

STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

PLATINUM SKIN CARE, INC.,
Plaintiff,

vs.

Case No. 17-4447-CB

TOTAL LIFE CHANGES, LLC, and
JACK FALLON, jointly and severally,
Defendants,

and

TOTAL LIFE CHANGES, LLC,
Defendant/Counter-Plaintiff,

vs.

PLATINUM SKIN CARE, INC.,
Plaintiff/Counter-Defendant.

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OPINION AND ORDER

This matter comes before the Court on defendant/counter-plaintiff Total Life Changes, LLC's ("Defendant TLC") motion for summary disposition under MCR 2.116(C)(10).

I. Background

Defendant TLC and Platinum Skin Care, Inc. ("Plaintiff Platinum") entered into a Confidentiality Agreement in 2013 in connection with the marketing and distribution of skin care products. The Confidentiality Agreement contains a non-competition clause and a termination clause. On December 5, 2017, through counsel, TLC provided written notice to Plaintiff Platinum exercising its rights under the termination clause to terminate the agreement.

On November 21, 2017, Plaintiff Platinum filed its Complaint alleging: Count I,

breach of contract for exclusivity; Count II, breach of contract for failure to pay; Count III, account stated; Count IV, unjust enrichment; Count V, fraudulent misrepresentation; and Count VI, innocent misrepresentation. On November 19, 2018, the parties stipulated to a dismissal of Counts II, III, and IV of Plaintiff's Complaint. The Court heard oral arguments on Defendant TLC's motion on November 5, 2018 and took the matter under advisement.

II. 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. Indeed, "an adverse party may not rest upon the mere allegations or denials of his or her pleadings, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial." MCR 2.116(G)(4).

III. Arguments

Defendant TLC argues that it properly terminated the Confidentiality Agreement on December 5, 2017. Therefore, according to Defendant TLC, Plaintiff Platinum is

precluded under the non-competition section of the Confidentiality Agreement from seeking damages for lost profits that accrued after the termination.

Plaintiff Platinum responds that the Court should deny the motion for summary disposition because paragraphs 8 and 9 of the Confidentiality Agreement specifically set forth a time frame and do not provide for early termination. Therefore, paragraphs 8 and 9 fall under the exception to the termination clause that states “except as otherwise provided in this Agreement....” Alternatively, Plaintiff Platinum argues that a question of fact exists based on ambiguity.

IV. Law and Analysis

Interpretation of contractual language is a question of law. *Morley v Automobile Club of Michigan*, 458 Mich 459, 465; 581 NW2d 237 (1998). When contract language is clear, unambiguous and has a definite meaning, courts do not write a different contract for the parties or consider extrinsic testimony. *Id.* Courts must interpret the terms of the contract according to their commonly used meanings. *Group Ins Co of Michigan v Czopek*, 440 Mich 590, 596; 489 NW2d 444 (1992). Courts must give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003). A contract is ambiguous when two provisions “irreconcilably conflict with each other or when a term is equally susceptible to more than a single meaning.” *Coates v Bastian Bros, Inc*, 276 Mich App 498, 503–04; 741 NW2d 539 (2007) quotations and citation omitted. When interpreting a contract, specific provisions normally override general ones. *Royal Prop Group, LLC v Prime Ins Syndicate, Inc*, 267 Mich App 708, 719; 706 NW2d 426 (2005).

In the present case, the termination clause in the Confidentiality Agreement provides:

18. Either party may terminate this Agreement by providing written notice to the other party. *Except as otherwise provided in this Agreement, all rights and obligations under this Agreement will terminate at that time.*

Plaintiff Platinum's Exhibit 2 (emphasis added). The parties do not contest that the agreement clearly and unambiguously provides that either party may terminate the Agreement. Neither do the parties contest that Defendant TLC communicated to Plaintiff Platinum On December 5, 2017 that it wished to exercise its right to terminate the Agreement under the termination clause in the Confidentiality Agreement.

Instead, the parties disagree about the scope and interpretation of the second sentence in the termination clause of paragraph 18—"except as otherwise provided in this Agreement, all rights and obligations under this Agreement will terminate at that time." Specifically, Plaintiff Platinum argues that Paragraphs 8 and 9 survive the termination clause. Those paragraphs state:

8. Other than with the express written consent of the Provider, which consent may not be unreasonably withheld, *the Recipient will not, for a period of ten(10) years, be directly or indirectly involved with a business which is in direct competition with the business lines of the Provider that are the subject of this Agreement.*

9. *For a period of ten (10) years, the Recipient will not divert or attempt to divert from the Provider any business the Provider had enjoyed, solicited, or attempted to solicit, from its customers, at the time the parties entered into the Agreement.*

Id. (emphasis added). Plaintiff Platinum reads the second sentence in the termination clause as excluding the non-compete provisions in paragraphs 8 and 9 because those paragraphs specifically provide for a period of ten years, and therefore otherwise provide a different time.

Defendant TLC reads paragraphs 8 and 9 of the Confidentiality Agreement as being subject to the termination clause and therefore terminable by either party at any time, regardless of their reference to a ten year period. Defendant TLC reads the second sentence of the termination clause as applying only to Paragraph 5, the only other instance where the Agreement explicitly addresses termination. Paragraph 5 reads:

5. The obligations to ensure and protect the confidentiality of the Confidential Information imposed on the Recipient in this Agreement and any obligations to provide notice under this *Agreement will survive the expiration or termination, as the case may be, of this Agreement* and will continue for a period of one (1) year from the date of such expiration or termination.

Id. emphasis added.

Following the language of the termination clause, the Court must look for provisions in the Agreement that otherwise provide for a time of termination of rights and obligations. Clearly Paragraph 5 addresses termination times and the survivability of certain rights and obligations. Paragraphs 8 and 9 provide for a specific time but do not explicitly address termination or survivability. However, while the non-competition section of the Confidentiality Agreement contains no language of continuing, post-termination obligations, the ten-year provisions in Paragraphs 8 and 9 would have little meaning if those provisions could be terminated at any time.

After reviewing the Agreement, the Court concludes that the termination clause is equally susceptible to two different interpretations and is therefore ambiguous. The phrase "except as otherwise provided" could refer only to the explicit mention in Paragraph 5 of rights and obligations that survive termination. Likewise, that sentence

of the termination clause could refer more broadly to other time frames articulated in the Agreement.

For these reasons, motion for summary disposition must be denied.

V. Conclusion

For the reasons set forth above, Defendant TLC'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: JAN 08 2019

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