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

JON WAALKES,

Plaintiff/Counter-Defendant,

vs.

HENRY R. DUNNICK,

Defendant,

and

RESOURCE COMMUNICATIONS, INC.,

Defendant/Counter-Plaintiff/
and Third-Party Plaintiff,

vs.

DESIGN CREATE SOLVE, LLC,

Third-Party Defendant.
_____/

Case No. 15-09926-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING SUMMARY DISPOSITION TO PLAINTIFF JON WAALKES AND THIRD-PARTY DEFENDANT DESIGN CREATE SOLVE

In this business dispute involving reciprocal restrictive covenants, Plaintiff Jon Waalkes and his new company, Third-Party Defendant Design Create Solve, LLC ("DCS"), have asked the Court to draw a line between customers that they can service and clients that they must leave to Defendant Henry Dunnick and his company, Defendant Resource Communications, Inc. ("RCI"). Therefore, what started as a synergistic fusion of the skills and resources of Waalkes and Dunnick has devolved into a dispute about the commercial preserves carved out for each man by the employment agreement that they both signed on October 5, 2010.

Plaintiff Waalkes and Defendant Dunnick did not envision a permanent business relationship. Indeed, the employment agreement not only includes a section entitled "Term and Termination" that prescribes a goal for Waalkes to reach, but also spells out "Obligations Upon Termination" imposed upon both parties. See Complaint for Declaratory Judgment, Exhibit 1 (Employment Agreement, §§ 6-7). Waalkes insists that he met his contractual goal and then appropriately left Defendant RCI to launch a solo career providing sales and marketing of point-of-purchase displays to customers that he had historically served. In contrast, Dunnick asserts that Waalkes failed to satisfy the goal in his employment agreement, and then prematurely left Defendant RCI to furnish print-media services to several of RCI's most important clients in contravention of his employment agreement. Because the employment agreement defines the parties' non-solicitation obligations in terms of tasks, rather than customers, the Court cannot award summary disposition to either side without first delineating the tasks that each side remains free to undertake.

Plaintiff Waalkes and Third-Party Defendant DCS have requested summary disposition under MCR 2.116(C)(10). "In evaluating a motion for summary disposition brought under this subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties . . . in the light most favorable to the party opposing the motion." Maiden v Rozwood, 461 Mich 109, 120 (1999). "Summary disposition is appropriate under MCR. 2.116(C)(10) if there is no genuine issue regarding any material fact[.]" 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. Applying these standards, the Court must decide whether Waalkes and DCS are entitled to summary disposition on their own claim as well as the various counterclaims and third-party claims.

On October 5, 2010, Plaintiff Waalkes and Defendant Dunnick both signed an employment agreement that turned Waalkes into an employee of Defendant RCI. See Complaint for Declaratory Judgment, Exhibit 1. Waalkes already had "experience in marketing goods and services, primarily through point of purchase displays , to customers and prospects including those listed on Addendum A" to the employment agreement. Id. (Employment Agreement at 1 – "Recitals"). Dunnick and his enterprise, RCI, also "provide[d] marketing goods and services, primarily through print media, to customers and prospects including those listed on Addendum A" to the employment agreement, id., so the parties understood at the outset that they serviced some of the very same customers.[1] Despite that overlap, Dunnick and RCI chose to enter into the employment agreement with Waalkes in order "to expand [their] business and create the opportunity for a succession plan for the company." Id.

The employment agreement contained an escape hatch for Plaintiff Waalkes. Specifically, section 6 prescribed a "goal" for Waalkes of providing total gross profits of $750,000.00 solely from his "sales procured while this agreement is in effect," and stated: "Upon Employee's attainment of the 'Goal,' this Agreement shall automatically terminate." See Complaint for Declaratory Judgment, Exhibit 1 (Employment Agreement, § 6). In addition, the employment agreement allowed Waalkes to unilaterally terminate the contract "for any reason upon 30 days written notice to" RCI. See id. (Employment Agreement, § 6(b)). But the employment agreement imposed several obligations upon Waalkes in the event of termination, id. (Employment Agreement, § 7), and required him to abide by post-termination restrictions, including a non-solicitation requirement at the heart of the parties' dispute in this case. See id. (Employment Agreement, § 8(c)).

---

[1] Neither Plaintiff Waalkes nor Defendant RCI completed Addendum A prior to signing the employment agreement. See Complaint for Declaratory Judgment, Exhibit 1. Waalkes subsequently filled out Addendum A, see id., Exhibit 2, but that apparently occurred after he left RCI.

The non-solicitation provision of the employment agreement bars each side from "engag[ing] in the solicitation for sale or marketing of" the other side's "Products and Services." See Complaint for Declaratory Judgment, Exhibit 1 (Employment Agreement, § 8(c)). Although the employment agreement speaks of "Products and Services," id., both sides seek to wall off one another from their customers by relying upon the non-solicitation language. That, however, is not the agreement struck by the parties.[2] The two sides entered into an employment agreement that contemplated, from start to finish, that Plaintiff Waalkes would engage in "marketing goods and services, primarily through point of purchase displays," whereas Defendant RCI would engage in "marketing goods and services, primarily through print media[.]" See id. (Employment Agreement at 1 – "Recitals"). Accordingly, the Court must interpret the non-solicitation provision in a manner that enables Waalkes to continue offering customers point-of-purchase displays and permits RCI to continue furnishing print media to customers. As a result, the Court must recognize that Waalkes and RCI may occasionally service the very same customers, albeit by providing different services to those customers.

The Court recognizes that this interpretation of the employment agreement potentially gives rise to a chaotic situation where both sides can market products and services to the same customers, but the Court cannot rewrite an unambiguous contract to avoid the consequences of the terms chosen by the parties. See Quality Products and Concepts Co v Nagel Precision, Inc, 469 Mich 362, 375 (2003). Moreover, the parties' job tasks seem more complementary than their customer lists, so the

---

[2] The Court disagrees with Plaintiff Waalkes's assertion that the parties to the employment agreement chose "to delineate their respective non-competes by tying them to specific customers." If the parties had placed special emphasis upon customers, rather than job tasks, they certainly would have exchanged complementary customer lists by filling out Addendum A to their agreement at the time they entered into that contract. The fact that neither side filled out Addendum A before the two sides signed the agreement speaks volumes about the insubstantial role that customer lists played in the bargain struck by the parties.

definition of the two sides' respective job tasks appears simpler than the allocation of their customers to one party or the other. Finally, the parties had the opportunity before they signed the employment agreement to list their respective customers in Addendum A to that agreement, but both sides chose not to avail themselves of that opportunity. That omission leads ineluctably to the conclusion that the parties saw no need under the contract to identify their respective customers. The Court cannot yet define the job tasks that each side can undertake in conformity with the non-solicitation language of the employment agreement, so the Court must deny summary disposition to Plaintiff Waalkes and Third-Party Defendant DCS on their claim for declaratory relief.[3]

The counterclaims and third-party claims asserted by Defendant RCI present an even greater muddle. Count One alleges that Plaintiff Waalkes breached the employment agreement because he did not "devote his full time and best efforts to the solicitation and promotion of RCI's products and services while the Employment Agreement was in place" and also because he failed to live up to his contractual obligations upon termination. The problem, however, is that Court cannot divine when Waalkes actually terminated his employment relationship with RCI,[4] so the Court cannot determine which period of time must be considered in analyzing whether Waalkes breached the employment agreement's requirements. Count Two, which alleges that Waalkes breached his fiduciary duties to

---

[3] Neither side devoted much attention in the briefs to the nature of the parties' job tasks, so the record requires further development before the Court can draw the line between permissible and impermissible activities for Plaintiff Waalkes.

[4] The only direct evidence on this point takes the form of a letter that Plaintiff Waalkes wrote to Defendant Dunnick in "September 2015" providing "formal notice of the *pending* completion of [his] employment term with [Defendant] Resource Communications." See Brief in Support of Motion for Summary Disposition, Exhibit J (emphasis added). Even that letter, however, explains that Waalkes "will continue to work on and complete the current orders that are in process as well as secure the balance needed to complete the goal." Id. Thus, the letter indicates that Waalkes had not yet met the "goal" when he sent the letter and that he planned to continue working for RCI.

RCI, raises similar concerns because the Court cannot tell whether Waalkes owed fiduciary duties to RCI at the time of his alleged misconduct. Finally, Count Three, which seeks recovery for unjust enrichment from Waalkes's new company, Third-Party Defendant DCS, rests upon the assumption that Waalkes committed misconduct that conferred an improper benefit upon DCS. Because such misconduct by Waalkes constitutes the *sine qua non* of the unjust-enrichment claim against DCS, the Court cannot yet pass upon the viability of that claim. Therefore, the Court must deny summary disposition to Waalkes and DCS on each of RCI's counterclaims and third-party claims.

The Court recognizes that this opinion may well strike both sides as a wholly imperfect effort to bring order to a dispute rife with uncertainty and confusion. Although the Court ordinarily does its best clean up claims, counterclaims, and third-party claims whenever afforded an opportunity to do so by a motion for summary disposition, this case appears to be a Gordian knot that the Court is powerless to cut until the parties further develop the record and sharpen their legal arguments in light of the discussion provided in this opinion. Such an iterative process will almost certainly take a toll on the Court and the attorneys, but the dispute remains shrouded in too much mystery for any final decisions at this juncture. Thus, the Court must deny the pending motion for summary disposition, albeit without prejudice to a future motion based upon a reframed presentation of the issues.[5]

IT IS SO ORDERED.

Dated: August 18, 2016

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

[5] Given the Court's resolution of the summary-disposition request, the Court need not rule on the "Motion and Brief to Strike Paragraph 18 of Affidavit of Henry R. Dunnick."