STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

FRASER ENGINE REBUILDER, INC.,
and ENGINE & TRANSMISSIONS, INC.,
Plaintiffs,

vs. Case No. 17-1424-CB

MPO, INC. and LANCASTER
ADVERTISING & MARKETING.
Defendants.
_____________________________________/

OPINION AND ORDER

This matter comes before the Court on Defendants MPO, Inc. ("MPO") and Lancaster Advertising & Marketing ("Lancaster Advertising" or together as "Defendants") motion for summary disposition under MCR 2.116(C)(7), (8) and (10).

I. Background

Ricco Ramaci is the principal of plaintiffs Fraser Engine Rebuilder, Inc. ("Fraser Engine") and its successor entity Engine & Transmission Incorporated ("E&T" or together as "Plaintiffs"). Kenneth Lancaster is the principal of defendants Lancaster Advertising and MPO. This case arises out of business relationships between Mr. Ramaci's and Mr. Lancaster's entities.

The Complaint alleges that Lancaster Advertising operated a website known as "Powertrain Direct" that generated leads for the sale of engines and transmissions. Complaint ¶11. Fraser Engine claims that it entered into a contract with Lancaster Advertising whereby Fraser Engine would be the exclusive customer and sole licensee of Powertrain Direct. Complaint ¶60.

According to the Complaint, because of a concern that customers would become confused about Fraser Engine's ability to sell new engines and transmissions when it had previously acted as a repair shop, Mr. Ramaci formed a new entity, E&T, dedicated to the sale of engines and transmissions. Complaint ¶22. By 2016, Mr. Lancaster did business as MPO. *Id.* ¶27. Plaintiffs allege that MPO also represented that E&T would be the sole customer and exclusive licensee of Powertrain Direct and receive all leads. *Id.* ¶29. Plaintiffs claim that Defendants breached their oral promises by giving sales leads to a competitor and, *inter alia*, by creating a new company that directly competed with E&T. *Id.* ¶33.

The parties entered in to three written IMS Agreements. The first, dated August 28, 2014 was between Fraser Engine and Lancaster Advertising. On January 5, 2016, MPO and E&T entered an IMS Agreement for $18,000 per month. On January 26, 2016, MPO and E&T entered into another IMS Agreement for $32,000 per month. A License Agreement between MPO and E&T was signed in January 2016, however, E&T now claims that an unauthorized agent signed the Agreement and therefore E&T denies entering into the Agreement. The Court issued an *Opinion and Order* on February 6, 2018 denying Defendants' motion for summary disposition under MCR 2.116(C)(8) with regard to a forum selection clause in the License Agreement.

On April 19, 2017, Plaintiffs filed their Complaint alleging: count I, breach of contract by Fraser Engine against Lancaster Advertising; count II, breach of contract by E&T against MPO; count III appears to state a claim for claim and delivery; count IV for defamation brought by E&T against MPO; count V, unfair competition and count VI for tortious interference.

II. Standards of Review

Summary disposition is appropriate pursuant to MCR 2.116(C)(7) if "[t]he claim is barred because of release, payment, prior judgment, immunity granted by law, statute of limitations, statute of frauds, an agreement to arbitrate, infancy or other disability of the moving party, or assignment or other disposition of the claim before commencement of the action." In reviewing a motion under MCR 2.116(C)(7), the Court accepts all well-pled factual allegations as true and construes in them in the light most favorable to the nonmoving party. *Stablein v Schuster*, 183 Mich App 477, 480; 455 NW2d 315 (1990). "If the pleadings or other documentary evidence reveal no genuine issues of material fact, the court must decide as a matter of law whether the claim is statutorily barred." *Holmes v Michigan Capital Medical Ctr,* 242 Mich App 703, 706; 620 NW2d 319 (2000); *Guerra v Garratt,* 222 Mich App 285, 289; 564 NW2d 121 (1997). If, however, a genuine issue of material fact exists such that factual development could provide a basis for recovery, summary disposition is inappropriate. *Guerra, supra* at 289.

Summary disposition under MCR 2.116(C)(8) is appropriate where a party fails to state a claim upon which relief can be granted. *Carter v Ann Arbor City Attorney*, 271 Mich App 425, 426-427; 722 NW2d 243 (2006) (citation omitted). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119–20; 597 NW2d 817 (1999). The court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* citation omitted. A court will only grant a motion under MCR 2.116(C)(8) where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* When deciding a motion brought under this section, a court considers only the pleadings. MCR 2.116(G)(5).

The Court will grant a motion for summary disposition under MCR 2.116(C)(10) if the documentary evidence shows no genuine issue of material fact. *Smith v Globe Life Ins Co*, 460 Mich 446, 454-55; 597 NW2d 28 (1999). The party opposing the motion for summary disposition has the burden of showing that a genuine issue of disputed fact exists. *Fulton v Pontiac Gen Hosp*, 160 Mich App 728, 735; 408 NW2d 536 (1987). The opposing party may not rest upon mere allegations or denials in the pleadings but must, by affidavit or other documentary evidence, set forth specific facts showing that there is a genuine issue for trial. MCR 2.116(G)(4). The Court does not assess credibility, weigh the evidence, or resolve factual disputes; if material evidence conflicts, the Court will deny the motion for summary disposition under MCR 2.116(C)(10). *Pioneer State Mut Ins Co v Dells*, 301 Mich App 368, 377; 836 NW2d 257 (2013).

III. Law and Analysis

A. Counts I and II (Breach of Contract)

1. Failure to State a Claim

Defendants argue that Counts I and II of Plaintiffs' Complaint fail to state claims for breach of contract because none of the written agreements between the parties actually contain the promises allegedly breached—specifically that: Plaintiffs would be the exclusive customer/sole licensee of Powertrain Direct; Plaintiffs would receive all sales leads; and that Defendants would give weekly meetings and access to Powertrain Direct's analytics and related data. To the extent Plaintiffs rely on an oral rather than written agreement, Defendants claim that the evidence does not support Plaintiffs' allegations and that such an agreement would violate the statute of frauds.

A valid contract requires "(1) parties competent to contract, (2) a proper subject matter, (3) a legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation." *Thomas v Leja,* 187 Mich App 418, 422; 468 NW2d 58 (1991) (citation omitted). To establish a breach of contract, a plaintiff must establish "(1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller–Davis Co v Ahrens Construction, Inc (On Remand),* 296 Mich App 56, 71; 817 NW2d 609 (2012).

"Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Universal Underwriters Ins Co v Kneeland,* 464 Mich 491, 496; 628 NW2d 491 (2001). "If the contractual language is unambiguous, courts must interpret and enforce the contract as written." *In re Egbert R. Smith Trust,* 480 Mich 19, 24; 745 NW2d 754 (2008).

In the present case, to the extent Plaintiffs base their breach of contract claims on the written contracts, Plaintiffs have not cited nor has the Court identified any specific written provisions to support the promises Defendants allegedly breached. Specifically, in their Complaint, Plaintiffs aver that Defendants promised to "cancel out all other customers," that Fraser Engine "would be the sole customer and exclusive licensee of Powertrain Direct and would receive all leads generated by Powertrain Direct." Complaint ¶16, see also, ¶21, 25, 29, 60. Further, Plaintiffs aver that Defendants "expressly represented that Powertrain Direct was the only program [Defendants] would operate in the engines and transmissions space." *Id.* ¶17. Plaintiffs allege that Defendants violated their representations by "giving sales leads generated from Powertrain Direct to a competitor . . ." *Id.* ¶19, 61.

Plaintiffs also maintain that Defendants promised "enhanced services designed to generate increased sales volumes . . .[including] providing E&T with . . . analytics, dashboards, [and] Google spend and related data. . ." *Id.* ¶27. Further, the Complaint states that Defendant Lancaster promised to develop for E&T a program "called 'Sales Fury' which. . . has never been forthcoming." *Id.* ¶38-39. As to the breach claims in Count II, relating to an alleged agreement between E&T and MPO, Plaintiffs complain that MPO breached its promise that E&T would be the exclusive licensee of Powertrain Direct, would receive all sales leads, would have weekly meetings, and would have access to analytics data. *Id.* ¶64-65. To broadly summarize, Plaintiffs base their breach of contract claims in the Complaint on three categories of promises: exclusivity, data access, and development of a sales program.

With Plaintiffs' allegations in mind, the Court turns to the alleged written agreements at issue in this case—which include three IMS agreements and a License Agreement. Regarding the IMS Agreements, the barely legible copies supplied to the Court read work orders and primarily recite a list of obligations that do not necessarily speak for themselves. The 8/28/14 IMS Agreement between Fraser Engine and Lancaster Advertising appears to state under "description,"

> Development and management of an integrated marketing system, to include:
> redesign two company websites for lead generation, engine sales, engine installation,
> Back door lead service, installation and launch on both websites, tag management platform and strategy for both websites,
> Paid search strategy for both websites,
> organic search strategy for both websites,
> content strategy for both websites,
> local search strategy for both websites,
> mobile search strategy for both websites, and
> email marketing platform and strategy for both websites.

Defendants' Exhibit 5. Defendants also attach an IMS Agreement dated January 5, 2016 between MPO and E&T, relating to "lead generation service as an Integrated System from the following [illegible]: [illegible] concept, programming, paid search, organic search, email marketing. . ." Defendants' Exhibit 12. The "total cost" of the January 5, 2016 IMS Agreement was $18,000 per month. *Id.*

Defendants also include a second IMS Agreement between MPO and E&T, dated January 26, 2016, containing a total cost term of $32,000 per month, for "subscription to integrated marketing system" powertraindirect.com, "includes expert lead generation services as an integrated system from the following" "leadership, research & analytics, content, programming, paid search, organic search, email marketing." *Id.* Nowhere do the IMS agreements expressly confer on Plaintiffs the right to be the "exclusive customer" or "sole licensee of Powertrain Direct." The written IMS Agreements also do not appear to make particular mention of data access or a sales fury program. It is unclear then, what, if any, of the above promises support Plaintiffs' breach of contract claims.

The License Agreement, on the other hand, not only fails to contain promises of exclusivity but, to the contrary, contains a non-exclusivity clause. Section 2.1 states, "MPO hereby grants to Client, and Client hereby accepts from MPO, a personal, *non-exclusive* right and license to use the Licensed Mark solely and exclusively in connection with cliente, leads and products that MPO may provide to the Client." Defendants' Exhibit 11, emphasis added.

Although the License Agreement may contradict Plaintiffs' allegations of breach of promises of exclusivity, Plaintiffs deny the validity of the written License Agreement on the basis that it lacks an authorized signature. Plaintiffs clearly therefore do not base their breach claims on the language of the License Agreement, which they disclaim. Instead, Plaintiffs concede that their "Complaint does not allege any breach of contract or tortious conduct by Defendants during the . . . pendency of the License Agreement." Having identified no writing to support Plaintiffs' breach claims, it follows that the alleged contracts Plaintiffs seek to enforce were oral.

Although Plaintiffs do not identify any written provision in the agreements, they have alleged the necessary elements to state a claim for breach of an oral contract. That is, Plaintiffs allege the existence of an agreement, that was breached, and that they incurred damage. See e.g., Complaint paragraphs 30-40, 59-62, 64-67. Therefore, Defendants' motion for summary disposition on counts I and II for failure to state a claim must be denied.

2. Statute of Frauds

To the extent Plaintiffs rely on an oral agreement rather than a written one, Defendants argue that that the statute of frauds bars Plaintiffs claims because the interest in the website and related software is a "thing in action." As such, it must have been in writing.

MCL 566.132(1)(f) provides that an agreement is void unless in writing and signed by an authorized party when the agreement concerns an "assignment of things in action . . ." A "thing in action" is synonymous with a "chose in action." *Burkhardt v Bailey*, 260 Mich App 636, 655 n9; 680 NW2d 453 (2004) citation omitted. "A chose in action is a right to personal things of which the owner has not the possession, but merely a right of action for their possession." *Id.* Internal quotation marks and citations omitted. A chose in action is the "right of a creditor to be paid"; a "right not reduced to possession but recoverable by bringing and maintaining an action" . . . *Id.*

Here, Plaintiffs' claims for breach of promises of exclusivity, data access and development of a sales program do not amount to a "chose in action" or "things in action" because they do not concern creditor's rights or things not in an owner's possession but to which an owner has a right of action to recover. Put differently, Plaintiffs do not seek to enforce an assignment of a right to payment or possession under a right of action. Instead, Plaintiffs seek damages for Defendants' alleged breaches to perform as promised. Therefore, subsection (f) of the statue of frauds does not bar Plaintiffs' alleged agreements in Counts I and II.

2. "Parol Evidence" Rule

Defendants next argue that even if Plaintiffs base their breach claims on purported oral agreements and not the writings mentioned above, the parol evidence rule would bar its enforcement because Plaintiffs would seek to vary the express non-exclusive terms of the License Agreement.

Yet Plaintiffs denied that E&T entered into the License Agreement, an argument this Court addressed in its February 6, 2018 *Opinion and Order*. The question of enforceability of the License Agreement has caused considerable dispute between the parties in this case not just because of the exclusivity term but because the License Agreement also contains a Texas forum selection clause. Specifically, ¶7.4 of the License Agreement states,

> This Agreement shall be governed by, and construed in accordance with, the laws of the State of Texas. The parties unconditionally and

> irrevocably consent to the exclusive jurisdiction of the courts located in the State of Texas and waive any objection with respect thereto, for the purpose of any action, suit or proceeding arising out of or relating to this Agreement or the transactions contemplated thereby.

However, Defendants can only enforce the forum selection clause in the License Agreement if E&T agreed to the clause in the first place.

Initially, Plaintiffs denied that Mr. Ramaci signed the License Agreement on behalf of E&T. Mr. Ramaci testified at his deposition that he never signed the document. Defendants' Exhibit 7. Then Defendants obtained records by discovery indicating that the alleged signature was transmitted from Mr. Ramaci's fax number. Defendants' Exhibit 6. Now Plaintiffs modify their position to claim Mr. Ramaci's son Paolo signed his father's name to the signature page of the License Agreement believing it was a routine matter. Exhibit 8, Affidavit of Paolo Ramaci. Paolo Ramaci states that he had his father's authority to sign his name to certain routine documents like purchase orders and checks. *Id.* For that reason, Defendants argue that the License Agreement is now enforceable since Paolo Ramaci claims he had actual authority to sign his father's name.

"The authority of an agent to bind a principal may be either actual or apparent." *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). "Apparent authority arises where the acts and appearances lead a third person reasonably to believe that an agency relationship exists. However, apparent authority must be traceable to the principal and *cannot be established only by the acts and conduct of the agent.*" *Id.* emphasis added.

Here, Paolo did not have actual authority because Ricco Ramaci still claims "I did not sign the purported License Agreement and I did not authorize anyone to place my signature on it." Affidavit of Ricco Ramaci, Response, Exhibit 1. As the putative agent, Paolo Ramaci's statement that he had authority to sign his father's name, standing alone, does not establish that he had apparent authority to do so. More particularly, only Ricco Ramaci's acts or conduct could establish the apparent authority of Paolo Ramaci. While Plaintiffs modified their position regarding the License Agreement, they still have not admitted that an authorized agent of E&T signed it. Even if a position strains credulity, it is well-settled that on a motion for summary disposition under MCR 2.116(C)(10), the Court does not assess credibility. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994).

At this point, questions of material fact remain whether the parties actually entered into the License Agreement. Enforcement of the forum selection clause and application of the parol evidence rule depends on a determination that the parties entered into the License Agreement in the first place. See, *Hamade v Sunoco Inc (R & M)*, 271 Mich App 145, 166; 721 NW2d 233 (2006)(Parol evidence of prior or contemporaneous agreements that contradict or vary the written contract, is not admissible to vary the terms of a contract which is clear and unambiguous.") Further, the Court need not address Plaintiffs' argument relating to the duration or termination of the License Agreement because doing so requires interpretation of the agreement. Not only does the Court have no reason to construe the License Agreement until the evidence or admissions show that the parties agreed to its terms, but the forum selection clause requires that only Texas law applies when construing the Agreement.

Finally, regarding Counts I and II, Defendants argue that the doctrine of anticipatory breach bars Plaintiffs' claims. Specifically, Defendants rely on an email correspondence on March 22, 2017 apparently mistakenly sent to Mr. Lancaster from Mr. Ramaci's attorney indicating a plan to "switch your activities away from them." Exhibit 14. Plaintiffs respond that the alleged breaches occurred before the alleged repudiation in March 22, 2017 so Defendants may not rely on the doctrine of anticipatory breach. When the alleged breaches occurred requires further factual development. Moreover, clearly allegations relating to Frasier Engine occurred before the events in March 2017 with E&T because Fraser Engine was E&T's predecessor entity. See also Complaint ¶33. Therefore, Defendants have not shown that the alleged breaches in Counts I and II occurred after Plaintiffs' alleged repudiation of the contract. For the reasons stated above, Defendants' motion for summary disposition on Counts I and II must be denied.

B. Count III (Claim and Delivery)

Defendants argue that the statute of frauds also bars Plaintiffs' claims in Count III because it pertains to the development of software and intellectual property. Defendants cite no additional authority for their argument but appear to rely on the same statue of frauds arguments raised in Counts I and II. Having decided that Defendants' arguments in Count I and II lacks merit, Defendants' arguments regarding the statute of frauds in Count III likewise lack merit for the same reasons as discussed above.

C. Count IV (Defamation)

Defendants argue that Plaintiffs state mere conclusions without any factual support for their defamation claim. However, Defendants cited no authority or evidence to support their motion. "A statement of position without supporting citation is insufficient to bring an issue before this Court." *Kuzinski v Boretti*, 182 Mich App 177, 180; 451 NW2d 859 (1989). Nonetheless, Plaintiffs have stated a claim for defamation.

In Michigan, the four basic elements of a defamation claim are as follows: "(1) a false and defamatory statement concerning the plaintiff, (2) an unprivileged communication to a third party, (3) fault amounting at least to negligence on the part of the publisher, and (4) either actionability of the statement irrespective of special harm (defamation per se) or the existence of special harm caused by publication." *Ghanam v Does*, 303 Mich App 522, 544; 845 NW2d 128 (2014) citation omitted. A statement that a corporation is no longer in business or is incapable of doing business affects that corporation's business reputation and its ability to do business. Those statements may be the basis for a cause of action for slander per se. *Heritage Optical Ctr, Inc v Levine*, 137 Mich App 793, 798; 359 NW2d 210 (1984).

Here, Plaintiffs have alleged that representatives of MPO communicated to numerous customers that E&T was no longer in business. Complaint ¶ 74. Though sparse, the Complaint contains the substance of allegedly false statements, communicated to a third party, that Defendants knew the statements were false, and E&T sustained damage to its reputation. Complaint ¶75-77. Therefore, Defendants motion for summary disposition for failure to state a claim will be denied.

D. Count V (Unfair Competition) and Count VI (Tortious Interference)

Defendants argue that Plaintiffs fail to state claims for unfair competition and tortious interference in Counts V and VI of the Complaint. Defendants contend that Plaintiffs' allegations are "completely conclusory" and should be dismissed. However, once again, Defendants cite no legal authority, no factual support, and provide little analysis for their position. Therefore, Defendants have not properly brought an issue before this Court regarding Counts V and VI.

Finally, Defendants renew their motion seeking enforcement of the Texas forum selection clause in the License Agreement. For the reasons discussed above, questions of material fact remain regarding the enforceability of License Agreement and therefore the forum selection clause contained therein. Additionally, Plaintiffs have stated that they do not base their breach claims on the License Agreement but on a purported oral agreement of exclusivity. As a result, Plaintiffs allege breach of a different contract. Therefore, Defendants' renewed motion under the forum selection clause is denied. For all of these reasons, Defendants' motion for summary disposition is denied.

IV. Conclusion

For the reasons set forth above, Defendant's motion is DENIED. Pursuant to MCR 2.602(A)(3), this *Opinion and Order* neither resolves the last pending claim nor closes this case.

IT IS SO ORDERED.

Date: MAR 25 2019

Kathryn A. Viviano
Hon. Kathryn A. Viviano, Circuit Court Judge