therefore, the Court shall assess the evidence supporting each of USI's four claims against each defendant.

1. Count One – Breach of Contract

Count One accuses Defendant Boose of breaching his employment contract with USI. That is, USI alleges that Boose indirectly solicited USI's clients, see First Amended Complaint, ¶ 25, and disclosed USI's confidential information to The Mahoney Group. Id., ¶ 26. Boose does not dispute that he remains bound by restrictive covenants in his employment agreement, but he contends that USI has utterly failed to prove any breach of those restrictive covenants. Therefore, the viability of USI's claim for breach of contract turns upon the existence of a breach, rather than the existence of an enforceable contract.

Defendant Boose's employment agreement with Plaintiff USI provides that Boose "shall not . . . directly or indirectly . . . solicit or attempt to solicit services in competition with [USI] to any Client Account" or "to any Active Prospective Client" as those terms are defined in the employment agreement Boose signed. See Plaintiff's Brief in Support of Its Motion for Preliminary Injunction, Exhibit D (Employment Agreement, § 7.1(a)). Because that ban on solicitation applies for two years

“after the effective date on which [Boose] is no longer employed, for any reason, by [USI],” see id. (Employment Agreement, § 7.1(b)), the Court must determine whether Boose and his new employer, The Mahoney Group, engaged in any act that can be characterized as direct or indirect solicitation of USI’s clients.

Steve Goble – who supervises Defendant Boose, oversees Defendant Mahoney Group’s tribal practice, and also acts as a producer for The Mahoney Group, see Plaintiff’s Brief in Support of Its Motion for Preliminary Injunction, Exhibit D (Deposition of Steve Goble at 6-7) – made efforts to reach out to several clients of USI shortly after Boose joined The Mahoney Group. Id. (Deposition of Steve Goble at 25, 28). During his conversations with representatives of the Saginaw Chippewa and Bay Mills Tribes, Goble explained that Boose had joined The Mahoney Group, that Boose had to abide by restrictive covenants for a limited time period, but that the tribes could work with Boose just as soon as his restrictive covenants expired. Id. (Deposition of Steve Goble at 28-31). Although Boose did not participate directly in Goble’s sales pitches, a rational trier of fact could consider the representations made by Goble as indirect solicitations because Boose’s potential involvement was presented as a selling point to the tribes. To be sure, the Court cannot rule definitively that Goble’s statements constituted indirect solicitations by Boose, so USI has no right to summary disposition under MCR 2.116(I)(2) on its claim for breach of contract. But Goble’s representations, given their timing and audiences, create a genuine issue of material fact as to whether Boose engaged in indirect solicitation of USI’s clients in contravention of the non-solicitation clauses in Boose’s employment agreement with USI, so the Court must deny summary disposition to Boose on Count One.³

³ Because Steve Goble, rather than Defendant Boose, made those representations on behalf of Defendant Mahoney Group, Plaintiff USI must prove that Goble’s statements were made with the knowledge and approval of Boose in order to prevail on its breach-of-contract claim against Boose.

2. Count Two – Misappropriation of Trade Secrets

Although Count Two of Plaintiff USI's first amended complaint presents a claim against all three defendants for misappropriation of trade secrets, USI has offered little resistance to the motion for summary disposition on that claim. To support a claim for misappropriation of trade secrets, USI must establish: "(1) the existence of a trade secret, (2) acquisition of the trade secret in confidence, and (3) unauthorized use or disclosure." See Henkel Corp v Cox, 386 F Supp 2d 898, 902 (ED Mich 2005). Even if USI entrusted its trade secrets to Boose, the record contains no evidence that Boose ever engaged in any unauthorized use or disclosure of trade secrets. Therefore, the Court must award summary disposition to all three defendants on the trade-secrets claim in Count Two.

3. Count Three – Tortious Interference With Business Relationships or Expectancies

In Count Three of the first amended complaint, Plaintiff USI accuses all three defendants of tortious interference with USI's business relationships and expectancies with its tribal clients. That claim requires proof "that the defendant[s] acted both intentionally and either improperly or without justification." Dalley v Dykema Gossett PLLC, 287 Mich App 296, 323 (2010). In other words, "to succeed under a claim of tortious interference with a business relationship, the plaintiff must allege that the interferer did something illegal, unethical or fraudulent." Id. at 324. USI has neither made such an allegation nor offered evidence that even approaches that standard. Consequently, the Court shall award summary disposition to the defendants on Count Three.

4. Count Four – Tortious Interference With Contracts

Count Four of the first amended complaint alleges that the two corporate defendants engaged in tortious interference with Defendant Boose's employment contract with Plaintiff USI. The record

merely establishes that Defendant Mahoney Group hired Boose knowing that Boose was bound by restrictive covenants in his employment agreement.⁴ To prevail on its claim for tortious interference with Boose’s employment contract, USI must prove “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). Needless to say, the evidence adduced by USI does not even approach the showing necessary to sustain the claim for tortious interference with a contract, so the Court shall grant summary disposition to the corporate defendants on Count Four.

B. Plaintiff USI’s Motion for a Preliminary Injunction.

In requesting injunctive relief, Plaintiff USI must shoulder “the burden of establishing that a preliminary injunction should be issued[.]” See MCR 3.310(A)(4). An injunction “represents an extraordinary and drastic use of judicial power that should be employed sparingly and only with full conviction of its urgent necessity.” Davis v Detroit Financial Review Team, 296 Mich App 568, 613 (2012). Our Court of Appeals “has identified four factors to consider in determining whether to grant a preliminary injunction.” Id. Those four factors are as follows:

- (1) the likelihood that the party seeking the injunction will prevail on the merits,
- (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued,
- (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and
- (4) the harm to the public interest if the injunction is issued.

Id. The Court must also bear in mind that injunctive relief is only appropriate if there is no adequate remedy at law, and there exists a real and imminent danger of irreparable injury. Id. at 614.

⁴ Defendant Boose’s employment agreement with Plaintiff USI did not grant him job security, see Plaintiff’s Brief in Support of Its Motion for Preliminary Injunction, Exhibit D (Employment Agreement, § 8.1), nor did it mandate that Boose had to work for USI for any set period of time.

1. Likelihood of Success on the Merits

As the Court has explained in denying Defendant Boose’s motion for summary disposition on Count One, Plaintiff USI has made a relatively strong argument that Boose engaged in indirect solicitation of USI’s tribal clients in violation of the non-solicitation provisions in his employment agreement. The Court need not repeat the analysis in section II(A)(1) of this opinion, except to note that USI’s likelihood of success on the merits of its claim for breach of contract against Boose turns upon Boose’s knowledge of, and involvement in, Steve Goble’s representations to the tribal clients of USI. The existing record contains strong circumstantial evidence that Boose was well aware that Goble was soliciting USI’s tribal clients and tying Boose’s eventual involvement to the sales pitches. In the fullness of time, Boose may be able to disabuse the trier of fact of that notion, and thereby beat back USI’s breach-of-contract allegations. But for now, the record leads the Court to conclude that USI is likely to tie Boose to the solicitations that Goble made to USI’s tribal clients, and thus prevail on its claim for breach of contract.

2. Irreparable Harm

Under settled Michigan law, “a party need[s] to make a particularized showing of concrete irreparable harm or injury in order to obtain a preliminary injunction.” Michigan Coalition of State Employee Unions v Civil Service Comm’n, 465 Mich 212, 225 (2001). “The mere apprehension of future injury or damage cannot be the basis for injunctive relief.” Pontiac Fire Fighters Union Local 376 v City of Pontiac, 482 Mich 1, 9 (2008). Moreover, “relative deterioration of competitive position does not in itself suffice to establish irreparable injury.” Thermatool Corp v Borzym, 227 Mich App 366, 377 (1998). But the loss of business – when coupled with the prospect of significant

additional erosion of clients – can support a finding of irreparable harm. Performance Unlimited, Inc v Questar Publishers, Inc, 52 F3d 1373, 1382 (6th Cir 1995). Here, Defendant Mahoney Group had no significant footprint in Michigan until it hired Defendant Boose, but it began reaching out to Plaintiff USI’s Michigan tribal clients as soon as it hired Boose. See Plaintiff’s Brief in Support of Its Motion for Preliminary Injunction, Exhibit D (Deposition of Steve Goble at 7-10, 28). Therefore, the Court finds that, in the absence of injunctive relief, Boose presents a substantial threat to USI’s tribal business in Michigan.

C. Balance of Harms to the Opposing Parties.

In assessing the relative harm to the opposing parties in the presence or absence of injunctive relief, see Davis, 296 Mich App at 613, the Court acknowledges that only Defendant Boose has any restrictive covenants that ban solicitation of Plaintiff USI’s clients. Thus, The Mahoney Group has the latitude to solicit USI’s tribal customers in Michigan so long as Boose has no role, either direct or indirect, in those solicitations. As a result, an injunctive order that simply holds Boose to all of the restrictions in his employment agreement with USI neither forces Boose out of a job nor bars his new employer, The Mahoney Group, from soliciting any tribal clients in Michigan. In contrast, the record establishes that, in the absence of an injunctive order, The Mahoney Group may well attempt to obtain the business of USI’s tribal clients by dropping Boose’s name and offering his services at a time in the near future. In other words, the balance of harms favors injunctive relief.

D. Potential Harm to the Public Interest.

The Court does not find that potential harm to the public interest is a significant factor in this case. If The Mahoney Group makes its solicitations properly by keeping Defendant Boose out of its

sales pitch to Plaintiff USI's clients, the public will not be deprived of any options in the insurance market. Accordingly, the entry of an injunctive order will not harm the public interest in any way. Conversely, if the Court refuses to grant injunctive relief, insurance customers will have unfettered access to the full range of insurance options. In other words, the Court concludes that concern about the public interest does not militate for or against injunctive relief.

III. Conclusion

For all of the reasons stated in this opinion, the Court shall deny summary disposition to both sides on Plaintiff USI's breach-of-contract claim against Defendant Boose in Count One of the first amended complaint. In contrast, the Court shall grant the defendants' summary-disposition motion under MCR 2.116(C)(10) on all of the other counts in the first amended complaint, so Counts Two, Three, and Four are no longer at issue.⁵ Finally, the Court shall grant an injunctive order preventing Boose from playing any role in any sales effort aimed at any client of USI. Thus, **IT IS ORDERED that Defendant Alan Boose is prohibited and enjoined from having any role whatsoever in any sales effort directed at any client of his former employer, USI, until further order of the Court.**

IT IS SO ORDERED.

Dated: July 25, 2016



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

⁵ As far as the Court can ascertain, this ruling takes both corporate defendants out of the case, leaving only Defendant Boose to contest the one remaining claim in Count One.