STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

414 Washington Street
Grand Haven, MI 49417
616-846-8315

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BRADFORD J. LEMKE, D.V.M.,
Plaintiff,

v

ALLENDALE ANIMAL HOSPITAL, P.C.,
Defendant/Third-Party Plaintiff,

v

JOAN LEMKE, D.V.M.,
Third-Party Defendant.
_____/

OPINION AND ORDER RE: SUMMARY DISPOSITION
File No. 14-03577-CZ
Hon. Jon A. Van Allsburg

At a session of said Court, held in the Ottawa County Building, in the City of Grand Haven, Michigan, on the 10th day of December, 2014:

PRESENT: THE HON. JON A. VAN ALLSBURG, Circuit Judge

Plaintiff, Bradford J. Lemke, D.V.M. (Brad), filed an action for declaratory judgment against defendant Allendale Animal Hospital, P.C. (Allendale), alleging that he is not bound by a non-competition agreement signed by his wife/third-party defendant, Joan Lemke, D.V.M. (Joan), who sold her practice to defendant. Allendale filed a Counterclaim and Third Party Complaint for Equitable and other Relief against Brad and Joan Lemke.

Plaintiff moved for summary disposition on his request for declaratory relief and as to the following counts in Allendale's counterclaim, pursuant to MCR 2.116(C)(10):

- Count III (Breach of Covenant Not to Compete by Dr. Brad Lemke)

- Count IV (Tortious Interference with Business Relationships/Expectancy as to Dr. Brad Lemke), and
- Count V (Civil Conspiracy as to Dr. Brad Lemke).

Counts I and II of defendant's counterclaim are not at issue in this motion as they are directed specifically at the third-party defendant, rather than the plaintiff. Plaintiff has also requested that sanctions be assessed against Allendale for making frivolous claims, pursuant to MCR 2.114(F). Oral argument on plaintiff's motion was heard on October 6, 2014. For the reasons stated below, the court grants Brad Lemke's motion in part and denies it in part.

Summary of the Facts

Brad's wife, third-party defendant Joan Lemke, D.V.M., entered into a Purchase Agreement to sell her sole ownership interest in Allendale Animal Hospital, P.C. to Fraser Animal Clinic, P.C. (Allendale's predecessor in interest), on March 1, 2009. On the same date, Joan Lemke signed a Non-Competition, Non-Solicitation, Non-Disclosure & Non-Disparagement Agreement with Fraser Animal Clinic, P.C. in connection with the sale of that veterinary practice. Brad Lemke did not sign any agreement with respect to this sale, and he had no ownership interest in the selling veterinary practice. He was engaged in a veterinary practice at another location. At the time of the sale, Brad and Joan Lemke were equal owners in the real estate company which owned the facility at 6857 Lake Michigan Drive in which the selling veterinary practice was located. Allendale continued to lease clinic space in that location until its lease expired on February 28, 2014, when it moved to another location in Allendale.

Allendale alleges, and Brad Lemke admits that, in 2011, after Allendale announced that it had purchased land for the construction of a new veterinary clinic, Brad made plans to open a competing veterinary clinic in the 6857 Lake Michigan Drive facility to be vacated by Allendale. Defendant further alleges that Joan actively participated with Brad in marketing that facility for lease to other veterinarians (including her husband, the plaintiff) and in managing that facility. Allendale also alleged that Brad worked in concert with Joan Lemke to directly compete with the defendant. It provided affidavit evidence that Brad and Joan had involvement in each other's veterinary practices.

Standard of Review

Plaintiff's motion under MCR 2.116(C)(10) tests the factual basis for defendants' counterclaim. *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, the court 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, defendant Allendale, the benefit of any reasonable doubt regarding material facts, the court must 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 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,* 451 Mich at 362.

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, 428; 789 NW2d 211 (2010).

Analysis

I. Plaintiff's Motion for Declaratory Judgment

Plaintiff's Complaint for Declaratory Judgment requests that the court declare that "he is not bound by his wife's non-compete agreement with Defendant." MCR 2.605(A)(1) states that "In a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." In *Fieger v Commissioner of Ins,* 174 Mich App 467; 437 NW2d 271 (1988), the Court of Appeals stated:

> "The declaratory judgment rule is intended to be liberally construed to provide a broad, flexible remedy to increase access to the courts, and in some instances a declaratory judgment is appropriate even though actual injuries or losses have not yet occurred. But, in such cases, an actual controversy will be found to exist only where a declaratory judgment is necessary to guide a litigant's future conduct in order to preserve the litigant's legal rights. *Shavers, supra* [*Shavers v Attorney General*, 402 Mich 554; 267 NW2d 72 (1978)]; *Crawford Co. v. Secretary of State,* 160 Mich App 88, 92-93, 408 NW2d 112 (1987). What is essential to an actual controversy is that plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised. *Id.* The plaintiff must allege and prove an actual justiciable controversy. *Shavers, supra,* 402 Mich at p. 589, 267 NW2d 72." *Id.* At 470-71.

In this case, the parties in their respective pleadings admit the existence of an actual controversy, and the letter that Allendale's attorney sent Brad and Joan Lemke on November 26, 2013, threatening litigation, establishes that fact. The threat of litigation and claims for damages constitutes a sufficient adverse interest to justify a request for declaratory relief. Whether plaintiff is entitled to the declaratory relief requested depends upon the resolution of Count III of defendant's counterclaim, the claim that Brad Lemke breached a covenant not to compete.

II. Defendant's Counterclaim for Breach of Covenant Not to Compete

The essential elements of a contract are (1) parties competent to contract, (2) a proper subject matter, (3) legal consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *McInerney v Detroit Trust Co*, 279 Mich 42, 46; 271 NW 545 (1937). The dispositive issue here is Allendale's admission that Brad Lemke never signed the Non-Competition Agreement (Answer to ¶4, plaintiff's motion for summary disposition). There is no allegation of a contract existing between Brad and Allegan. The allegation of a breach of a

covenant by Brad in concert with Joan (¶38, defendant's counterclaim) concerns the contract between Joan and Allendale.

Without a contract with an individual, there is no breach of contract by that individual. Plaintiff's motion for summary disposition as to Count III of defendant's counterclaim is therefore GRANTED. Correspondingly, plaintiff's motion for declaratory relief, determining that he is not bound by third-party defendant's Non-Competition Agreement with Defendant, is also GRANTED.

III. Defendant's Counterclaim for Tortious Interference with Business Relationship/Expectancy

Although Count IV of Allendale's counterclaim alleges tortious interference against both plaintiff and third-party defendant, plaintiff's motion for summary disposition relates only to that claim as it applies to Brad Lemke. The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. *Badiee v Brighton Area Schools,* 265 Mich App 343, 365-366; 695 NW2d 521 (2005); *Mino v Clio School Dist,* 255 Mich App 60, 78; 661 NW2d 586 (2003); *Feaheny v Caldwell,* 175 Mich App 291, 301; 437 NW2d 358 (1989); see also M Civ JI 126.01.

Tortious interference with a contract or contractual relations is a cause of action distinct from tortious interference with a business relationship or expectancy. *Knight Enterprises v RPF Oil Co*, 299 Mich App 275, 279; 829 NW2d 345 (2013); M Civ JI 125.01 and 126.01. As the *Knight* court explained: "The elements of tortious interference with a contract are (1) the existence of a contract, (2) a breach of the contract, and (3) an unjustified instigation of the breach by the defendant." *Id.* at 280, quoting *Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 89-90; 706 NW2d 843 (2005).

Tortious interference with a contract or business relationship is an intentional tort. *Knight, supra*, at 280, *Badiee, supra*, at 365. A party alleging tortious interference with a

contractual relationship "'must allege the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the contractual rights or business relationship of another.'" *Knight, supra*, at 280 (quoting *Derderian v Genesys Health Care Sys,* 263 Mich App 364, 382; 689 NW2d 145 (2004)). The Court of Appeals explained in *Knight*, quoting *Badiee, supra*, at 367, as follows:

> "A wrongful act per se is an act that is inherently wrongful or an act that can never be justified under any circumstances. If the defendant's conduct was not wrongful per se, the plaintiff must demonstrate specific, affirmative acts that corroborate the unlawful purpose of the interference." *Id.* at 280 (internal citations omitted).

In support of the claim of tortious interference against Brad Lemke, Allendale points to activities that arguably were wrongful acts for Joan Lemke, who was bound by a non-compete agreement, but cannot be described as wrongful acts with respect to Brad, who had not entered into such a covenant. Summary disposition is thus warranted in Brad Lemke's favor on Allendale's claim against him of tortious interference with business relationship.

IV. Defendant's Counterclaim for Civil Conspiracy

Defendant's counterclaim alleges a claim for civil conspiracy against both plaintiff and third-party defendant in Count V, but Brad Lemke's motion for summary disposition relates only to that claim as it applies to him.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n,* 257 Mich App 365, 384; 670 NW2d 569 (2003), quoting *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Organization, supra*, at 384, quoting *Early Detection Center, PC v New York Life Ins Co*, 157 Mich App 618, 632; 403 NW2d 830 (1986).

Allendale's argument in support of its conspiracy claim against Brad Lemke is that Joan and Brad Lemke acted in concert to breach the non-compete agreement that Joan had entered into with Allendale and, in doing so, to aid Joan in tortiously interfering with Allendale's business relationships and expectations. The claims against Joan have not been challenged by a

motion for summary disposition and are supported in Allendale's response to Brad's motion for summary disposition by affidavits that provide evidence that Brad and Joan worked in concert on the planned start-up of Brad's proposed clinic in the facility at 6857 Lake Michigan Drive. This evidence, considered in the light most favorable to Allendale for purposes of this motion, supports its claim of a "combination of persons" engaged in "concerted action" to accomplish an unlawful purpose, and it provides a "separate, actionable tort" on which a claim of conspiracy may rest.

In *Edwards Publications, Inc v Kasdorf*, unpublished per curiam opinion of the Court of Appeals, 2009 WL 131636 (Docket No. 281499, Jan. 20, 2009),[1] the Court of Appeals reversed a summary disposition determination in a case in which a competitor of the plaintiff had hired plaintiff's former employee. Finding that the non-compete provisions precluded the former employee from working for the competitor, the court ruled, *id.* at *7, that "the civil conspiracy claim can proceed where there was evidence that [the defendant and new employer] were aware of the non-compete provisions, yet by a concerted effort [employer] hired [defendant], thereby accomplishing the unlawful purpose of employing [defendant] in a field that violated contractual rights."

Allendale's conspiracy claim against the Lemkes is not as clear cut as the claim in *Edwards Publications*, but Allendale has stated a claim as a matter of law and, in response to Brad Lemke's motion for summary disposition, responded with evidence in support of its conspiracy claim. Summary disposition is thus denied as to Brad Lemke with respect to Count V of Allendale's counterclaim.

V. Plaintiff's Request for Sanctions for Pleading Frivolous Claims

A court is permitted to impose sanctions against a party based on a frivolous claim under MCR 2.114(F): "[A] party pleading a frivolous claim or defense is subject to costs as provided in MCR 2.625(A)(2)." Sanctions are also permitted by MCL 600.2591, which provides in relevant part:

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[1] The court recognizes that it is not bound by this unpublished decision, MCR 7.215(C)(1); *Charles Reinhart Co v Winiemko*, 444 Mich 579, 588 n 19; 513 NW2d 773 (1994), and merely views the opinion as persuasive, *Dyball v Lennox*, 260 Mich App 698, 705 n 1; 680 NW2d 522 (2003). Unpublished opinions can be instructive or persuasive. *Beyer v Verizon North, Inc*, 270 Mich App 424, 431; 715 NW2d 328 (2006); *Paris Meadows, LLC v City of Kentwood*, 287 Mich App 136, 139 n 3; 783 NW2d 133 (2010).

> "(1) Upon motion of any party, if a court finds that a civil action or defense to a civil action was frivolous, the court that conducts the civil action shall award to the prevailing party the costs and fees incurred by that party in connection with the civil action by assessing the costs and fees against the nonprevailing party and their attorney.
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> * * *
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> (3) As used in this section:
> (a) "Frivolous" means that at least 1 of the following conditions is met:
> (i) The party's primary purpose in initiating the action or asserting the defense was to harass, embarrass, or injure the prevailing party.
> (ii) The party had no reasonable basis to believe that the facts underlying that party's legal position were in fact true.
> (iii) The party's legal position was devoid of arguable legal merit ...."

"Whether a claim is frivolous ... depends on the facts of the case." *Kitchen v Kitchen*, 465 Mich 654, 662; 641 NW2d 245 (2002). "The mere fact that [a party] did not ultimately prevail does not render" its arguments frivolous. *Id.*

The trial court's imposition of sanctions also flows from MCR 2.114(D)(2) and (E), which allow for the award of reasonable expenses when the opposing party's pleadings are not "well grounded in fact" or are not "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law."

In this case, Brad Lemke initiated the litigation by filing a declaratory action. While Allendale did not prevail on two of the claims it asserted in response to the declaratory action, its responsive pleadings are not frivolous.

Conclusion

For the reasons stated above, summary disposition is GRANTED in favor of Bradford Lemke on his request for declaratory relief and on the claims against him in Count III and Count IV of Allendale Animal Hospital's counterclaim. Summary disposition on Count V and the request for sanctions are DENIED.

IT IS SO ORDERED.

Dated: December 10, 2014

Hon. Jon A. Van Allsburg, Circuit Judge