

STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

VIBRUS GROUP, LLC, a Michigan,
limited liability company,

Plaintiff,

vs.

Case No. 2013-3197-CK

BRENDA PETTWAY, and POWERLINK
ENVIRONMENTAL SERVICES, LLC,
d/b/a POWERLINK FACILITIES
MANAGEMENT SERVICES, a Michigan
limited liability company,

Defendants.

OPINION AND ORDER

Defendant Powerlink Environmental Services, LLC (“Powerlink”) has filed a motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff has filed a response and requests that the motion be denied.

In addition, Plaintiff has filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10). Powerlink has filed a response and requests that the motion be denied.

Factual and Procedural History

Plaintiff is in the business of providing services involving human resources, employee recruiting, and employee staffing. On January 10, 2007, Defendant Brenda Pettway (“Defendant Pettway”) entered into an “Executive Employment Agreement” (“Executive Agreement”) with Plaintiff’s predecessor CennaCare Staffing Solutions, Inc. (“Cenna”). Included with the Executive Agreement’s terms is a non-compete provision

(the “Non-Compete”). Plaintiff alleges that it stepped into Cenna’s shoes with respect to the Executive Agreement when it purchased Cenna, and that Defendant Pettway continued to work pursuant to the terms of the Executive Agreement up until her resignation on February 25, 2013.

Prior to her resignation, Defendant Pettway was allegedly negotiating with Powerlink. Defendant Pettway allegedly began working for Powerlink shortly after resigning her employment with Plaintiff.

Plaintiff and Powerlink both provide employment staffing services, and both provide those services to Henry Ford Hospital’s Environmental Services Department (“Henry Ford”). Plaintiff alleges that Defendant Pettway manages Powerlink’s account with Henry Ford and that Powerlink and Defendant Pettway have engaged in a scheme to recruit Plaintiff’s employees in an effort to get them to leave Plaintiff and come to Powerlink. Further, Plaintiff alleges that Powerlink/Defendant Pettway have successfully hired some of those individuals away from Plaintiff.

On August 7, 2013, Plaintiff filed its complaint in this matter asserting the following claims: Count I- Breach of Contract against Defendant Pettway; Count II- Breach of Fiduciary Duty against Defendant Pettway; Count III- Defamation against Powerlink; Counts IV and V- Tortious Interference against Defendant Pettway and Powerlink; and Count VI- Conspiracy against Defendant Pettway and Powerlink. Plaintiff has since dismissed Count III-Defamation.

On November 12, 2014, Powerlink filed its instant motion for summary disposition. Plaintiff has since filed a response and requests that the motion be denied.

On November 26, 2014, Plaintiff filed its instant motion for summary disposition. Powerlink has since filed a response and requests that the motion be denied.

On December 8, 2014, the Court held a hearing in connection with the motions and took the matters under advisement. The Court has reviewed the materials submitted by the parties, as well as the arguments advanced at the hearing, and is now prepared to render its decisions.

Standard of Review

A motion under MCR 2.116(C)(10) tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, 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. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

Arguments and Analysis

A. Counts IV and V- Tortious Interference

Plaintiff's complaint includes claims for, *inter alia*, (1) tortious interference with a business relationship or expectancy and (2) tortious interference with a contract. Tortious interference with a contract and tortious interference with a business relationship or expectancy are separate and distinct torts under Michigan law. *Health Call of Detroit v Atrium Home & Health Care Services, Inc.*, 268 Mich App 83, 89; 706 NW2d 843

(2005). The Court in *Health Call* summarized the elements needed to establish the torts as follows:

The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted.

Id., at 89-90 [internal citations omitted]

In its motion, Powerlink first contends that Plaintiff's tortious interference with a contract claim as it relates to Defendant Pettway fails because the Executive Agreement was between Cenna and Defendant Pettway, not Plaintiff and Defendant Pettway. Specifically, Powerlink contends that Cenna could not assign its rights under the Executive Agreement without Defendant Pettway's written consent. The Executive Agreement provides, in pertinent part:

Assignment

This Agreement shall be binding upon both parties. Neither party may assign or delegate any of its rights or obligations hereunder without first obtaining the written consent of the other party.

It appears undisputed that Cenna did not obtain Defendant Pettway's written consent to assign its rights under the Executive Agreement to Plaintiff. If contract language is unambiguous the Court must construe and enforce the contract as written. *Quality Prods & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). Therefore, an unambiguous contractual provision is reflective of the parties' intent as a matter of law, and that intent will be enforced unless it is contrary to public

policy. *Id.* Indeed, “[t]he goal of contract interpretation is to read the document as a whole and apply the plain language used in order to honor the intent of the parties. [The Court] must enforce the clear and unambiguous language of a contract as it is written.” *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012).

In this case, the Executive Agreement, which is the only contract related to Defendant Pettway’s employment with Cenna and/or Plaintiff, unambiguously provides that it is between Cenna and Defendant Pettway. Additionally, the Executive Agreement unambiguously provides that it may not be assigned without the written consent of the other party, which it is undisputed was not obtained in this case. Consequently, the Court must enforce the terms of the Executive Agreement as written and hold that there was not a contractual relationship between Plaintiff and Defendant Pettway. Accordingly, Plaintiff’s tortious interference with a contract claims against Defendants based on the Executive Agreement fail as a matter of law.

In addition, Plaintiff alleges that Defendants tortiously interfered with its relationship with Henry Ford by hiring some of Plaintiff’s employees (“Targeted Employees”). Plaintiff’s allegation that Defendants have tortiously interfered with its contractual relationship with Henry Ford is based on two contracts: a contract between Plaintiff and Act 1 and Act 1’s contract with Henry Ford (collectively, “Henry Ford Contracts”). In its motion, Powerlink contends that it is a company affiliated with Henry Ford and that as a company affiliated with Henry Ford its actions in soliciting and hiring the Targeted Employees is permitted under the Henry Ford Contracts. The Henry Ford contracts provide, in pertinent parts:

- B. If Henry Ford, directly, such as through any company within [Henry Ford's] control, or a company affiliated with [Henry Ford], solicits, or offers employment to, and/or hires any PERSONNEL of [Act 1] (or its subcontractors) as an employee, consultant, independent contractor of [Henry Ford], or utilizes the PERSONNEL through another temporary or outsourcing service within three (3) months after the termination of that particular PERSONNEL's temporary assignment with [Act 1] at [Henry Ford], [Henry Ford] agrees to pay [Act 1] \$3,000.00.

- C. However, in the event a particular PERSONNEL has been utilized at [Henry Ford] on a regular basis, within a rolling twelve (12) month year (acknowledging days off) for a minimum of 520 hours for non-clinical staff or 640 hours for clinical staff, [Henry Ford] may offer employment to that particular PERSONNEL without incurring any cost. Once a particular PERSONNEL has reached the required number of minimum hours in that rolling 12 month period [Henry Ford] will not be required to wait the above stated 3 month period prior to employing that particular individual.

(See Powerlink's Exhibit 3, at 1(B))

In its motion, Powerlink contends that the individuals it allegedly solicited had been utilized for the minimum number of hours required under section (C) and that as a result it, as a company affiliated with Henry Ford, could solicit them without causing any breach of the terms of the Henry Ford Contracts.

In its response, Plaintiff contends that even if Henry Ford could have solicited the individuals in question pursuant to the above-reference provisions, Powerlink was not permitted to do so because it is not a "company affiliated with Henry Ford."

The phrase "company affiliated with Henry Ford" is not defined by the Henry Ford Contracts. The evidence Plaintiff has presented with respect to this issue is (1) the provision of the contract between Powerlink and Henry Ford in which Powerlink is categorized as an independent contractor and (2) representations made in a separate proceeding by Henry Ford that it is not affiliated with Powerlink. In its brief, Powerlink

relies on the affidavit of Marco Capicchioni, Henry Ford's former vice president of facility, real estate and support services, in which he testified that Powerlink was acting as a partner with Henry Ford. Based on this evidence, the Court is convinced that a genuine issue of material fact exists as to whether Powerlink was affiliated with Henry Ford at the time it solicited and/or hired the Targeted Employees.

Next, Powerlink contends that Plaintiff could not have a realistic expectation that their relationship with the Targeted Employees would continue beyond 6 months as the Henry Ford Contracts provide that Plaintiff is to ensure that no employees are assigned to work for Henry Ford for more than six months unless Henry Ford authorized otherwise in writing. *See* Powerlink's Exhibit 8, at p. 13. In this case, it appears undisputed that all but one of the Targeted Employees had worked beyond their 6 month contract term at the time they were hired by Powerlink. While Plaintiff asserts that it was improper for Defendants to solicit and/or hire the Targeted Employees because they had an expectation that the Targeted Employees would continue working for Plaintiff, they have failed to provide any evidence that its expectation was more than wishful thinking.

Business expectancy must be a reasonable likelihood, more than mere wishful thinking. *Trepel v Pontiac Osteopathic Hospital*, 135 Mich App 361, 377; 354 NW2d 341 (1984). In this matter, Plaintiff had no assurances or guarantees that any of the Targeted Employees would continue their employment with Plaintiff for a set period of time. Consequently, the Court is convinced that Defendants did not tortiously interfere with Plaintiff's business expectancy by soliciting/hiring the Targeted Employees. Moreover, while one of the Targeted Employees appears to have worked for less than 6 months prior to being hired by Powerlink, Plaintiff has not alleged the Defendants in any

way prevented Henry Ford from paying the \$3,000.00 fee that applied in that situation. Accordingly, Plaintiff has failed to establish that Defendants had a culpable motive when they solicited and/or hired that individual. For these reasons, Powerlink's motion for summary disposition of Plaintiff's tortious interference with a claims related to Henry Ford must be granted.

The remainder of Plaintiff's tortious interference claim against Powerlink is their allegation that Powerlink tortiously interfered with Plaintiff's contracts with the Targeted Employees. Specifically, Plaintiff alleges that Defendants' actions induced the Targeted Employees to breach the non-compete provisions of their contracts with Plaintiff. The provisions in question provide:

5.1 Agreement not to Compete

Employee shall not compete or assist anyone else to compete with [Plaintiff] either directly or indirectly:

- (a) While Employee is employed by [Plaintiff]; or
- (b) For a period of one year after the termination of his/her employment, except as otherwise provided below.

5.2 Definitions:

(b) To act "directly or indirectly" means to act in the capacity of an owner, stockholder, officer, director, partner, member, manager, lender or consultant, or in any other capacity. Nothing in this section shall prohibit an Employee from working for another employer during times wherein said Employee is not employed by [Plaintiff] provided that the Employee is not a founder, owner, stockholder, officer, director or partner of such other employer in competition with [Plaintiff].

In this case, the Targeted Employees were hired by Powerlink after their employment with Plaintiff had ended. While the Targeted Employees' contracts with Plaintiff provide a one year non-compete provision, the contracts also provide that nothing in the contracts bars the employees from becoming employed by a different company so long as they are not currently employed by Plaintiff, and the contracts do not

require the Targeted Employees to work for a certain period of time before they can resign. While Plaintiff is correct that “[t]he intentional and knowing inducement of a party to break his contract with another party is a wrongful act, and actionable as such, unless reasonable justification or excuse can be shown” *Greenwald v Greenwald*, 480 Mich 1158; 746 NW2d 620 (2008), Defendants’ actions in this case did not cause the Targeted Employees to breach their agreements with Plaintiff. Accordingly, as the alleged breaches are Plaintiff’s sole evidence of an illegal, fraudulent or unethical motive, Plaintiff has failed to satisfy a necessary element of its tortious interference claim. Consequently, the Court must grant summary disposition of Plaintiff’s tortious interference with a contract claims in favor of Defendants.

B. Conspiracy

“Civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means.” *Temborius v Slatkin*, 157 Mich App 587, 599-600; 403 NW2d 821 (1986). Further, “the agreement, or preconceived plan, to do the unlawful act is the thing which must be proved.” *Id.* at 600. “Direct proof of agreement is not required, however, nor is it necessary that a formal agreement be proven.” *Id.* “It is sufficient if the circumstances, acts and conduct of the parties establish an agreement in fact. Furthermore, conspiracy may be established by circumstantial evidence and may be based on inference.” *Id.*

For the reasons discussed above, the Court is convinced that no unlawful act was committed by Defendants. Consequently, Plaintiff’s conspiracy claims must also be dismissed.

B. Count I-Breach of Contract

Count of I of Plaintiff's complaint purports to state a breach of contract claim against Defendant Pettway. However, for the reasons discussed above, Plaintiff was not a party to the Executive Agreement, the contract that it alleges that Defendant Pettway breached. Consequently, Plaintiff's claim fails as a matter of law and summary disposition must be granted in favor of Defendant Pettway.

Conclusion

Based upon the reasons set forth above, Plaintiff Vibrus Group, LLC's motion for partial summary disposition is DENIED and Defendant Powerlink Environmental Services, LLC's motion for summary disposition is GRANTED. Plaintiff's breach of contract (Count I), tortious interference (Count IV and V) and conspiracy (Count VI) claims are DISMISSED. As Plaintiff's defamation claim (Count III) has previously been dismissed, the sole remaining claim in this case is Plaintiff's breach of fiduciary duty claim (Count II) against Defendant Brenda Pettway. In compliance with MCR 2.602(A)(3), the Court states this *Opinion and Order* does not resolve the last claim and does not close the case.

IT IS SO ORDERED.

/s/ John C. Foster
JOHN C. FOSTER, Circuit Judge

Dated: December 30, 2014

JCF/sr

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