

STATE OF MICHIGAN
MACOMB COUNTY CIRCUIT COURT

BAKER AEROSPACE TOOLING &
MACHINING, INC. d/b/a BAKER
MACHINING & MOLD TECHNOLOGIES,
INC., a Michigan Corporation,

Plaintiff/Counter-Defendant,

vs.

Case No. 2014-1261-CK

RAYMOND A. WISNIEWSKI, an
Individual, and ONYX MANUFACTURING,
INC., a Michigan Corporation, Jointly and
Severally,

Defendants/Counter-Plaintiffs,

and

CHERYL L. WISNIEWSKI, an individual,

Defendant.

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OPINION AND ORDER

Defendants/Counter-Plaintiffs Ray Wisniewski and Onyx Manufacturing, Inc., and Defendant Cheryl L. Wisniewski (collectively, “Movants”) have moved for summary disposition pursuant to MCR 2.116(C)(8) and (10). Plaintiff/Counter-Defendant Baker Aerospace Tooling & Machining, Inc., d/b/a Baker Machining & Mold Technologies, Inc. (“Plaintiff”) has filed a response and requests that the motion be denied.

Facts and Procedural History

Plaintiff is a large tooling supplier. In October 2009, Defendant Ray Wisniewski (“R. Wisniewski”) joined Plaintiff as a Technical Lead/R&D. In February 2010, R. Wisniewski executed a “Non-Compete Agreement”, with an effective date of February 2, 2010 (the “Non-Compete”). In addition, R. Wisniewski also executed a separate agreement addressing solicitation of employees and confidentiality (the “Agreement”).

In January 2012, Plaintiff hired Defendant Cheryl Wisniewski (“C. Wisniewski”) as an office assistant. In the same month, Plaintiff provided C. Wisniewski with an employee handbook.

On April 17, 2013, R. Wisniewski and C. Wisniewski resigned from their employment with Plaintiff. On April 18, 2013, R. Wisniewski formed Defendant Onyx Manufacturing, Inc. (“Onyx”), an entity which allegedly competes with Plaintiff.

On March 31, 2014, Plaintiff filed its complaint in this matter, asserting the following claims: Count I- Breach of Contract against all defendants, Count II- Breach of Fiduciary Duty against the Wisniewskis, Count III- Unfair Competition against all defendants, Count IV- Misappropriation of Trade Secrets against all defendants, Count V- Tortious Interference with Contractual Relations against all defendants, Count VI- Tortious Interference with Business Expectancy against all defendants, Count VII- Fraud/Fraudulent Concealment against the Wisniewskis, Count VIII- Unjust Enrichment against all defendants, Count IX- Conversion against all defendants, Count X- Conspiracy/Concert of Action against all defendants, and Count XI- Declaratory and/or Injunctive relief against all defendants.

On July 3, 2014, Movants filed their motion for partial summary disposition pursuant to MCR 2.116(C)(8). On September 15, 2014, the Court entered its Opinion and Order granting

Movants' motion and dismissed count I of Plaintiff's complaint to the extent that such claims were based on any non-competition agreements.

On August 1, 2014, Movants filed their instant motion for summary disposition. Plaintiff has filed a response and requests that the motion be denied. On October 9, 2014, the Court held a hearing in connection with the motion and took the matter 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 make its decision.

Standard of Review

Summary disposition may be granted pursuant to MCR 2.116(C)(8) on the ground that the opposing party has failed to state a claim upon which relief may be granted. *Radtke v Everett*, 442 Mich 368, 373-374; 501 NW2d 155 (1993). A motion under MCR 2.116(C)(10), on the other hand, 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

1) Count I- Breach of Contract.

As a preliminary matter, in light of the Court's September 15, 2014 Opinion and Order, the portion of Movants' instant motion related to Plaintiff's breach of contract claims based on

the alleged non-competition agreements no longer needs to be addressed by the Court. In addition, in the September 15, 2014 Opinion and Order the Court held that there is no contract between Plaintiff and C. Wisniewski. Consequently, any remaining portion of Plaintiff's breach of contract claim(s) against C. Wisniewski must be dismissed.

In its complaint, Plaintiff alleges that R. Wisniewski committed the following breaches (not including the previously dismissed non-competition allegations): (1) misappropriating and misusing of Plaintiff's proprietary and confidential information, documentation, and trade secrets, (2) contacting Plaintiff's customers, soliciting their business, and providing the same services Plaintiff provides; and (3) soliciting and hiring Plaintiff's employees.

a) Misappropriation

In its response, Plaintiff contends that R. Wisniewski has the following of Plaintiff's information/documentation: (i) supplier list; (ii) quality assurance manual; (iii) Baker DataFlow documents; (d) computer passwords; (e) contact lists; (f) document templates; (g) pricing information; and (h) machinery diagrams.

It appears undisputed that R. Wisniewski and Onyx are in possession of at least some of the items listed above. Nevertheless, Movants contend that R. Wisniewski did not breach the terms of the Non-Compete or the Agreement (collectively, the "Contracts"). With respect to confidentiality, the Non-Compete provides:

Confidentiality. [R.Wisniewski] and all related entities will not at any time or in any manner, either directly or indirectly, use for the personal benefit or divulge, disclose, communicate in any manner any information that is proprietary to [Plaintiff] and all related companies and will protect such information and treat it as confidential. (*See* Plaintiff's Exhibit 3.)

Further, the Agreement provides, in pertinent part:

[R. Wisniewski] [a]grees to receive in confidence from [Plaintiff] all secret and confidential information, processes, procedures, type of tooling, names of

machines used in operation, customer names, vendor and supplier names, employee names, data and/or any information what so ever obtained from [Plaintiff] relative to [Plaintiff's] plant, facilities, products and processes during the course of said review and disclosure. As a general guide, it may be said that any unpublished information is secret and confidential. (*See* Plaintiff's Exhibit 4.)

In their motion, Movants contend that their obligations with respect to confidentiality are governed by the Non-Compete and the Agreement (collectively, the "Contracts") and that as such their obligations are limited by the one year limitations period provided in the Non-Compete. However, while the Non-Compete does include a one year limitations period with respect to the non-compete and non-solicitation provisions, neither of the Contracts contains a limitations period with respect to confidentiality. *See* Plaintiff's Exhibits 3 & 4. Therefore, Movants' contention is plainly without merit.

Next, Movants contend that merely removing information from Plaintiff's computer does not violate the confidentiality provisions as is evidenced by the fact that Plaintiff's employee handbook provides that proprietary information may be removed "in the pursuit of company business." *See* Movants' Exhibit C. While Plaintiff does not appear to maintain that R. Wisniewski's act of removing its information alone violated the confidentiality provisions, it does assert that R. Wisniewski breached the provisions by transferring that information onto Onyx's computers. What Plaintiff appears to assert is that Onyx is a separate entity that was founded to engage in a business that is competitive to Plaintiff and that R. Wisniewski breached the Contracts by transferring its information to Onyx.

Generally the law treats a corporation as an entirely separate entity from its stockholders, even where one person owns all of the corporation's stock. *Kline v Kline*, 104 Mich App 700, 702; 305 NW2d 297 (1981). While Movants contend that the transfer to Onyx was incidental and that Onyx has not utilized Plaintiff's information, the fact remains that R. Wisniewski

provided Onyx, one of Plaintiff's competitors, with Plaintiff's information. Accordingly, the Court is convinced that at a minimum a genuine issue exists as to whether R. Wisniewski breached one or more of the Contracts by transferring Plaintiff's information to Onyx. For these reasons, Movants' motion for summary disposition of Plaintiff's breach of contract claim against R. Wisniewski must be denied with respect to Plaintiff's claims based on the confidentiality provisions.

b) Solicitation of Plaintiff's Customers

In its complaint, Plaintiff alleges that R. Wisniewski and Onyx used its confidential information to solicit Plaintiff's customers and employees in direct contravention of the Contracts' non-solicitation provisions. Specifically, the Non-Compete provides:

NON-SOLICITATION CONVENANT. For a period of one (1) year after the effective date of this Agreement, [R. Wisniewski] and related entities will not directly or indirectly solicit, or compete on the same programs, contracts, and work that [Plaintiff] and their related companies are bidding for their customers and their related companies.

In addition, the Agreement provides:

[R. Wisniewski] will not solicit or contact for any reason, or attempt to induce, or aid, assist or abet any other party or person in inducing or attempting to induce, hire or attempt to hire, any employee who is or was associated with [Plaintiff] or any related Company for a ten year period, causing to alter or terminate his or her employment or other relationship with [Plaintiff] or any related Company will result in unlimited compensation.

With respect to non-solicitation of Plaintiff's customers, Plaintiff contends that the parties intended the non-solicitation provision to expire 1 year after Ray's employment ended rather than 1 year after the Non-Compete became effective, and requests that the Court utilize the Non-Compete's severability provision to alter/clarify its terms.

While it is the Court's obligation to determine the intent of the contracting parties, if the language of the contract 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 Court is convinced that the plain language of the Non-Compete provides that the non-solicitation provision was to expire in February 2011, well before R. Wisniewski left Plaintiff, started Onyx and engaged in the complained of activities regarding Plaintiff's customers. While Plaintiff may have intended to limit R. Wisniewski's ability to solicit its customers for 1 year after his employment ended, the plain language of the contract it drafted provides otherwise. Even if the Court were to find the language of the Non-Compete ambiguous, which it clearly is not, the language would be construed against Plaintiff as the drafting party. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 474; 663 NW2d 447 (2003). Based on the clear language of the Non-Compete and the fact that it is undisputed that the Movants did not compete with Plaintiff within 1 year of R. Wisniewski executing the Non-Compete, the Court is satisfied that Plaintiff's breach of contract claim must be dismissed to the extent is based on the non-solicitation of customers provision of the Non-Compete.

With regards to the non-solicitation of employees provision contained in the Agreement, Movants contend that the 10 year limitations period is superseded by the 1 year time limitation provided in the Non-Compete as both related to solicitation. However, the Court is convinced that the documents do not overlap with respect to R. Wisniewski's ability to solicit. The plain

and unambiguous terms of the Non-Compete addresses solicitation of Plaintiff's customers while the terms of the Agreement govern solicitation of Plaintiff's employees, a topic not addressed by the Non-Compete. Accordingly, contrary to Movants' position the non-solicitation provision of the Agreement related to solicitation of employees is independent outside of the scope of the Non-Compete. Consequently, Movants' position is without merit. For these reasons, Movants' motion for summary disposition of Plaintiff's claim for breach of contract related to the solicitation of its employees by R. Wisniewski must be denied.

2) Count II- Breach of Fiduciary Duty

In their motion, Movants contend that neither R. Wisniewski nor C. Wisniewski owed Plaintiff a fiduciary duty. A fiduciary relationship...exists when there is a reposing of faith, confidence, and trust and the placing of reliance by one on the judgment and advice of another." *Farm Credit Services of Michigan's Heartland, PCA v Weldon*, 232 Mich App 662, 680; 591 NW2d 438 (1998). A person who is in a fiduciary relationship with another is under a duty to act for the benefit of the other person regarding matters within the scope of the relationship. *Teadt v Lutheran Church Missouri Synod*, 237 Mich App 567, 581; 603 NW2d 816 (1999). "Relief is granted when such position of influence has been acquired and abused, or when confidence has been reposed and betrayed." *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 508; 536 NW2d 280 (1995). Unless circumstances indicate otherwise, the employer/employee relationship alone generally does not give rise to fiduciary duties. See e.g., *Bradley v Gleason Works*, 175 Mich App 459, 463, 438 NW 2d 330, 332 (1989).

a. R. Wisniewski

In its response, Plaintiff asserts that R. Wisniewski was its vice president of aerospace operations, an executive position earning \$120,000.00 per year. In support of its position,

Plaintiff relies on its organizational chart as of 9/17/12. (See Plaintiff's Exhibit 2.) In their motion Movants contend that R. Wisniewski was not a high level executive as is evidence by his former title of "Technical Lead/R&D." However, R. Wisniewski's former title does not alter the fact that he later acquired a different title. While the scope of R. Wisniewski's employment duties is in dispute that at best creates a genuine issue of material fact which requires more factual development, which precludes summary disposition of this issue at this time.

In addition, the Court is convinced that Movants' contention that Plaintiff's misappropriation claims are preempted by the Michigan Uniform Trade Secrets Act is without merit. Contrary to Movants' contention, Plaintiff's claims are not premised entirely on their allegation that Movants' misappropriated trade secrets; rather, Plaintiff alleges that the Wisniewskis breached their duties by using its confidential information, **including** trade secrets, for their own benefit and/or the benefit of Onyx. While the alleged misuse of trade secrets forms a portion of Plaintiff's claims it is but one type of allegedly improper conduct. MUTSA displaces claims that are "based solely upon the misappropriation of a trade secret. *Bliss Clearing Niagara, Inc v Midwest Brake Bond Co*, 270 F Supp 2d 943, 946 (WD Mich 2003). In this case, Plaintiff's breach of fiduciary duty claims are not displaced by MUTSA as misappropriation of trade secrets forms a portion, but not all of, Plaintiff's claims.

b. C. Wisniewski

It appears undisputed that C. Wisniewski's role with Plaintiff was that of an office assistant. Nevertheless, Plaintiff contends that discovery stands a fair chance of adducing facts establishing her fiduciary relationship to Plaintiff given its allegation that she was R. Wisniewski's "right hand." However, Plaintiff has failed to provide any authority for potentially finding that a secretary/administrative assistant owes a fiduciary duty to a corporation. While C.

Wisniewski may have aided R. Wisniewski's exercise of his fiduciary responsibilities, if any, the Court is satisfied that C. Wisniewski did not owe Plaintiff any fiduciary duties herself. Consequently, Movants' motion for summary disposition of Plaintiff's breach of fiduciary duty claims against C. Wisniewski must be granted.

3) Count III- Unfair Competition

In their motion, Movants contend that they are entitled to summary disposition of Plaintiff's unfair competition claims because such claims are displaced by MUTSA. However, for the reasons discussed above Movants' contention is without merit.

Movants also contend that Plaintiff's claim is invalid to the extent that it is based on the alleged contracts between the parties. With regards to Onyx and C. Wisniewski, the Court has already held that Plaintiff did not enter into a binding contract with either party. Accordingly, its unfair competition claims against them based on an alleged breach of contract is without merit. With respect to R. Wisniewski, the Court remains satisfied that a genuine issue exists as to whether he breached his contracts with Plaintiff by allegedly providing Onyx with Plaintiff's confidential and proprietary information and/or by soliciting Plaintiff's employees. Accordingly, Movants' motion for summary disposition of Plaintiff's unfair competition claim against R. Wisniewski must be denied.

4) Count IV- Misappropriation of Trade Secrets

In their motion, Movants contend that Plaintiff has failed to provide any description or facts related to specific trade secrets allegedly misappropriated. In its response, Plaintiff asserts that "a genuine issue of material fact remains with respect to whether the information purloined by Defendants constitutes trade secrets under MUTSA." (*See* Plaintiff's response at 18.) In addition, Plaintiff cites to Movants' discovery response and its expert's initial report in support

of its assertion that R. Wisniewski took its information and gave it to Onyx. However, Plaintiff has not specifically plead or provided a list of the alleged trade secrets that Movants have allegedly misappropriated. Accordingly, the Court is convinced that Plaintiff must amend its complaint to more specifically plead its trade secrets claim.

5) Counts V and VI- Tortious Interference with Contract and/or Business Expectancy

The requisite elements for tortious interference with a contract or business expectancy are: (1) the existence of a contract or valid business relationship or expectancy, (2) knowledge of the contract or business relationship or expectation of the relationship by the interferer, (3) an intentional interference causing a breach, disruption, or termination of the contract or business relationship or expectation, and (4) resulting in damages to the complaining party. *Baidee v Brighton Area Schools*, 265 Mich App 343, 365-366; 695 NW2d 521 (2005); *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 255; 673 NW2d 805 (2003). One who alleges tortious interference must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law. *Baidee, supra* at 367; *CMI Int'l, Inc v Internet Int'l, Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002). “A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances.” *Baidee, supra*, quoting *Prysak v RL Polk Co*, 193 Mich App 1, 12-13; 483 NW2d 629 (1992). “If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference.” *Baidee, supra*, quoting *CMI Int'l, supra* at 131. If the interferer’s actions were motivated by legitimate business reasons, its actions would not establish improper motive or interference. *Baidee, supra* at 366. 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 its response, Plaintiff contends that Movants utilized the misappropriated information to induce customers/potential customers to terminate or diminish their ongoing relationships with Plaintiff. However, Plaintiff has failed to provide the Court with any evidence that Movants' alleged improper conduct caused any of its customers to breach or terminate their contracts with Plaintiff. In addition, Plaintiff has failed to cite to any valid business expectancy that was affected by Movants' actions. Rather, Plaintiff's allegations seem to be based on their hope for additional orders from their existing customer(s) and for orders from new customers. However, the Court is convinced that these allegations fall into the category of wishful thinking rather than that of valid business expectancies. Consequently, the Court is satisfied that Plaintiff's claims for tortious interference fail as a matter of law.

6) Count VII- Fraud/Fraudulent Concealment

Movants' motion for summary disposition of Plaintiff's fraud claims is based on its assertion that they did not owe Plaintiff a duty to disclose. While the Court agrees that C. Wisniewski did not owe Plaintiff a fiduciary duty, the Court, for the reasons discussed above, is convinced that a genuine issue of fact remains as to the scope of R. Wisniewski's duty/duties to Plaintiff, if any. Accordingly, Movants' motion for summary disposition of Plaintiff's fraud claim must be granted with respect to C. Wisniewski but denied with regards to R. Wisniewski.

7) Counts VIII and IX- Unjust Enrichment and Conversion

Movants' motion is based on their meritless contention that Plaintiff's unjust enrichment and conversion claims are displaced by MUTSA. Consequently, Movants' motion for summary disposition of Plaintiff's unjust enrichment and conversion claims against W. Wisniewski and Onyx must be denied. However, Movants are entitled to summary disposition of Plaintiff's

unjust enrichment and conversion claims against C. Wisniewski as Plaintiff has failed to provide any proof that she took, or received from the other Defendants, any of Plaintiff's information.

8) Count X- Conspiracy

Movants' motion is based on their assertion that Plaintiff has no viable underlying tort claim. While Movants' are entitled to summary disposition of all of Plaintiff's claims against C. Wisniewski, not all of Plaintiff's tort claims against R. Wisniewski and Onyx have been dismissed. Accordingly, Movants' motion for summary disposition of the conspiracy claims must be granted with respect to C. Wisniewski but denied as to the other Defendants.

Conclusion

Defendants/Counter-Plaintiffs Ray Wisniewski and Onyx Manufacturing, Inc., and Defendant Cheryl L. Wisniewski's ("Movants") motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically:

- (1) Movants' motion for summary disposition of Plaintiff's claims against Defendant Cheryl L. Wisniewski is GRANTED.
- (2) Movants' motion for summary disposition of Plaintiff's claims against Defendant/Counter-Plaintiff Onyx are GRANTED, IN PART and DENIED, IN PART.
 - i. Movants' motion for summary disposition of Plaintiff's Count I- Breach of Contract (Count I) and Tortious Interference (Counts V and VI) claims against Onyx is GRANTED. Movants' motion for summary disposition of Plaintiff's Unfair Competition (Count III), Misappropriation of Trade Secrets (Count IV), Unjust Enrichment (Count VIII), Conversion (Count IX), Conspiracy/Concert of Action

(Count X) and Declaratory and/or Injunctive Relief (Count XI) against Onyx is DENIED.

(3) Movants' motion for summary disposition of Plaintiff's Tortious Interference claims (Counts V and VI) and portion of the Breach of Contract claim (Count I) related to the alleged solicitation of Plaintiff's customers against Defendant/Counter-Plaintiff Raymond A. Wisniewski is GRANTED. Movants' motion for summary disposition of Plaintiff's remaining Breach of Contract claims (Count I), and claims for Breach of Fiduciary Duty (Count II), Unfair Competition (Count III), Misappropriation of Trade Secrets (Count IV), Fraud/Fraudulent Concealment (Count VII), Unjust Enrichment (Count VIII), Conversion (Count IX), Conspiracy/Concert of Action (Count X), and Declaratory and/or Injunctive Relief (Count XI) claims against R. Wisniewski is DENIED.

(4) Plaintiff shall, within 14 days of the date of this Opinion and Order, amend its misappropriation of trade secrets claim to specifically identify the alleged trade secrets taken.

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: November 24, 2014

JCF/sr

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