**STATE OF MICHIGAN**
**IN THE BUSINESS COURT FOR THE COUNTY OF LIVINGSTON**

MICHIGAN LAWN & SNOW SERVICE, LLC,
Plaintiff

Case No. 21-31150-CB
Hon. Michael P. Hatty

v

JERRAD BEAUCHAMP, KEN MARONE,
and THE POND PLACE of MICHIGAN, LLC,
Defendants
_____/

# OPINION AND ORDER ON MOTION FOR PARTIAL SUMMARY DISPOSITION BY DEFENDANT BEAUCHAMP

At a session of the 44th Circuit Court,
Held in the City of Howell, Livingston County,
on the 29th day of September, 2022

THIS MATTER comes before this Court on Motion for Partial Summary Disposition by Defendant Jerrad Beauchamp (hereinafter "Beauchamp") pursuant to MCR 2.116(C)(7) and (10). This Court, having reviewed the parties' written briefs, having heard the parties' oral arguments, being otherwise fully advised in the premises, and for the reasons stated herein, GRANTS Defendant's Motion in part and DENIES Defendant's motion in part.

**I**

In October 2018, Beauchamp was the owner of a business called Beauchamp Lawn and Snow Services, Inc (hereinafter "BLSS") and Defendant The Pond Place of Michigan, LLC (hereinafter "Pond Place"). On October 26, 2018, Beauchamp sold BLSS to Plaintiff for a purchase price of $8.8 million. The agreement reached between the parties provided that Beauchamp was able to retain his ownership of Pond Place, among other companies he owned which have not been discussed in this matter. However, Beauchamp agreed that he would not compete against Plaintiff within a 500 mile radius of Brighton, Michigan for a period of six years. Beauchamp further agreed

that he would not hire or solicit employees of Plaintiff during that six-year period. Beauchamp further agreed not permit other businesses under his ownership or control, including Pond Place, to so compete or solicit. Specifically, the agreement reached between BLSS, by and through Beauchamp, and Plaintiff, was memorialized in an Asset Purchase Agreement (hereinafter "APA"), which provided, in pertinent part, as follows:

> **"Restricted Business"** means grounds maintenance, landscape construction and snow removal services and in no event shall it include…(iii) the business of The Pond Place as historically conducted…
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> * * *
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> **"Territory"** means the territory within a 500-mile radius of Seller headquarters at 3589 Old US Highway 23, Brighton, MI.
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> * * *
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> **Section 6.03 Non-competition Non-solicitation:** (a) For a period of six (6) years commencing on the Closing Date (the "Restricted Period"), Seller and Owner shall not, and shall not permit any of their respective Affiliates to, directly or indirectly, (i) engage in or assist others in engaging in the Restricted Business in the Territory; (ii) have an interest in any Person that engages directly or indirectly in the Restricted Business in the Territory in any capacity… (iii) cause, induce or encourage any material actual or prospective client, customer, supplier, or licensor of Buyer… or any other Person who has a material business relationship with Buyer, to terminate or modify any such actual or prospective relationship…
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> (b) During the Restricted Period, neither Seller nor Owner shall, and shall not permit any of their respective Affiliates to, directly or indirectly, hire or solicit any person who is offered employment by Buyer… or is or was employed by Buyer during the Restricted Period, or encourage any such employee to leave such employment or hire any such employee who has left such employment… provided that nothing in this Section 6.03(b) shall prevent Seller or Owner or any of their respective Affiliates from hiring (i) any employee whose employment with Buyer has been terminated by Buyer after one hundred (180) days from the date of termination of employment with Buyer, (ii) any employee whose employment has been terminated by the employee or (iii) employment of Owner or Ken Marone by a separate entity that Owner owns.
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> * * *

> …No arbitration or action, regardless of form, arising out of the terms and provisions of this Agreement may be brought or commenced by any party more than one (1) year after the dispute, claim, or cause of action arise.

An individual named Don Davis was employed by BLSS before the sale to Plaintiff on October 26, 2018 and then by Plaintiff after the sale until he voluntarily resigned in January 2019 when his compensation structure was changed. He was then hired by Beauchamp at Pond Place in March or April of 2019. Around this same time, Plaintiff became aware that Pond Place had been installing seawalls as part of its services and requested Pond Place desist such activity because it was Plaintiff's belief that this was a "Restricted Business" as that term is defined above.

On March 5, 2021, Beauchamp sold Pond Place to defendant Ken Marone and a non-party individual named John Smith for $764,094.93. Plaintiff commenced this action on May 14, 2021, asserting that Defendants had breached the provisions of the APA discussed above concerning the agreement not to compete and to not solicit Plaintiff's employees. Plaintiff's complaint further alleges tortious interference and civil conspiracy.

Beauchamp now brings this motion, asserting that the construction and installation of seawalls is not a "Restricted Business;" that even if it were so considered, Plaintiff is barred by the one-year contractual limitation provided for in the APA from bringing such a claim for a violation of the agreement not to compete or solicit; and that this same limitation bars Plaintiff's claim relative to Pond Place's employment of Mr. Davis.

**II**

A motion for summary disposition pursuant to MCR 2.116(C)(7) may be brought on the grounds that dismissal of the action or other relief is appropriate because of statute of limitations. This is also appropriate when considering a contractual limitations period. *Timko v Oakwood Custom Coating, Inc*, 244 Mich App 234, 238 625 NW2d 101 (2001). A party is not required to submit any material in support of a motion under MCR 2.116(C)(7); the motion can be evaluated

on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). "The contents of the complaint are accepted as true unless contradicted by documentation submitted by the movant." *Id*. "A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Id*. "In reviewing the motion, a court must review all documentary evidence submitted by the parties, accepting as true the contents of the complaint unless affidavits or other appropriate documents specifically contradict them." *Yono v Dep't of Transp*, 495 Mich 982, 982-983; 843 NW2d 923 (2014); see also MCR 2.116(G)(5). "If the movant properly supports his or her motion by presenting facts that, if left unrebutted, would show that there is no genuine issue of material fact that the movant [is entitled to summary disposition], the burden shifts to the nonmvoing party to present evidence that establishes a question of fact." *Kincaid v Cardwell*, 300 Mich App 513, 537 n 6; 834 NW2d 122 (2013). "If the trial court determines that there is a question of fact as to whether the movant [is entitled to summary disposition], the court must deny the motion." *Dextrom v Wexford Co*, 287 Mich App 406, 431; 789 NW2d 211 (2010).

A motion brought under MCR 2.116(C)(10) tests the factual support for a plaintiff's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Summary disposition under MCR 2.116(C)(10) is available when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10); see also *Coblentz v City of Novi*, 475 Mich 558; 719 NW2d 73 (2006). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *Atty Gen v PowerPick Players' Club of Mich, LLC*, 287 Mich App 13, 26–27; 783 NW2d 515 (2010). In reviewing a motion brought under MCR 2.116(C)(10), 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); *Maiden* at 120. Granting the nonmoving party the benefit of any reasonable doubt regarding material facts, the 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). If there is no genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Quinto v Cross & Peters Co*, 451 Mich 358, 363; 547 NW2d 314 (1996).

**III**

"Absent an ambiguity or internal inconsistency, contractual interpretation begins and ends with the actual words of a written agreement." *Cnty of Ingham v Mich Co Rd Comm Self-Insurance Pool*, 329 Mich App 295, 310; 942 NW2d 85 (2019). "When interpreting a contract, our primary obligation is to give effect to the parties' intention at the time they entered into the contract. To do so, we examine the language of the contract according to its plain and ordinary meaning. If the contractual language is unambiguous, courts must interpret and enforce the contract as written[.]" *Id.*

When reading section 6.03(a) and the definition of "Restricted Business" together, the APA unambiguously prohibits Beauchamp, and his Affiliates, from competing with MLSS in any of its business offerings. The APA permits Beauchamp to operate "the business of The Pond Place as historically conducted." The Pond Place did not "historically conduct" seawalls. Seawall services were offered by BLSS before the sale and after the sale to MLSS, the Pond Place never historically conducted seawall services, the Parties' intent is clear and the APA non-competition provision includes seawall services.

Further, while section 9.09(b) clearly provides for a one-year contractual limitation of actions after the claim arose, the abrogation of the continuing-wrongs doctrine does not prevent Plaintiff from asserting claims that arose within one year of the commencement of this action:

> When we abrogated the continuing-wrongs doctrine in *Garg*, we explained that the relevant statute of limitations there, MCL 600.5805, "requires a plaintiff to commence an action within three years of each adverse employment act by a defendant." After *Garg*, a plaintiff in Michigan may not revive stale claims even if the claims are part of a series of "continuing violations." But *Garg*, of course, did not operate to immunize future wrongful conduct. In other words, a plaintiff's failure to timely sue on the first violation in a series does not grant a defendant immunity to keep committing wrongful acts of the same nature. A plaintiff is free to bring a new action each time a defendant commits a new violation. *Garg* simply held that a plaintiff may not recover for injuries that fall outside the statutory period of limitations—regardless of how related those injuries are to timely claims—when the Legislature has not permitted such recovery by statute. But, importantly, *Garg* allowed the claim that accrued within the limitations period to go forward.
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> *Twp of Fraser v Haney*, _____ Mich _____, slip op at 5; (2022) (citing *Garg v Macomb County Community Mental Health Services*, 472 Mich 263; 696 NW2d 646 (2005)).

Thus, the one-year limitation on actions provision provided for in the parties' agreement does prevent claims from being asserted that arose prior to May 14, 2020. This would include Pond Place's employment of Mr. Davis and any claims relative to Defendants' installation or construction of seawalls that occurred prior to that date. However, Plaintiff may continue to bring any claim that arose subsequent to May 14, 2020, this would include the installation or construction of any seawalls that occurred after May 14, 2020.

**IV**

Accordingly, this Court GRANTS Defendant's Motion for Partial Summary Disposition in part and DENIES Defendant's Motion in part, consistent with this opinion.

**IT IS SO ORDERED**.

Michael P. Hatty
Circuit Court Judge