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 ON DEFENDANTS' MOTION FOR RECONSIDERATION
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 19th day of May, 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 moved 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). In an Opinion and Order entered April 22, 2022, the court denied defendants' motion and partially granted and partially denied plaintiff's motion. Defendants move for reconsideration, alleging the court made a palpable error, the correction of which should change the outcome of defendants' motion.

The standard for a Motion for Reconsideration is found in MCR 2.119(F)(3), which states:

> (3) Generally, and without restricting the discretion of the court, a motion for rehearing or reconsideration which merely presents the same issues ruled on by the court, either expressly or by reasonable implication, will not be granted. The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error.

A court has considerable discretion in granting reconsideration to correct mistakes, preserve judicial economy, and minimize costs to the parties. *Churchman v Rickerson*, 240 Mich App 223; 611 NW2d 333 (2000). The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition must result from correction of the error. To be "palpable" is to be easily perceptible, plain, obvious, readily visible, noticeable, patent, distinct, or manifest. *Luckow Estate v Luckow*, 291 Mich App 417, 805 NW2d 453 (2011). The court may properly deny a motion for reconsideration based on a legal theory and facts which could have been pled or argued prior to the trial court's original order. *Werdlow v Detroit Policemen and Firemen Retirement System Board of Trustees*, 269 Mich App 383; 711 NW2d 404 (2006).

Defendants first argue that plaintiff cannot enforce his noncompetition agreements with the defendants as he has no "reasonable competitive business interest" to protect, as that term is used in the Michigan Antitrust Reform Act (MARA), MCL 445.771 et seq. Defendants assert that plaintiff's advertising expenses are not a sufficient basis for establishing a "competitive business interest," and apparently further assert that plaintiff's publication of a notice to customers (to the effect that "matters regarding your tattoos should be directed to the artist who performed the work") constitutes a waiver of any competitive business interest.[1]

As noted in the court's Opinion and Order, defendants' arguments fail to fully apprehend plaintiff's arguments. Plaintiff's reasonable competitive business interest arose when he invested in a business location, advertised his independent contractors' services, and began to develop a reputation for tattooing and related services in the Zeeland area. He sought to protect that investment, and the goodwill generated by the successful provision of those services, by executing non-competition agreements with his independent contractors.

Whether or not there was an anticipatory breach of contract may be a red herring in this case, in addition to being a disputed issue of fact. There seems to be no dispute, however, that

[1] A waiver is the intentional relinquishment of a known right that may be shown by express declarations or by declarations that manifest the parties' intent and purpose. *Sweebe v Sweebe,* 474 Mich 151, 156-157; 712 NW2d 708 (2006), quoting *Bailey v Jones,* 243 Mich 159, 162; 219 NW 629 (1928). The recognized definition of the term "waiver" is "[t]he voluntary relinquishment or abandonment – express or implied – of a legal right or advantage.... The party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it." Black's Law Dictionary (9th ed.). To effectuate a valid waiver, "no magic language" need be used. *Sweebe,* 474 Mich at 157. "Rather ... a waiver must simply be explicit, voluntary, and made in good faith." *Id.* In order to ascertain whether a waiver exists, a court must determine if a reasonable person would have understood that he or she was waiving the interest in question. *Id.* The present factual record in this case does not permit the court to make a factual finding that plaintiff waived his competitive business interest so as to prevent or estop him from pursuing the present action. Whether plaintiff was waiving all claims to his accrued business goodwill, or simply attempting to preserve some of his business goodwill and mitigate his damages, are matters of intent, and therefore issues of fact to be resolved.

defendants did, in fact, open a competing tattooing business within the geographical area and time frame restricted by their respective non-competition agreements. Plaintiff asserts that he has lost profit and customers by defendants' breach of contract. These are disputed fact issues, of course, and inappropriate for summary disposition.

The court rejects defendants' assertion that the court must issue a holding regarding the enforceability of the defendants' non-competition agreements as a matter of law. A jury trial has been demanded in this case, and the jury will sit as the trier of fact with respect to any factual prerequisites to such a determination. At this stage of the proceedings, the court presumes that a reasonable juror could find that plaintiff had reasonable competitive business interests that were subject to protection by a non-competition agreement, and that plaintiff and the defendants executed such agreements. Michigan case law provides many examples of two-year, twenty-mile non-competition agreements that have been found enforceable. Defendants do not cite any published case law regarding non-competition agreements affecting tattoo artists specifically, but even if the time and geographic limits in the defendants' agreements are determined to be unreasonable, MARA gives the court the discretion to modify such terms in order to make them reasonable.[2]

While the court appreciates the defendants' clarification and supplementation of their earlier arguments, defendants' arguments are largely a repetition of the arguments made prior to the trial court's Opinion and Order of April 22, 2022. The court is not persuaded that it made a palpable error in that Opinion and Order, and defendants' motion for reconsideration is therefore DENIED.

IT IS SO ORDERED.

Date: May 19, 2022

Hon. Jon A. Van Allsburg, Circuit Judge

[2] "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).