

ESRVDV

STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

NORTHWOOD, INC.,
Plaintiff,

vs.

Case No. 17-4622-CB

OLYMPUS GLOBAL, LLC,
DELTA GLOBAL, LLC,
CHRISTOPHER SHAYA,
JEREMIAH MANKOPF, and
DANIEL GLADYS,
Defendants,

and

CHRISTOPHER SHAYA,
JEREMIAH MANKOPF,
and DANIEL GLADYS,
Defendants/Counter-Plaintiffs,

vs.

NORTHWOOD, INC.,
Plaintiff/Counter-Defendant,

and

JEREMIAH MANKOPF,
Defendant/Counter-Plaintiff/Cross-Plaintiff,

vs.

CHRISTOPHER SHAYA,
Defendant/Counter-Plaintiff/Cross-Defendant.

OPINION AND ORDER

Cross-defendant Christopher Shaya ("Mr. Shaya") filed a motion for summary disposition under MCR 2.116(C)(10) of cross-plaintiff Jeremiah Mankopf's ("Mr. Mankopf") remaining cross-claims.

1. Background

Northwood, Inc. ("Northwood"), a medical equipment provider, sold blood-glucose test strips to Olympus Global, LLC ("Olympus") and Delta Global, LLC ("Delta") for distribution under the terms of a Distribution Agreement. In this litigation, Northwood claims that Olympus and Delta in turn sold the test strips to buyers outside the permitted distribution network thereby causing Northwood to violate the terms of its contract with its manufacturer and incur related losses.

Mr. Mankopf and Mr. Shaya were founding principals of Olympus. Olympus dissolved and Mr. Mankopf and Mr. Shaya entered into a Dissolution Agreement in January 2015. The Dissolution Agreement contained clauses relating to release, fiduciary duties and indemnification. Around the same time, Mr. Shaya formed Delta with Mr. Gladys. Based on his findings in discovery in the Northwood litigation, Mr. Mankopf learned about Mr. Shaya's continued dealings with Northwood through Delta. Mr. Mankopf came to believe that Mr. Shaya misrepresented the basis for dissolution of Olympus.

Mr. Mankopf filed an Amended Cross-Claim against Mr. Shaya alleging: Olympus was profitable; Mr. Shaya expressed a desire to exit the business; Mr. Shaya actually had in place a secret plan to divert accounts with Northwood from Olympus to Delta thereby causing injury to Mr. Mankopf. Specifically, Mr. Mankopf's First Amended Cross-Claim against Mr. Shaya alleged six counts: count I, fraudulent misrepresentation; count II, civil conspiracy; count III, common law and statutory conversion; count IV, breach of contract; count V, contractual indemnification; count VI, and breach of express and contractual fiduciary duty.

The Court issued an *Opinion and Order* on December 19, 2018, dismissing under MCR 2.116(C)(8) counts I-III of the Cross-Complaint. Now Mr. Shaya moves for summary disposition under MCR 2.116(C)(10) of the remaining claims in counts IV-VI. The Court heard oral argument on April 26, 2019 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, Law and Analysis

A. *Count IV, Breach of Dissolution Agreement*

Mr. Shaya argues that no facts support Mr. Mankopf’s claim for breach of the Dissolution Agreement. Mr. Mankopf bases his breach claim in the Cross-complaint on alleged violation of the covenant to cease business. Yet, according to Mr. Shaya, no provision in the Dissolution Agreement requires Mr. Shaya to cease doing business.

Further, Mr. Shaya maintains that Mr. Mankopf cannot show breach of the Distribution Agreement based on the diversion of the Northwood contract from Olympus to Delta because Exhibit A to the Distribution Agreement does not identify the Northwood contract as an asset of Olympus. Regarding alleged breaches of the covenant of confidentiality and breach of contractual fiduciary duty, Mr. Shaya maintains that Mr. Mankopf fails to cite any facts in support of those claims. Finally, Mr. Shaya claims that unrefuted evidence establishes that he did not breach the confidentiality agreement or fiduciary duty clause.

Mr. Mankopf responds that Mr. Shaya exploited confidential information from Olympus because he immediately formed Delta and continued the relationship with Northwood using the same contract negotiated between Northwood and Olympus. Mr. Mankopf argues that under the definition of “confidential information,” in the Dissolution Agreement, Mr. Shaya used confidential information by his continued dealings through Delta.

In order 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).

As an initial matter, nothing in the Dissolution Agreement requires Mr. Shaya to “cease business.” In addition, to the extent Mr. Mankopf’s breach of contract claim rests on contractual fiduciary duty, the Court will address that claim under Count VI below.

To the extent that the breach of contract claim rests on the misuse of confidential information, Paragraph 3(b) of the Dissolution Agreement states that the members agree “that they will not disclose any of the Confidential Information to anyone. . .” Mr. Mankopf’s Exhibit 4. The Dissolution Agreement defines “confidential information” as:

Confidentiality; Non-Disparagement. The term “Confidential Information” means and includes any and all information concerning the existence and operation of the Company, including any and all information relating to the Company’s (sic) its customers’, vendors’ and subcontractors’ past, current and future products, trade secrets, product plans, technology, research, specifications. . . *employee and contract relationships, customer names and other information related to customers, price lists, pricing policies and financial, business, technical and other information and materials disclosed or made available to a Member. . .* the term “Confidential Information” shall not include information which (i) at the time of disclosure to a Member is available to the public and in the public domain . . .or (ii) is independently developed by a Member without use of the Confidential Information.

Id. emphasis added. Mr. Mankopf cites to deposition testimony of Mr. Shaya and Ken Fasse, the president of Northwood, indicating that Mr. Shaya continued to transact business with Northwood through Delta after the dissolution of Olympus. Mr. Mankopf points to the fact that Mr. Shaya immediately formed Delta with another person and continued the relationship with Northwood on the same terms using the same contract and access to product negotiated between Northwood and Olympus. Consequently, Mr. Mankopf raised a question of fact of whether Mr. Shaya necessarily disclosed confidential information contrary to the Dissolution Agreement by permitting Delta to access Olympus’ customers, pricing, policies and/or business information etc. Therefore, the motion for summary disposition on Count IV of the cross-claim for breach of contract is denied.

B. *Count V, Contractual Indemnification*

Next, Mr. Shaya argues that no facts support Mr. Mankopf's claim for contractual indemnification. Mr. Shaya maintains that under the indemnification clause, Mr. Shaya is only obligated to indemnify Mr. Mankopf for losses that Mr. Shaya causes—and Northwood sued Mr. Mankopf for his own actions. Mr. Shaya claims that Mr. Mankopf released any loss from Olympus in the Dissolution Agreement. Because Mr. Shaya and Mr. Mankopf did no business together after the dissolution of Olympus, Mr. Shaya argues that he could not have caused loss to Mr. Mankopf.

Mr. Mankopf responds that the release in the Dissolution Agreement must be read together with the indemnification clause such that they both have effect. Mr. Mankopf states that he seeks indemnification for events that occurred after the signing of the Dissolution Agreement—therefore the release does not apply. Specifically, Mr. Mankopf contends that Mr. Shaya's continued dealings with Northwood after the Dissolution Agreement was entered caused his damages. Northwood brought suit, according to Mr. Mankopf, because of Mr. Shaya's actions.

Paragraph 4(b) of the Dissolution Agreement states,

Shaya indemnification of Mankopf. Shaya shall indemnify Mankopf against, and agrees to hold Mankopf harmless from and against any and all loss, liability, costs or expenses. . .which may be suffered by or asserted against Mankopf as a result of (i) any personal liabilities of Shaya; (ii) the breach or violation of any covenant, agreement or warranty made by Shaya in or in connection with this Agreement or in any document executed pursuant hereto; (iii) the misrepresentation made by Shaya to Mankopf in or in connection with this Agreement or any document executed pursuant hereto; (iv) the assertion against Mankopf of any claims or demands of any nature made upon any person against Mankopf arising out of any act or omission of Shaya to an act occurring after the Effective Date.

The Court previously determined that the release applied to the events occurring before the parties entered into the Dissolution Agreement—and therefore, the events

concerning the operation of Olympus. Consequently, any portion of Mr. Mankopf's indemnification claim relating to the Northwood and Roche litigation and Mr. Mankopf's involvement with Olympus falls under the release because it necessarily occurred prior to the Dissolution Agreement. Specifically, the parties released all claims "arising out of or in connection with the operation of the business of the Company prior to the date hereof." Exhibit A of Cross Complaint.

Mr. Mankopf's indemnification claim is therefore limited to the provisions of the indemnification clause that remain relevant in light of facts alleged and the release. Mr. Mankopf has not shown evidence that he suffered loss, liability, costs or expenses as a result of *claims or demands made against* him arising out of Mr. Shaya's acts or omissions occurring after the Effective Date, as provided in (iv) of the indemnification clause. Instead, Mr. Mankopf seeks to recover for alleged lost profits arising from Mr. Shaya's continued, ill-fated relationship with Northwood. Mr. Mankopf overlooks that in light of his entering into the Dissolution Agreement and releasing Mr. Shaya, Mr. Mankopf had no future expectation of profits. Further, any lost profits would not amount to a "claim or demand" as provided in the indemnification clause. As a result, Mr. Shaya's motion for summary disposition on Count V of the cross-claim is granted.

C. *Count VI, Breach of Express and Contractual Fiduciary Duty*

Mr. Shaya argues that the breach of fiduciary duty claims fall within the release. Mr. Mankopf responds that Mr. Shaya breached his fiduciary duties both to Olympus and to Mr. Mankopf by self-dealing, engaging in disloyal acts, and by using confidential information for self-gain. According to Mr. Mankopf, the Michigan Limited Liability Act imposes on Mr. Shaya duties, which Mr. Shaya breached both in the operation of

Olympus and in its winding up. Mr. Mankopf also argues that the Court should not consider Mr. Shaya's arguments on count VI for failure to cite authority.

As an initial matter, Mr. Mankopf's assertion that Mr. Shaya, as a minority member, somehow breached a fiduciary duty to Mr. Mankopf during the operation of Olympus lacks merit. First, Mr. Mankopf recognizes that in general, members of Michigan LLCs do not have fiduciary duties to other members. Moreover, the Court previously decided that the release clause in the Dissolution Agreement is enforceable. As a result, even if Mr. Mankopf had a breach claim arising from the operation of Olympus, that claim was released because it necessarily occurred prior to the signing of the Dissolution Agreement.

Additionally, Mr. Mankopf appears to misapply the summary disposition standard with his suggestion that Mr. Shaya's motion fails based on the Court's previous ruling of the sufficiency of the cross-claims. The Court merely assessed the Cross-complaint on a motion under MCR 2.116(C)(8) and determined that Mr. Mankopf had stated a claim for breach of fiduciary duty. For the purposes of MCR 2.116(C)(8), the Court takes all factual allegations as true. Mr. Shaya now brings a motion under MCR 2.116(C)(10) testing the factual sufficiency of the claim, which does not shift the initial burden of proof to Mr. Shaya. Rather, Mr. Mankopf must now produce sufficient evidence to show a factual basis for his claim.

Regarding any remaining fiduciary duty arising out of agreement between the parties, the Dissolution Agreement provides in relevant part:

5. Fiduciary Duties. The Members each acknowledge that by execution of this Agreement, each assumes a fiduciary duty to the other to all of the developments in which they will continue to have joint interests after full execution of the actions required by this Agreement. The Members further

acknowledge and agree that each of them shall have a duty to act in such a way so as to not favor their own interests over the other's.

Mr. Mankopf's Exhibit 4. By its own terms, the fiduciary duty clause covers "developments" in which the parties "continue to have joint interests." Mr. Mankopf has not identified any continuing joint interest between Mr. Shaya and Mr. Mankopf after the dissolution of Olympus.

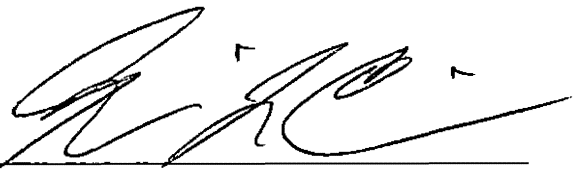
Mr. Mankopf presented sufficient evidence to create a question of material fact only in regard to the final sentence of paragraph 5—specifically, whether Mr. Shaya breached his agreement to not favor his own interests over Mr. Mankopf's. Mr. Mankopf has presented evidence that Mr. Shaya continued the operations of Olympus under Delta Global, LLC, using the same relationship with Northwood. Therefore, Mr. Shaya's motion for summary disposition on Count VI of the counter-claim is denied, but only to the extent Mr. Mankopf relies on the last sentence of paragraph 5 of the Dissolution Agreement.

Finally, Mr. Mankopf seeks leave to amend his cross-claim to add a derivative action. The grant or denial of leave to amend pleadings is within the trial court's discretion. *PT Today, Inc v Commr of Office of Fin & Ins Services*, 270 Mich App 110, 142; 715 NW2d 398 (2006). Mr. Mankopf's motion is denied. Discovery has closed. Motions for summary disposition have been filed and heard. Mr. Mankopf would add a new theory of recovery that would necessarily require focusing on a different set of events from those presently at issue. That is, Mr. Mankopf's present claims all relate to post-release occurrences in accordance with the terms of the Dissolution Agreement. However, a derivative action would focus on events that occurred before the parties dissolved Olympus. As a result, leave to amend at this point would be prejudicial.

IV. Conclusion

For the reasons set forth above, Mr. Shaya's motion is GRANTED in part and DENIED in part. Specifically, Mr. Shaya's motion is denied as to count IV for breach of contract, granted as to count V for indemnification, and granted to count VI for breach of fiduciary duty except to the extent Mr. Mankopf relies on the last sentence of paragraph 5 in the contract. 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.



HONORABLE RICHARD L. CARETTI
Circuit Court Judge

DATE: September 17, 2019

cc: John Sier, Esq.
Carina Kraatz, Esq.
Ed Lennon, Esq.
Andrew Abood, Esq.

