

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT

JENNIFER VAN VALLIS-BRIGHT

Plaintiff,

v

Case No. 22-192350-CB
Hon. Michael Warren

SCRIPPS MEDIA INC.,

Defendant.

OPINION AND ORDER GRANTING
SCRIPPS' MOTION FOR SUMMARY DISPOSITION
DUE TO THE LACK OF AN ACTUAL CONTROVERSY

At a session of said Court, held in the
County of Oakland, State of Michigan
May 10, 2022

PRESENT: HON. MICHAEL WARREN

OPINION

I

Overview

This cause of action arises out of a Salesperson Non-Compete Agreement (the "Agreement") Jennifer Van Vallis-Bright (the "Plaintiff") signed on January 24, 2020 during the course of her employment as a salesperson with Scripps Media Inc. ("Scripps"). The Plaintiff alleges that a non-compete provision in the Agreement is unenforceable and she seeks a determination that it does not preclude her from accepting

a General Sales Manager position with another company. In particular, the Plaintiff alleges one count of Declaratory Relief.

Before the Court is Scripps' Motion for Summary Disposition Due to Lack of an Actual Controversy. Oral argument is dispensed as it would not assist the Court in its decision-making process.¹

At stake is whether an actual controversy regarding the validity and enforceability of a non-compete provision to preclude the Plaintiff from accepting a sales manager position with a new employer exists where the position the Plaintiff sought as alleged in her Complaint has been filled by another candidate? Because there is no actual controversy over whether Scripps' non-compete provision can prevent the Plaintiff from accepting the position as alleged in her Complaint, the answer is "yes," and summary disposition is warranted.

¹ MCR 2.119(E)(3) provides courts with discretion to dispense with or limit oral argument and to require briefing. MCR 2.116(G)(1) specifically recognizes application of MCR 2.119(E)(3) to summary disposition motions. Subrule (G)(1) additionally authorizes courts to issue orders establishing times for raising and asserting arguments. This Court's Scheduling Order clearly and unambiguously set the time for asserting and raising arguments, and legal authorities to be in the briefing - not to be raised and argued for the first time at oral argument. Therefore, both parties have been afforded due process as they each had notice of the arguments and an opportunity to be heard by responding and replying in writing, and this Court has considered the submissions to be fully apprised of the parties' positions before ruling. Because due process simply requires parties to have a meaningful opportunity to know and respond to the arguments and submissions which has occurred here, the parties' have received the process due.

II Background

The parties agree that the Plaintiff and Scripps entered into the Agreement. The parties further agree that the Agreement contains a non-compete provision which precludes a Salesperson from performing services as a Salesperson or in any other sales-related capacity for any similar business that will require the Salesperson to conduct business and/or sell digital advertising products within twenty-five miles of Scripps' main office for six months from the date of termination of the Salesperson's employment.

In particular, the Agreement states as follows:

8. At such time as [S]alesperson may leave the Station's employment for any reason, voluntary or involuntary, Salesperson understands and agrees that as a condition for Station entering into the Agreement and Salesperson's employment, Salesperson may not perform services as a Salesperson or in any other sales-related capacity for:

- Any similar business to include, but not limited to: television, radio, newspaper, directory, pure play digital technology, that will require the Salesperson to conduct business and/or sell digital advertising products within twenty-five miles from the Station's main office.
- Any solicited client that was contacted while employed at the Station, or for whom a lead was generated.

This Agreement shall be in effect for six (6) months from the date of termination of Salesperson's employment.

The Agreement also contains the following non-solicitation provision:

9. You agree that upon termination of your employment, and for one (1) year thereafter, you shall not, directly or indirectly, (a) employ or solicit

the employment of any person who is then or has been within six (6) (months prior to your termination, an employee of the Station or any of its affiliated companies; or (b) interfere with, disturb or interrupt the relationships (regardless of whether such relationships have been reduced to formal contracts) of the Station or any of its affiliated companies with any user, advertiser, customer, supplier or consultant.

The Plaintiff subsequently entered into an Account Executive Agreement with Scripps which she alleges nullified the terms of the non-compete provision in the Agreement.²

On December 3, 2021, the Plaintiff's employment with Scripps was terminated due to her noncompliance with Scripps' Covid-19 vaccination policy. The non-competition clause will expire by its own terms on June 3, 2021.

In her Complaint, the Plaintiff seeks to have the non-compete provision declared invalid so she can pursue new employment as a sales manager, later identified as a General Sales Manager position with Audacy:

47. So that she can pursue new employment without interference from Scripps, Jenn seeks a declaratory ruling that the Non-Compete does not apply to her being employed as a General Sales Manager at a location more than 25 miles from Scripps' main office in Cincinnati, Ohio, and that even if it the terms applied to the new position, the Non-Compete is illegal, void, invalid, and unenforceable under applicable laws and public policy.

48. In addition, Jenn seeks a determination from this Court that the Non-Compete cannot be used to bar her from taking a sales manager position that does not solicit customers, that would allow her to work remotely, from her home in Clarkston and other locations in Metro-Detroit which are more than 25 miles from Scripps' main office, and/or bar her from taking a

² The Account Executive Agreement attached as Exhibit B to the Response is not signed by the Plaintiff.

position in a different field, radio, than her television sales position at Scripps.

* * *

51. Here, Scripps has no legitimate competitive business interest to protect. Jenn has not made any attempt to solicit Scripps' customers, nor will she; Scripps has not provided Jenn with any specialized training, but hired her for her prior 30 years of sales experience; Jenn will be employed in a management position in a different field than her television advertising sales position; and Jenn would work remotely, from her home, and in Metro-Detroit which is more than 25 miles from Scripps' main office.

* * *

54. MCR 2.605 provides that the Court may declare the rights and other legal relations of parties in a case of an actual controversy within its jurisdiction.

55. As set forth above, the Non-Compete does not protect a legitimate business interest under Michigan law, and thus unreasonably restricts Jenn's ability to work.

56. According, under Michigan law, the Non-Compete is unreasonable, illegal, void, invalid, and may not be enforced against Jenn.

57. An actual controversy exists between Jenn and Scripps regarding the enforcement of the Non-Compete.

The Complaint does not allege any controversy with the non-solicitation provision. Indeed, the Plaintiff alleges that the sales manager position does not solicit customers and that she "has not made any attempt to solicit Scripps' customers, nor will she." [Complaint, ¶48, ¶51].

Scripps thereafter filed a Counterclaim for Declaratory Judgment, asking the Court to declare "that the January 24, 2020 Salesperson Non-Compete Agreement signed by

Counterclaim Plaintiff is valid, binding, enforceable, and supported by a protectable business interest” and “if the Counterclaim Defendant takes the position with Audacy that has given rise to the present dispute, less than six months from her December 3, 2021 termination date with Counterclaim Plaintiff, then she will be in breach of the January 24, 2020 Salesperson Non-Compete Agreement.” [Counterclaim, ¶100.]

Notwithstanding her allegations, the Plaintiff has acknowledged that she does not have a written or final offer of employment from Audacy. [Deposition of Jennifer Vallis-Bright, p 146.] In addition, Audacy’s Executive Vice President and Deputy General Counsel has attested that the General Sales Manager position that was the subject of discussions between the Plaintiff and Audacy has been filled by another candidate and is no longer open, and there is no likelihood that Audacy will employ the Plaintiff before June 3, 2022. [Affidavit of Michael E. Dash, Jr.]

III The Arguments

Scripps argues that because the General Sales Manager position at Audacy has been offered to another candidate and the Plaintiff will not become employed at Audacy before the subject non-compete provision expires, the challenge to the non-compete provision is moot, and this cause of action should be dismissed. Scripps further argues that the Plaintiff’s Complaint does not allege facts reflecting an actual controversy over the non-solicitation provision.

The Plaintiff argues that the issues in this case are not moot and seeks summary disposition in her own favor pursuant to MCR 2.116(I)(2) because the non-compete provision was superseded and nullified by the Plaintiff's subsequent agreements with Scripps.

IV Standards of Review

A motion for summary disposition pursuant to MCR 2.116(C)(4) tests the court's jurisdiction over the subject matter. "When [re]viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Cork v Applebee's of Mich, Inc*, 239 Mich App 311, 315 (2000). A genuine issue of material fact exists if reasonable minds could differ on the issue. *Johnson v Detroit Edison Co*, 288 Mich App 688, 695 (2010).

A motion for summary disposition pursuant to MCR 2.116(C)(8) tests the legal sufficiency of the complaint, not whether the complaint can be factually supported. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 159-160 (2019); *Pawlak v Redox Corp*, 182 Mich App 758 (1990). A motion for summary disposition based on the failure to state a claim upon which relief may be granted is to be decided on the pleadings alone. *Bailey v Schaaf*, 494 Mich 595, 603 (2013); *Parkhurst Homes, Inc v McLaughlin*, 187 Mich App 357 (1991). Exhibits attached to pleadings may be considered under MCR 2.116(C)(8) because they are part of the pleadings pursuant to MCR 2.113(C). *Id.* at 163. Matters of public

record may also be considered. MCR 2.113(C)(1)(a). See also *Dalley v Dykema Gossett*, 287 Mich App 296, 301 n 1 (2010) (court documents are matters of public record that may be considered on a motion under MCR 2.116[C][8]).

“All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant.” *Maiden v Rozwood*, 461 Mich 109, 119 (1999); *Wade v Dep’t of Corrections*, 439 Mich 158, 162 (1992). Summary disposition is proper when the claim is so clearly unenforceable as a matter of law that no factual development can justify a right to recovery. *Parkhurst Homes*, 187 Mich App 357; *Spiek v Dept of Transportation*, 456 Mich 331, 337 (1998).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim or defense. See, e.g., MCR 2.116(G)(3)(b); *Quinto v Cross & Peters Co*, 451 Mich 358, 362 (1996). Accordingly, “[i]n 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, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion.” *Maiden v Rozwood*, 461 Mich 109, 119-120 (1999); MCR 2.116(C)(10); MCR 2.116(G)(4); *Quinto*, 451 Mich at 358. The moving party “must specifically identify the issues” as to which it “believes there is no genuine issue” of material fact and support its position as provided in MCR 2.116. MCR 2.116(G)(4).

Under Michigan law, the moving party may satisfy its burden of production under MCR 2.116(C)(10) by demonstrating to the court that the non-moving party's evidence is insufficient to establish an essential element of the nonmoving party's claim. *Quinto*, 451 Mich at 361. If the moving party properly supports its motion, the burden "then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Id.* at 362. If the moving party fails to properly support its motion for summary disposition, the nonmoving party has no duty to respond and the trial court should deny the motion. MCR 2.116(G)(4); see also *Meyer v City of Center Line*, 242 Mich App 560, 575 (2000) (concluding that the trial court erred when it granted an improperly supported motion for summary disposition under MCR 2.116[C][10]).

In all cases, MCR 2.116(G)(4) squarely places the burden on the parties, not the trial court, to support their positions. A reviewing court may not employ a standard citing mere possibility or promise in granting or denying the motion. *Maiden*, 461 Mich at 121-120 (citations omitted), and may not weigh credibility or resolve a material factual dispute in deciding the motion. *Skinner v Square D Co*, 445 Mich 153, 161 (1994). Rather, summary disposition pursuant to MCR 2.116(C)(10) is appropriate if, and only if, the evidence, viewed most favorably to the non-moving party, fails to establish any genuine issue regarding any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362, citing MCR 2.116(C)(10) and (G)(4); *Maiden*, 461 Mich at 119-120 (1999). A genuine issue of material fact exists when the record leaves open an issue upon which reasonable minds might differ. *El-Khalil v Oakwood Healthcare*,

Inc, 504 Mich 152, 160 (2019) (citation omitted). Granting a motion for summary disposition under MCR 2.116(C)(10) is warranted if the substantively admissible evidence shows that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Quinto*, 451 Mich at 362-363.

V

As an initial matter, the Plaintiff's request for relief under MCR 2.116(I)(2) is denied because it injects arguments not properly before the Court

The Plaintiff's request for summary disposition in her favor under MCR 2.116(I)(2) is predicated upon issues/arguments that are not responsive to the issue underlying the Motion. MCR 2.116(I)(2) does not allow the Court to render judgment for the nonmoving party on issues unresponsive, and thus, unrelated to the Motion. As such, the unresponsive arguments for relief under MCR 2.116(I)(2) are not properly before the Court and will not be considered as they are beyond the matter specifically identified in Scripps' Motion in accordance with MCR 2.116(G)(4) - i.e., whether summary disposition is warranted because of the absence of an actual controversy. Allowing arguments regarding enforceability of the non-compete provision, nullity of the non-compete provision, and public policy to stand effectively eviscerates the entire briefing schedule and due process by encouraging responding parties to pursue disguised motions for summary disposition under MCR 2.116(C)(10) by ambush and to impermissibly wreck

havoc with the shifting burden standards of MCR 2.116 (C)(10)/(G)(4) and the purpose of MCR 2.116(I)(2).³ This is a tactic the Court cannot countenance.

VI There is no actual controversy

A declaratory judgment is “[a] binding adjudication of the rights and status of litigants which is conclusive in a subsequent action between the parties as to the matters declared. Declaratory judgments are procedural remedies.” *Associated Builders and Contractors v Director of Consumer & Industry Services Director*, 472 Mich 117, 124 (2005) (citation omitted). A suit for declaratory judgment is a judicial procedure whereby a court renders an opinion on a question of law. *Health Center v Comm’r of Ins*, 152 Mich App 336, 347 (1986). A cause of action for a declaratory judgment requires an “actual controversy” between the parties. MCR 2.605(A)(1). An “actual controversy exists when a declaratory judgment is needed to guide a party’s future conduct in order to preserve that party’s legal rights.” *League of Women Voters of Mich v Sec’y of State*, 506 Mich 561, 586 (2020). While a “court is not precluded from reaching issues before actual injuries or losses have occurred, there still must be a present legal controversy, not one that is merely hypothetical or anticipated in the future.” *Id.* A “case becomes moot when the issues presented as no longer live.” *Id.* at 591, n 47. “[M]ootness is a threshold issue that a court

³ Indeed, the Court’s briefing schedule specifically identified the dispositive motion as being “related to the alleged absence of an ‘actual controversy’ under MCR 2.605(A)(1)” and afforded Scripps only two (2) days to file a reply in support of its Motion.

must address before it reaches the substantive issues of a case.” *Can IV Packard Square, LLC v Packard Square, LLC*, 328 Mich App 656, 661 (2019).

Of importance to this matter is *Pantano v Phillips Service Industries, Inc*, per curiam opinion of the Court of Appeals, issued October 17, 2017 (Docket No. 332748), wherein our Court of Appeals held that a cause of action for declaratory judgment regarding whether a non-competition agreement prohibited plaintiff from accepting employment with a competitor was moot where the plaintiff had no pending offer of employment and the one-year limitation on the non-competition clause had expired. For that reason, the court declined to address substantive challenges to the validity of the agreement.

In the instant case, there is no actual controversy regarding whether the non-compete provision can be used to bar the Plaintiff from accepting a General Sales Manager position with Audacy where (a) the Plaintiff does not have a written or final job offer from Audacy, (b) the General Sales Manager position with Audacy was filled by a different candidate, and (c) there is no likelihood that Audacy will employ the Plaintiff before expiration of the non-compete provision on its own terms on June 3, 2022. Indeed, the remaining duration of the non-compete provision is just over three weeks away. Because there is no live actual controversy before the Court, summary disposition is warranted.⁴

⁴ The Motion seeks dismissal of the entire case, including Scripps’ Counterclaim. [Motion, p 6.]

The Plaintiff's one-sentence request for leave to amend her pleadings pursuant to MCR 2.116(I)(5) to add further claims against Scripps which have accrued since the beginning of this litigation is unwarranted. Such subsequent developments are not amendments, they are supplemental pleadings. MCR 2.118(E). The Plaintiff is free to file a new lawsuit in connection with such purported developments, but the gravamen of this case is resolved.

ORDER

Based on the foregoing Opinion, Scripps' Motion for Summary Disposition Due to Lack of an Actual Controversy is **GRANTED**.

This is a final order that resolves the last pending claim and closes the case.

