STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

ROGER SOULLIERE, et al.,

Plaintiffs,

vs. Case No. 2013-001334-CB

FRANK BERGER, et al.,

Defendants.

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OPINION AND ORDER

This matter is before the Court on defendants Matthew Esch, Time Shea, James Risnor, Brian Roberts, Nicholas Maiorana and David Atkinson's ("moving defendants") motion for summary disposition of plaintiffs' complaint against them under MCR 2.116(10).

I. Background

This business action, filed April 11, 2013, arises out of some business loans on which plaintiff Roger Soulliere and his namesake business entities ("Soulliere") defaulted. In its complaint, Soulliere claims that the bank initially agreed to forebear collection on the debt to allow Soulliere to continue operations. However, as part of that agreement, Soulliere and the bank executed a Surrender Agreement which conveyed ownership of specific business collateral to the bank to liquidate at some later, undetermined time. According to Soulliere, defendant Frank Berger assembled an investor group (the "Stonescape" entities) that purchased Soulliere's former business location and other surrendered assets from the bank in order to compete with Soulliere. Among other things, Soulliere claims Stonescape has improperly taken control of

non-surrendered assets causing it irreparable harm. Additionally, pertinent to this motion, Soulliere claims that Berger and several of Stonescape's employees, including the moving defendants, formerly worked for Soulliere. Soulliere asserts that all its employees signed non-compete agreements. Soulliere seeks injunctive and declaratory relief, as well as damages for various contract and tort claims.

In their answer, filed May 3, 2013, defendants admit signing Soulliere's non-compete agreement. However, they deny that the agreements were still in effect when they accepted employment with Stonescape. They assert that they were part-time or seasonal employees when they signed the agreements, and that the agreements self-terminated with their temporary employment. These defendants now move for summary disposition under MCR 2.116(C)(10) for dismissal from the action.

II. Standard of Review

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support of the plaintiff's claim. *Outdoor Advertising v Korth*, 238 Mich App 664, 667; 607 NW2d 729 (1999). The Court considers the affidavits, pleadings, depositions, admissions, and other evidence submitted to determine whether a genuine issue of material fact exists to warrant a trial. *Id.* The Court must resolve all reasonable inferences in the nonmoving party's favor. *Id.*

III. Parties' Arguments

The moving defendants argue that each of them had left Soulliere's employ since signing the five-year non-compete agreements and had returned for re-hire at a later date. The moving defendants argue that none of them were required to sign new agreements when they were re-hired, even though they had to re-apply for their positions. Resultantly, the moving defendants aver that the non-compete agreements did not automatically renew with each term of

employment. Moreover, the moving defendants argue that even if the five-year term is deemed a reasonable restriction, the most recently signed agreement would have expired in 2009. Consequently, defendants claim they have not breached any contracts and Soulliere's claims against them are baseless.

In response, Soulliere, contends that the limitations in the non-compete agreements were understood by the moving defendants to be a "continuing condition of the [d]efendants' continued employment from season to season." Soulliere further disputes that the terms of the agreement were not reasonably related to protecting the business' legitimate interests. Finally, Soulliere argues that defendants motion to dismiss under (C)(10) is premature at best, as there remain many questions of fact pertaining to the numerous causes of action stated in Soulliere's complaint.

IV. Law

Non-compete agreements are permitted under MCL 445.774a(1), which states:

> 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. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

(Emphasis added.)

Generally, a non-compete agreement which does not tailor the scope of its geographic limitations to only those areas which are necessary to protect the employer's "legitimate business interests" would not be considered reasonable. See e.g., *Superior Consulting Co, Inc v Walling*, 851 F Supp 839, 847 (ED Mich, 1994). Further, a broad prohibition against working in *any*

capacity for a competitor is generally too restrictive. See *id.* Finally, the duration considered reasonable for a non-compete agreement typically ranges from six months to three years. See e.g., *Kelly Servs, Inc v Marzullo*, 591 F Supp 2d 924, 939 (ED Mich, 2008).

V. Analysis

Having reviewed the identical non-compete agreements for each of the moving defendants, the Court disagrees with Soulliere that these defendants "understood" the five-year non-compete limitations restarted every time they were re-hired. "The cardinal rule in the interpretation of contracts is to ascertain the intention of the parties." *D'Avanzo v Wise & Marsac*, 223 Mich App 314, 319; 565 NW2d 915 (1997). Further, "contracts must be construed so as to give effect to every word or phrase as far as practicable." *Id* at 467. No language in these agreements reflects a mutual intent to be bound by these terms for an additional five years each time the employee returned to Soulliere for a job. This holds true particularly when the employee is part-time or seasonal, and is considered "terminated" as opposed to being "laid off."

Further, given the parameters for reasonableness stated above, this Court considers the terms of these non-compete agreements unreasonably restrictive to enforce nearly 10 years after they were executed. Summary disposition of the claims pertaining to breach of the non-compete agreements for these moving defendants is warranted.

However, as to the remainder of Soulliere's claims pertaining to torts or other non-contractual causes of action, defendants' motion must be denied as premature.

VI. Conclusion

For the reasons set forth above, defendants Matthew Esch, Time Shea, James Risnor, Brian Roberts, Nicholas Maiorana and David Atkinson's motion for summary disposition pursuant to MCR 2.116(C)(10) is GRANTED IN PART as to Soulliere's COUNT I only. The

motion is DENIED as to all other counts. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* does not resolve the last remaining issue and does not close this case.

IT IS SO ORDERED.

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

Dated: February 24, 2014

JCF/sr

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