STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

HANTZ GROUP, INC., HANTZ TAX & BUSINESS, LLC, and HANTZ AGENCY, LLC,
Plaintiffs,

v

Case No. 2015-146862-CB
Hon. Wendy Potts

JASON VAN DUYN, JUSTIN HULETT, And AQUEST WEALTH STRATEGIES,
Defendants.
_____/

OPINION AND ORDER RE: DEFENDANTS' MOTION FOR SUMMARY DISPOSITION PURSUANT TO MCR 2.116(C)(8)

At a session of Court
Held in Pontiac, Michigan
On
JAN 19 2016

This matter is before the Court on Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8). On October 15, 2015, the Court entered a Stipulated Order to Waive Oral Argument of Defendants' Motion.

By way of background, Defendants Jason Van Duyn and Justin Hulett were employed as financial consultants with Hantz Financial Services, Inc., a wholly-owned subsidiary of Plaintiff Hantz Group, Inc. Upon their termination of employment from Hantz Financial Services, Inc., Defendants Van Duyn and Hulett allegedly converted Plaintiffs' client files, customer lists, and other proprietary material as well as solicited clients to move their business to Van Duyn's financial firm, Aquest Wealth Strategies, Inc. ("Aquest").

Consequently in 2009, Hantz Group, Inc., Hantz Tax & Business, LLC, Hantz Benefits, LLC, Hantz Financial Services, Inc., and Hantz Agency, LLC initiated litigation, namely 09-101563-CK, against Jason Van Duyn, Harold Parslow III, Jonathan Bailey, and Aquest Wealth Strategies as Defendants. Hantz Group, Inc., Hantz Tax & Business, LLC, Hantz Benefits, LLC, and Hantz Agency, LLC also filed a lawsuit, namely 12-001481-CK, in Macomb County against Defendant Justin Hulett. According to Plaintiffs, the parties agreed to dismiss these two actions in order to file a claim before the FINRA arbitration panel with the understanding that they could conduct discovery pursuant to the Michigan court rules. Upon further research, the parties discovered that there were no FINRA rules that allowed for discovery under the Michigan court rules and since the matter could not be resolved, Plaintiffs filed the current Complaint on May 1, 2015. In essence, Plaintiffs are claiming that Defendants Van Duyn and Hulett breached their non-solicitation and confidentiality agreements that were executed while in the employment of Hantz Financial Services, Inc.

In their Motion for Summary Disposition, Defendants are requesting the Court to dismiss Plaintiffs' Complaint pursuant to MCR 2.116(C)(8) and (C)(10).

MCR 2.116(C)(8)

In reliance on MCR 2.116(C)(8), Defendants first argue that Plaintiffs have failed to identify in the Complaint, the names of their customers who transferred accounts to Aquest. Additionally, Defendants claim that Plaintiffs have failed to provide any affidavits or supporting documentation indicating the transfer of customer accounts. Second, Defendants contend that Plaintiffs have failed to differentiate between Van Duyn, Hulett, and Aquest within the Complaint. Third, Defendants assert that Plaintiffs have failed to allege that the "non-compete contracts" were executed between the instant Plaintiffs and Defendants who are parties to this

lawsuit. The Court notes for the record that Plaintiffs' Complaint specifically addresses non-solicitation and confidentiality agreements, not non-compete contracts.

When reviewing a summary disposition motion pursuant to MCR 2.116(C)(8), all well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the non-movant. *Maiden v Rozwood,* 461 Mich 109, 119; 597 NW2d 817 (1999). The Court only considers the pleadings in a (C)(8) motion. *Id.* Where no factual development of the allegations permits recovery by law, a movant is entitled to summary disposition. *Id.* "The mere statement of the pleader's conclusions, unsupported by allegations of fact upon which they may be based, will not suffice to state a cause of action." *NuVision, Inc. v Dunscombe*, 163 Mich App 674, 681; 415 NW2d 234 (1987).

Defendants' first argument comprises of Plaintiffs' alleged failure to identify in the Complaint, the names of their customers who transferred accounts to Aquest as well as Plaintiffs' alleged failure to provide any affidavits or supporting documentation indicating the transfer of customer accounts. In response, Plaintiffs assert that Defendants cite to no authority that requires them to identify customer names in the Complaint and attach affidavits and supporting documentation.

The Court agrees with Plaintiffs' position that Defendants have not provided any legal authority in support of this particular argument. "It is not sufficient for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position." *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998).

Accordingly, the Court reviews Plaintiffs' Complaint in light of MCR 2.111(B)(1), which requires that a Complaint must contain "a statement of facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." The Court finds that Plaintiffs' Complaint provides specific factual allegations regarding Defendants' violations of the subject anti-solicitation and confidentiality agreements to satisfy the requirements of MCR 2.111(B)(1). Moreover, the discovery deadline in this matter is March 21, 2016 and so it is possible that there will be additional factual development regarding the identification of solicited customers to potentially allow for recovery by Plaintiffs. As such, Defendants are not entitled to summary disposition under MCR 2.116(C)(8) with regard to this first argument.

Second, Defendants contend that Plaintiffs have failed to differentiate between Van Duyn, Hulett, and Aquest within the Complaint. The Court has reviewed the Complaint and finds that it distinguishes between the employment histories of both individual defendants, including the execution dates of their respective non-solicitation agreements. The Complaint also designates Defendant Van Duyn as the individual who recruited the Hantz Financial Services, Inc. employees for Aquest. The Complaint separates the actions of Defendants Van Duyn and Aquest from Defendant Hulett with regard to their alleged violation of the prior 2009 injunctive order. In sum, the Court finds that the Complaint sufficiently delineates the alleged, unlawful actions of the three defendants upon which Plaintiffs' claims are based and relief is requested. Thus, Defendants have not proven that they are entitled to relief under MCR 2.116(C)(8) with regard to this second argument.

Third, Defendants maintain that their non-compete contracts were executed with Hantz Financial Services, Inc., which is not a party to this lawsuit. As such, Plaintiffs have no standing to bring their Complaint. Conversely, Plaintiffs argue that Hantz Group, Inc. is the parent corporation of Hantz Financial Services, Inc. and therefore, it is entitled to pursue the matter herein.

The Court observes from Count One of the Complaint that Defendants Van Duyn and Hulett allegedly breached their non-solicitation *and* confidentiality agreements that were executed while in the employment of Hantz Financial Services, Inc. The Court defers to Plaintiffs' claim as set forth in Paragraph Nineteen of the Complaint that each of the Defendants signed a confidentiality agreement with Plaintiff Hantz Group, Inc. as a condition of their employment. Paragraph Thirty-two of the Complaint refers to Defendants' execution of the subject non-solicitation agreements with Plaintiffs wherein Defendants agreed not to contact, solicit, retain, or accept business from any clients of Hantz Group, Inc., Hantz Tax & Business, LLC, and Hantz Agency, LLC, all of which are Plaintiffs to this lawsuit. In consideration of these particular claims, there is the likelihood that Plaintiffs have standing to file this lawsuit. Even so, the Court finds that further factual development is necessary to identify the relevant contracts in this matter as well as the contracting parties in order to determine whether or not Plaintiffs are permitted recovery by law. Therefore, the Court cannot grant Defendants' summary disposition motion with regard to their third argument under MCR 2.116(C)(8).

MCR 2.116(C)(10)

Pursuant to MCR 2.116(C)(10), Defendants make their fourth argument that they are not alleged to be employees of Plaintiffs, nor was an agreement executed between the parties. Fifth, Defendants maintain that Plaintiffs have failed to attach to their Complaint copies of the non-

compete agreements that were executed between Defendants and Plaintiffs because they do not exist. The Court observes that Defendants' fourth and fifth arguments focus primarily on a lack of standing claim, which is substantially similar to the third argument as presented under MCR 2.116(C)(8).

"A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating a motion for summary disposition brought under this subsection, 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. 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." *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999); *Quinto v Cross & Peters Co.*, 451 Mich. 358, 362; 547 N.W.2d 314 (1996).

In consideration of Defendants' fourth argument, there appears to be no dispute among the parties that Defendants were directly employed by Hantz Financial Services, Inc. and not Plaintiffs. Yet, the underlying issue is whether or not Defendants executed confidentiality and non-solicitation agreements with Plaintiffs.

Thus far, the Court has only examined the two Group Practice Agreements[1] between Defendant Justin Hulett and the "Company," which comprises of Hantz Financial Services, Inc., a subsidiary of Hantz Group, and its affiliated companies including, but not limited to, Hantz Tax & Business, LLC and Hantz Agency, LLC, both of which are parties to this lawsuit. "It goes without saying that a contract cannot bind a nonparty." *AFSCME Council 25 v County of Wayne*, 292 Mich App 68, 80; 811 NW2d 4 (2011); quoting *Equal Employment Opportunity Comm v Waffle House, Inc*, 534 US 279, 294; 122 S Ct 754; 151 L Ed 2d 755 (2002). Clearly, the Group

[1] Plaintiffs present the Group Practice Agreements as Exhibit Eight in their Response.

Practice Agreements bind the parties who executed the agreements or in this case, Defendant Justin Hulett and Plaintiffs Hantz Tax & Business, LLC and Hantz Agency, LLC.

Next, the Court defers to Plaintiffs' Exhibit Six, the June 30, 2011 Court of Appeals unpublished decision that arose from the earlier lawsuit, namely 09-101563-CK. Within the text of that opinion, the Court of Appeals stated that "Defendants [including Jason Van Duyn] signed agreements with HG [Hantz Group, Inc.] as a condition of their employment acknowledging that HG was providing them with confidential information, that the confidential information was critical to the success of the company and must not be disseminated or used outside of their employment, and agreeing that they would not use the confidential information or disseminate it to any other individual or entity." *Hantz Group, Inc v Van Duyn*, unpublished opinion per curiam of the Court of Appeals, issued June 30, 2011 (Docket No. 294699).

The language within the Court of Appeals opinion supports Plaintiffs' claim that Hantz Group, Inc. had entered into some type of contractual agreement, i.e., a confidentiality agreement, with at least Defendant Van Duyn. As such, it appears that certain agreements were executed between Plaintiffs and Defendants. However, a genuine issue of material fact does exist as to the applicable contracts at issue in this case as well as to the identity of the contracting parties. Thus, Defendants are not entitled to summary disposition on this fourth ground under MCR 2.116(C)(10) due to the need for further discovery.

With respect to their fifth argument, Defendants assert that they are entitled to summary disposition under MCR 2.116(C)(10) because Plaintiffs have failed to attach to their Complaint copies of the non-compete agreements that were executed by Defendants and Plaintiffs. While the Court is familiar with two of the six non-solicitation agreements concerning Defendant Hulett, the Court has not had the opportunity to review any other non-solicitation agreement or

any confidentiality agreements that are the subject of this lawsuit. The Court must review the applicable non-solicitation and confidentiality agreements in order to determine the identity of the parties to those contracts and in turn, the merit of Plaintiffs' underlying claims.

Pursuant to MCR 2.113(F)(1)(b), "if a claim or defense is based on a written instrument, a copy of the instrument or its pertinent parts must be attached to the pleading as an exhibit unless the instrument is in the possession of the adverse party and the pleading so states." Here, Plaintiffs allege that Defendants breached their non-solicitation and confidentiality agreements in Count One of the Complaint. However, Plaintiffs failed to attach copies of the subject non-solicitation and confidentiality agreements to the Complaint or in the alternative, Plaintiffs' Complaint fails to clearly state that the written agreements are in the possession of the adverse party in order to satisfy MCR 2.113(F)(1)(b). As such, the Court grants Plaintiffs leave to amend their Complaint - by either attaching the subject non-solicitation and confidentiality agreements or including the requisite statement under MCR 2.113(F)(1)(b) within 14 days. See MCR 2.118(A)(2). Accordingly, the Court will not grant Defendants' request for summary disposition under MCR 2.116(C)(10) on this fifth ground.

Statute of Limitations/Doctrine of Laches

Next, Defendants maintain that the Statute of Limitations and the Doctrine of Laches support their argument that Plaintiffs have no excuse for the late filing date of the Complaint when Defendant Van Duyn terminated his employment with Hantz Financial Services, Inc. on May 1, 2009. In reply, Plaintiffs note that Defendants refer to the Statute of Limitations, but never allege that Plaintiffs violated them. Plaintiffs argue further that Defendants have failed to allege any prejudice or actual harm from the delay in refiling the case to qualify for relief under the Doctrine of Laches.

MCL 600.5807 requires that "no person may bring or maintain any action to recover damages or sums due for breach of contract, or to enforce the specific performance of any contract unless, after the claim first accrued to himself or to someone through whom he claims, he commences the action within the periods of time prescribed by this section." MCL 600.5807(8) provides that the Statute of Limitations is six years for actions to recover damages or sums due for breach of contract.

The Court observes that the current Complaint was filed by Plaintiffs on May 1, 2015. Defendant Van Duyn terminated his employment with Hantz Financial Services, Inc. on May 1, 2009, with the non-solicitation agreement ending on May 1, 2010. Defendant Hulett terminated his employment with Hantz Financial Services, Inc. on April 15, 2011, with the non-solicitation provisions within the Group Practice Agreement expiring on April 15, 2012. As such, the Court finds that Plaintiffs are properly within the six year Statute of Limitations timeframe to file this action.

"The doctrine of laches is concerned with unreasonable delay, and it generally acts to bar a claim entirely, in much the same way as a statute of limitation." *Michigan Ed Employees Mut Ins Co v. Morris,* 460 Mich. 180, 200; 596 NW2d 142 (1999). "It is applicable in cases in which there is an unexcused or unexplained delay in commencing an action and a corresponding change of material condition that results in prejudice to a party." *Public Health Dep't v. Rivergate Manor,* 452 Mich. 495, 507; 550 NW2d 515 (1996).

As stated previously, a similar lawsuit was filed in 2009, involving Hantz Group, Inc., Hantz Tax & Business, LLC, Hantz Benefits, LLC, Hantz Financial Services, Inc., and Hantz Agency, LLC as Plaintiffs and Jason Van Duyn, Harold Parslow III, Jonathan Bailey, and Aquest Wealth Strategies as Defendants. Certain plaintiffs also had a pending Macomb County case,

namely 12-001481-CK, against Defendant Hulett. Both lawsuits were dismissed "without prejudice" in 2012 so that the parties could file a claim before the FINRA arbitration panel. Once the parties discovered that they were not allowed to conduct discovery under the Michigan court rules to prepare for the FINRA arbitration, Plaintiffs filed the current Complaint on May 1, 2015.

Here, the Court finds that there is no unreasonable or unexplained delay in commencing the current action as the parties have been attempting to litigate these issues since 2009. The Court further finds that Defendants have failed to show that there has been a corresponding change of material condition that would prejudice them in this matter. As such, Defendants have not demonstrated their right to equitable relief under the Doctrine of Laches.

Meritless Complaint

Finally, Defendants argue that Plaintiffs' Complaint is not supported by a corporate officer to verify the allegations set forth in the Complaint as required under MCR 2.114. Plaintiffs address the requirements set forth under MCR 2.111, MCR 2.113, and MCR 2.114 to support their position that the Complaint has merit and is a valid pleading.

The Court notes that MCR 2.114 applies to all pleadings. The court rule provides that "a document need not be verified or accompanied by an affidavit" except when otherwise provided by court rule or statute. MCR 2.114(B)(1). Further, the "signature of an attorney or party, whether or not the party is represented by an attorney, constitutes a certification by the signer that" he or she has read the document, that the document is well grounded in fact and warranted by existing law or a good-faith argument, and is not presented for any improper purpose. MCR 2.114(D). The Court observes that Plaintiffs' Complaint has been filed by David J. Shea as Plaintiffs' counsel and is sufficient to meet the requirements of MCR 2.114.

Parenthetically, the Court notes that neither party has briefed the viability of the accounting or civil conspiracy claims, and so the Court will not address those claims in relation to Defendants' motion.

For the reasons stated herein, the Court finds that Defendants are not entitled to summary disposition with regard to their motion under either MCR 2.116(C)(8) or (C)(10). The Court hereby denies Defendants' Motion for Summary Disposition without prejudice. Defendants shall have the opportunity to renew their motion, if warranted, upon further discovery.

It is hereby ordered that Defendants' Motion for Summary Disposition Pursuant to MCR 2.116(C)(8) is denied without prejudice.

IT IS SO ORDERED.

Dated: JAN 19 2016

Hon. Wendy Potts