STATE OF MICHIGAN

IN THE 20TH CIRCUIT COURT FOR THE COUNTY OF OTTAWA
SPECIALIZED BUSINESS DOCKET
414 Washington Street
Grand Haven, MI 49417
616-846-8315
* * * * *

PATRICK M. COOPER, dba Z.Ink Tattoo and Piercing,
Plaintiff,

v

JOHN ELIZARDO, JR., dba Don't Tell Mom DTM, **DAKOTA NOVAK,** and **ASHLEY PEREZ,**
Defendants.
_____/

OPINION AND ORDER REGARDING SUMMARY DISPOSITION MOTIONS
File No. 21-06505-CB

Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Courthouse in the City of Grand Haven, Michigan, on the 22nd day of April, 2022,
PRESENT: HON. JON A. VAN ALLSBURG, CIRCUIT JUDGE

This is an action to recover damages and injunctive relief against former subcontractors for breach of noncompete agreements, and other business torts. An answer and affirmative defenses have been filed, and a jury trial has been demanded. Defendants move for summary disposition pursuant to MCR 2.116(C)(10), alleging that there are no disputed issues of material fact and defendants are entitled to judgment as a matter of law. Plaintiff moves for partial summary disposition under MCR 2.116(C)(10), asserting that plaintiff is entitled to summary disposition as to defendants' liability for breach of contract (Counts I-III), and as to defendant Elizardo's liability for intentional interference with contractual relations (Count IV) and for trespass (Count VI), with damages reserved for trial.

Summary of the Facts

Beginning in 2016, plaintiff Patrick Cooper operated Z.ink Tattoos and Piercing in Zeeland. Between 2016 and 2020, defendants John Elizardo, Jr, Dakota Novak, and Ashley Perez began working at Z.ink as independent contractor tattoo artists. As part of their contracts, each of

the defendant tattoo artists signed non-compete agreements. Those agreements included the following terms.[1]

> The Contractor/Employee shall not own, manage, operate, consult or be employed in a business substantially similar to, or competitive with, the present business of the Company or such other business activity in which the Company may substantially engage during the term of employment.
>
> This non-compete agreement shall extend for a radius of 20 miles of the Company's present location and shall be in full force and effect during the period of employment and for 2 years following contract/employment termination, notwithstanding the cause or reason for termination.

On September 14, 2020, Elizardo informed Cooper of his intention to leave Z.ink and open his own tattoo shop at some point in 2021. Elizardo and Cooper tried to negotiate the terms of this exit over several discussions, but by December 10, 2020, the parties had reached an impasse and the independent contractor relationship was terminated. On December 11, 2020, Cooper made an announcement on Z.ink's Facebook page that Z.ink would no longer be offering tattoo services, and that "any appointments, refunds, touch ups or other important matters regarding your tattoos should be directed to the artist who performed the work."

On December 14, 2020, after being told not to enter the Z.ink property, Elizardo went to the tattoo shop and collected what Elizardo alleges were his things. Later in December, Cooper announced on Facebook that the shop would be reopening as That Little Candle Shop. Rather than offering tattoos or piercings, the reopened shop sold jewelry, lotions, and similar goods.

At some point prior to the end of the independent contractor relationship, Elizardo contacted a landlord about potentially renting a commercial space to open his own tattoo parlor. By February of 2021, Elizardo had opened his own tattoo shop called Don't Tell Mom. In early December 2021, Cooper hired new tattoo artists and restarted tattoo services at Z.ink.

Standard of Review

The competing motions under MCR 2.116(C)(10) test the factual basis of the opposing parties' claims and defenses. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). "Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Haliw v City of Sterling Heights*, 464 Mich 297; 627 NW2d 581 (2001), *citing Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). In reviewing such a motion, this Court

[1] Ashley Perez signed a slightly different contract which replaced the "a business substantially similar to . . ." language with "a business that engages in permanent body modification such as tattooing, the application of permanent makeup, body piercing, or scarification." Her contract also extended the restricted area radius to 30 miles and added a liquidated damages clause.

must consider the pleadings, affidavits, depositions, admissions, and any other admissible evidence in favor of the nonmoving party. MCR 2.116(G)(5). Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, this Court must then determine whether a factual dispute exists to warrant a trial. *Bertrand v Alan Ford, Inc*, 449 Mich 606, 617-618; 537 NW2d 185 (1995). A party moving for summary disposition has the initial burden of supporting his position with affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. If the burden of proof at trial would rest on the nonmoving party, the nonmoving party may not rely on mere allegations or denials in his or her pleadings, but must set forth specific facts which show that a genuine issue of material fact exists. If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra.*

Affidavits offered in support of or in opposition to a motion for summary disposition must be considered to the extent that the content or substance would be admissible in evidence to establish or deny the grounds stated in the motion. The evidence contained in the affidavits need not be admissible in form, but must be admissible in content. An affidavit filed in support of or in opposition to a motion must be made on personal knowledge, state with particularity facts admissible as evidence establishing or denying the grounds stated in the motion, and show affirmatively that the affiant, if sworn as a witness, can testify competently to the facts stated in the affidavit. *Dextrom v Wexford County,* 287 Mich App 406 (2010), lv den 488 Mich 853; 787 NW2d 508 (2010). Neither party in the present case has submitted a supporting affidavit.

Analysis

The court identifies the flaw in defendants' argument as follows: Plaintiff announced the modification of his retail business model in December 2020, two months before defendants opened their own tattoo shop. Defendants argue that this means defendants could not have been in competition with plaintiff when they opened their business. This misses the point: plaintiff asserts that the announcement of the change in his business model was an attempt to mitigate his damages as defendants had already begun the process of starting their own competing business. An anticipatory breach occurs when a party to a contract "unequivocally declares the intent not to perform" prior to the time of performance. *Paul v Bogel*, 193 Mich App 479, 493; 484 NW2d 728 (1992). The parties dispute whether and when defendants made an unequivocal declaration of their intention not to abide by the terms of the non-compete agreement. Other issues pertaining to plaintiff's claim of anticipatory breach and plaintiff's attempt to mitigate damages are also disputed by the parties, rendering summary disposition as to plaintiff's claims inappropriate.

Plaintiff likewise seeks summary disposition – on grounds of liability only – against all defendants on Counts I-III, and against defendant Elizardo on Count IV. Plaintiff also seeks injunctive relief against all defendants in Count VIII. The evidence that plaintiff and each of the

three defendants executed a Non-Compete Agreement is not in dispute. Nor do the parties dispute that the defendants have engaged in activities, within the two years after leaving plaintiff's business and within twenty miles (within thirty miles in Perez' case) of plaintiff's business location, that would violate the Non-Compete Agreement. Defendants assert that plaintiff may not enforce the agreements for two reasons, first that the scope of the agreement is overbroad and therefore unenforceable, and second that plaintiff ceased carrying on the business to which the agreement applied and is therefore unable to (or barred from) enforcing it.

The first defense is easily rejected. Contracts in restraint of trade or commerce are generally unlawful. "A contract . . . between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful." MCL 445.772. However, there are specific exceptions to this rule. It is the public policy of Michigan to enforce reasonable non-competition provisions in employment contracts, and that policy is applicable here. The Michigan Antitrust Reform Act ("MARA"), MCL 445.771 *et seq.*, permits an employer[2] to protect its "reasonable competitive business interests," and as to potential overbreadth of a noncompete agreement, states:

> "... 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." MCL 445.774a(1).

The second defense is based on the factual circumstances. The defense requires a finding that plaintiff had ceased carrying on a business that engages in "body modification such as tattooing, body piercing, or scarification" to the extent that he had no reasonable competitive business interests to protect and therefore no longer had the right or ability to enforce the noncompete agreements. This argument essentially requests the court to reject plaintiff's argument that defendants committed an anticipatory breach of the noncompete agreements, and to reject plaintiff's argument that his publicizing a business known as "The Little Candle Shop" was simply an attempt to mitigate his damages. The parties dispute the facts surrounding these issues, and resolving such factual disputes is beyond the scope of a summary disposition motion.

Finally, plaintiff seeks summary disposition on the issue of liability for trespass in Count VI against defendant Elizardo. The questions of reasonable business interest and anticipatory breach are irrelevant to this count. "A trespass is an unauthorized intrusion into the lands of another." *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 56; 602 NW2d 215 (1999). Plaintiff has supported his charge of trespass with plaintiff's uncontradicted deposition testimony and defendants' admission that Elizardo entered the Z.ink premises on December 14, 2020, after the independent contractor relationship between plaintiff and Elizardo terminated and after

[2] While the statutory text only mentions employers, MCL 445.774a also permits noncompete agreements as part of independent contractor relationships. *Bristol Window and Door, Inc. v Hoogenstyn*, 250 Mich App 478, 493; 650 NW2d 670, 678 (2002).

Elizardo was instructed not to enter Z.ink property. The burden now shifts to defendants to establish that a genuine issue of disputed fact exists regarding this issue. Defendants have failed to do so. Summary disposition in plaintiff's favor on the issue of liability for trespass is therefore appropriate here. The Court is silent as to the issue of damages for trespass and to the issue of conversion, as neither issue is before the Court at present.

Conclusion

While the parties largely agree on the facts of the case, genuine issues of material fact remain. For the reasons stated above, Defendants' motion for summary disposition is DENIED. Plaintiff's motion for partial summary disposition is GRANTED IN PART with regard to defendant Elizardo's liability for trespass in Count VI. The issue of damages is reserved for trial. Plaintiff's motion for partial summary disposition is otherwise DENIED.

IT IS SO ORDERED.

Date: April 22, 2022

Hon. Jon A. Van Allsburg, Circuit Judge