

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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SPARTAN GRAPHICS, INC.,

Plaintiff-Appellant,

v

ENTERMARKET CORPORATION,

Defendant-Appellee,

and

GEORGE SCHMUTZ

Defendant.

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UNPUBLISHED

November 16, 2010

No. 292235

Kent Circuit Court

LC No. 09-000170-CZ

Before: O'CONNELL, P.J., and SERVITTO and SHAPIRO, JJ.

PER CURIAM.

This litigation arises from claims of trade secret misappropriation. Plaintiff appeals by leave granted the trial court's April 15, 2009 interlocutory order granting defendant EnterMarket Corporation's motion for partial summary disposition and dismissing plaintiff's claims against EnterMarket for misappropriation of trade secrets (Count II), tortious interference with a contract (Count III), and tortious interference with an advantageous business relationship (Count IV) on the grounds that they were barred by a prior release. We affirm the trial court's dismissal of Count III, but reverse and remand as to Counts II and IV.

**I. BACKGROUND**

Plaintiff, a Michigan corporation, designs, produces, and sells specialty printed materials, including graphic decals, stickers, signs, posters, appliqués, and other recognition products to distributors, retainers, and end users. In the late 1990s, Goodren Product Services Corporation, a New Jersey corporation that sells design and manufacturing services, but subcontracts the actual design and manufacturing to vendors, began using both plaintiff and Continental Identification Products, Inc (CIP) as print vendors.

In 2000, as a result of a bankruptcy of one of Goodren's principal customers, Goodren was unable to pay plaintiff and CIP for products it had purchased from both and sold to the now bankrupt customer. Goodren owed plaintiff and Continental a combined debt of approximately

\$366,515. Although Goodren, plaintiff, and CIP entered into an agreement for repayment of the debt, which was subsequently revised, Goodren ceased doing business in 2005, leaving the debt largely unpaid. On January 1, 2006, EnterMarket, a New York corporation and print broker, hired Jeffrey Kahn, Goodren's principal, to be its vice president. EnterMarket used plaintiff and CIP as one of its print vendors in 2005 and 2006.

On February 16, 2007, plaintiff and CIP filed suit against Goodren and EnterMarket in Kent Circuit Court. Goodren and EnterMarket had the suit removed to the United States District Court for the Western District of Michigan. Plaintiff and CIP alleged that Goodren had merged with EnterMarket, with EnterMarket agreeing to assume the Goodren debt. As a result of facilitated mediation in April 2008, the parties agreed to settle the suit for payment by EnterMarket of \$84,500. The parties memorialized the terms in a document captioned "Settlement Agreement and Mutual Release" (the settlement agreement) which was signed by EnterMarket's representative on May 6, 2008, and plaintiff's representative on May 20, 2008.

The last paragraph of the "Recitals" portion of the settlement agreement provides:

R. The Parties wish to fully and completely resolve any and all claims which have been brought or which could have been brought in the Lawsuit or in connection with the business relationships between the parties.

The actual terms of the settlement agreement follow the recitals and contain, among other things, the releases made by the parties. Paragraph 2 provides:

**Release by Plaintiffs:** Plaintiffs, for themselves, their officers, directors, owners, employees, parents, subsidiaries, affiliate companies, sureties, successors and assigns, hereby release and forever discharge Defendants and their parents, subsidiaries, affiliate companies, and all of their respective officers, directors, employees, agents, attorneys, sureties, insurance companies, successors and assigns, from any and all claims, liens, claims of lien, actions, causes of action, debts, obligations, warranties, demands and costs of any kind or nature whatsoever, known or unknown, accrued or unaccrued, that were, could have been, or might have been asserted by the Plaintiffs in the Lawsuit or in any forum in connection with, arising out of, related to, based upon, in whole or in part, directly or indirectly: (a) any allegation, transaction, fact, matter, circumstance, occurrence, representation, action, omission or failure to act that was alleged, involved, set forth, referred to or could have been alleged in the Lawsuit; or (b) any business transaction, business relationship, or business dealings between Plaintiffs and the Defendants though [sic] the date of the execution of this Agreement. Notwithstanding the above, by entering into this Settlement Agreement and Release, Plaintiffs do not release or waive any claims they may have against George Schmutz or any other former employee of Plaintiffs.

On January 7, 2009, plaintiff initiated the instant litigation against EnterMarket and George Schmutz in Kent Circuit Court. Plaintiff alleged that it employed Schmutz for more than 18 years as its operations manager in its sales department and that Schmutz had continuous, direct contact with plaintiff's current and potential customers, had access to all of plaintiff's pricing information and sales strategies, and had access to plaintiff's confidential and proprietary

information relating to customers, customer prospects, customer contacts, business plans, sales strategies, and pricing information. Plaintiff further alleged that, as a condition of his employment, Schmutz entered into a non-competition agreement with plaintiff.

According to plaintiff, Schmutz resigned from his position with plaintiff in June 19, 2006. Plaintiff alleged that it learned in March 2008 that EnterMarket, a direct competitor of plaintiff in the business of commercial printing and fulfillment services, had hired Schmutz. Plaintiff also alleged that it learned in September 2008 that Schmutz was actively soliciting business from customers he had serviced while employed by plaintiff, using his knowledge of plaintiff's confidential and proprietary information and his contacts with, and knowledge relating to, plaintiff's customers to solicit millions of dollars in sales from plaintiff's customers for EnterMarket.

Plaintiff's complaint alleged three counts against EnterMarket: Count II for misappropriation of trade secrets, Count III for tortious interference with a contract by employing Schmutz in violation of the non-competition agreement, despite knowledge of its existence, and Count IV, tortious interference with an advantageous business relationship. EnterMarket moved for summary disposition under MCR 2.116(C)(7), asserting that plaintiff's claims against it were barred by the settlement agreement, and alternatively under MCR 2.116(C)(8), asserting that plaintiff had failed to state a claim upon which relief could be granted. EnterMarket attached interrogatory answers from the federal lawsuit which disclosed that Schmutz began serving as a consultant to EnterMarket in late 2006, and was hired by EnterMarket on January 1, 2007 to be its president.

The trial court held a hearing on the motion on April 2, 2009 and granted the motion as to Counts II, III and IV, holding:

The Court notes, parenthetically, that without question Count 3 and Count 4 are covered by the release by the plaintiffs. There's no question in the Court's mind. Clearly, they deal with the relationship between the parties predating May 20<sup>th</sup>, 2008, and there's no—any potential cause of action was known on signing of the settlement release agreement. It was a release of all claims as of the date of the execution of the agreement pursuant to Subparagraph (b) of the Paragraph 2 of the agreement, and therefore Counts 3 and 4, which allege claims that arise under June 19, 2006 actions of Co-Defendant George Schmutz, clearly are barred by the settlement release agreement under MCR 2.116(C)(7).

The more difficult analysis is—relates to Count 2. In Count 2, this is the tortious interference, and the comments of Mr. Dougherty are very thoughtful and well-presented . . . that his position being, as I understand it, that because of the date of the execution of the agreement limiting language of Subparagraph 2(b), there could not be continued—there could not be a bar to the claims in Count 2 after May 20<sup>th</sup>, 2008.

The Court, however, looks at the language of the entire document, the release agreement. In it, the plaintiffs agree to release any claims for “demands and costs of any kind or nature whatsoever, known or unknown, accrued or unaccrued, that were, could have been, or might have been asserted by the

plaintiffs in the lawsuit or in any forum in connection with, arising out of, related to, based upon, in whole or in part, directly or indirectly.”

The Court draws its attention to the “arising out of, related to,” and related in while—“related to, in whole or in part, directly or indirectly” language, very, very broad language, “of any allegation, transaction, fact, matter, circumstances, occurrence, representation, action, omission, or failure that was alleged, involved, set forth, referred to, or could have been alleged in the lawsuit.”

That required the Court to turn back the hands of time to May 20, 2008. May 20, 2008, there was knowledge that Mr. Schmutz was working for the competitor, and there was apparently a belief that there w[ere] violations of trade secrets going on. That’s related to. That’s arising out of. That’s direct and indirect.

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What’s the intent of the parties? It’s evidence by the specific language, but—that I’ve already referenced, but it’s also evidence by the specific language as pointed out by Counsel Holaday in Subparagraph 4 of the—or Subparagraph R . . . where “the parties wish to fully and completely resolve any and all claims which have been brought or which would have been brought in the lawsuit or in connection with the business relationships between the parties.” It appears that it was a desire to have a permanent, lasting, effective divorce between the parties who were litigants against—a commercial divorce to avoid further litigation.

I’m satisfied that the release encompasses that which is alleged in Counts 2, 3, and 4.

Plaintiff immediately sought clarification regarding whether the trial court’s ruling included tortious interference activity committed by EnterMarket after May 20, 2008. The trial court answered affirmatively, “because it is the Court’s belief that based on the complaint as filed, . . . you were aware of this tortious conduct going forward at the time on May 20 by virtue of the employment and his position and participation in this industry.”

Plaintiff moved for reconsideration under MCR 2.119(F), arguing that although it knew by May 28, 2008<sup>1</sup> that EnterMarket employed Schmutz, it had no knowledge of any misappropriation or use of its trade secrets at that time, and that it did not learn that EnterMarket and Schmutz had misappropriated its trade secrets until September 2008. Thus, plaintiff argued, it could not have included its misappropriation claims in the federal action, such that the

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<sup>1</sup> Plaintiff refers throughout its brief to the “May 28, 2008 release.” However, the record indicates that plaintiff’s representative signed the settlement agreement on May 20, 2008, and the trial court relied on plaintiff’s knowledge as of May 20, 2008. Accordingly, the pertinent date is May 20, 2008, not May 28, 2008.

language in the settlement agreement did not bar the claim. The trial court denied the motion as untimely, but further held that even if the motion had been timely, it would still have denied the motion because of the broad language of the release.

Plaintiff filed an application for leave to appeal the trial court's grant of summary disposition, which this Court granted. *Spartan Graphics, Inc v EnterMarket Corp*, unpublished order of the Court of Appeals, entered December 1, 2009 (Docket No. 292235).

## II. SUMMARY DISPOSITION

Plaintiff alleges that the trial court erroneously granted summary disposition. We review de novo both a trial court's decision to grant summary disposition, *Michigan Federation of Teachers v Univ of Michigan*, 481 Mich 657, 664; 753 NW2d 28 (2008), and the interpretation of the terms of a release. *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 13; 614 NW2d 169 (2000).

"[T]he scope of a release is governed by the intent of the parties as expressed in the release." *Collucci v Eklund*, 240 Mich App 654, 658; 613 NW2d 402 (2000). Where the text is unambiguous, the parties' intentions are ascertained from the plain language of the release. *Id.* "The fact that the parties dispute the meaning of a release does not, in itself, establish an ambiguity." *Cole*, 241 Mich App at 14. Rather, a release is ambiguous only when its language is reasonably susceptible to more than one interpretation. *Id.* at 13.

The trial court granted summary disposition pursuant to MCR 2.116(C)(7). Summary disposition under MCR 2.116(C)(7) is appropriate where a claim is barred by a release. *Cole*, 241 Mich App at 13. A party may support or oppose a motion under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence, but the substance or content must be admissible evidence. *By Lo Oil Co v Dep't of Treasury*, i267 Mich App 19, 26; 703 NW2d 822 (2005). "The allegations of the complaint are accepted as true unless contradicted by documentary submissions." *Id.* Summary disposition is properly granted under (C)(7) if the undisputed facts establish that the claim has been released. See *id.*

The trial court, relying on plaintiff's complaint, concluded that Counts II, III and IV of plaintiff's complaint against EnterMarket were barred by the release because those claims "could have been" advanced by plaintiff in the federal lawsuit by amendment because plaintiff knew by March 2008 that Schmutz was employed by EnterMarket. Plaintiff's complaint provides:

On or about March 2008, Spartan learned that Schmutz has gone to work for EnterMarket, a direct competitor of Spartan. On or about September 2009, Spartan learned that Schmutz was actively soliciting Spartan employees and business form customers whom he had serviced while employed by Spartan.

As previously noted, we must accept these allegations as true because they were not contradicted by any documentary evidence. *By Lo Oil Co*, 267 Mich App at 26.

Looking first at Count III, plaintiff alleged that EnterMarket tortiously interfered with a contract by employing Schmutz in violation of the non-competition agreement, despite EnterMarket's knowledge of the agreement. However, because plaintiff's complaint concedes

that it was aware in March 2008 that EnterMarket had hired Schmutz, any violation of the non-competition agreement occurred prior to the May 20, 2008 execution of the settlement agreement. Accordingly, the trial court properly concluded that Count III was barred by plaintiff's release.

However, looking at Counts II and IV, which involve the misappropriation of trade secrets and tortious interference with business relationships with plaintiff's clients based on that misappropriation, we conclude that, because there was no evidence to support a finding that EnterMarket was misappropriating plaintiff's trade secrets prior to May 20, 2008, the trial court granted summary disposition prematurely. The fact that Schmutz began working for EnterMarket before May 20, 2008 does not permit the reasonable inference that he also engaged in the alleged unauthorized use of plaintiff's trade secrets before May 20, 2008. Although EnterMarket had hired Schmutz well before the release was signed, which placed him in a position where he *could have* misappropriated trade secrets during the pendency of the federal lawsuit, it does not logically follow that he *actually was* so engaged. Such a conclusion is mere speculation without any factual or evidentiary support.

Defendant argues that plaintiff's carving out an exception to the release to be able to sue Schmutz was evidence that plaintiff was aware of his unlawful actions. We disagree. Plaintiff knew at the time the release was executed that Schmutz was violating his non-competition agreement. Thus, the exception contained in the release can be explained by plaintiff's wish to retain an action against Schmutz for that violation; it does not require that plaintiff was aware of misappropriation of trade secrets or solicitation of plaintiff's clients. Indeed, the record indicates that the trial court was aware of this problem. When EnterMarket's counsel initially tried to argue that plaintiff knew about the misappropriation in May 2008, the trial court indicated that simply because Schmutz had the knowledge at the time he was hired did not mean that he was using it: "But what if he's not using it at that point, or what if he's not using it in such a way that it's demonstrably harming the former employee?"

According to the record, plaintiff has not alleged a specific date when Schmutz allegedly began the unauthorized use of plaintiff's trade secret. Rather, its complaint simply indicates that plaintiff only became aware of the misappropriation in September 2008, more than three months after plaintiff's execution of the settlement agreement. The evidence supplied by EnterMarket does not demonstrate that Schmutz engaged in the unauthorized use of plaintiff's trade secrets, let alone that he did so before May 20, 2008. Thus, there is no evidence in the record to support the conclusion that Schmutz engaged in misappropriation of trade secrets prior to the execution of the settlement agreement, such that plaintiff could have amended the federal lawsuit to allege Counts II and IV. Further, although not evidence, plaintiff's counsel's represented to the trial court that plaintiff believes "most of [the trade secret misappropriation] has occurred within the last nine months or so," which would mean it began in August 2008, well after the settlement agreement was signed.

At oral argument, the parties disputed the application of the release language related to "known or unknown" claims. EnterMarket argued that when plaintiff became aware of the misappropriation of trade secrets was irrelevant because the release used broad language that released all claims "known or unknown." However, we agree with plaintiff that EnterMarket's interpretation is overly broad in light of the explicit limitations contained in the release paragraph. EnterMarket focuses on the beginning language of the release which provides, a

release of “any and all claims . . . actions, causes of action . . . of any kind or nature whatsoever, known or unknown, accrued or unaccrued, that were, could have been, or might have been asserted by the Plaintiffs in the Lawsuit or in any forum.” However, it ignores that this broad language is limited by the next phrase which limits that broad release to claims:

arising out of, related to, based upon, in whole or in part, directly or indirectly: (a) any allegation, transaction, fact, matter, circumstance, occurrence, representation, action, omission or failure to act that was alleged, involved, set forth, referred to or could have been alleged in the Lawsuit; or (b) any business transaction, business relationship, or business dealings between Plaintiffs and the Defendants though [sic] the date of the execution of this Agreement.

Thus, whatever claims, known or unknown, that could have been brought in the Lawsuit or in any other forum were required to arise from or relate to something that “could have been alleged in the Lawsuit” under subsection (a). The “or in any forum” language is not made nugatory, as it is necessary for subsection (b) which includes no limitations on being brought in the Lawsuit. Thus, while plaintiff’s interpretation gives reasonable meaning to each aspect of the release, EnterMarket’s broad interpretation would have us ignore all of the subsequent language contained in the release after “in any forum.” We cannot accept an interpretation that renders release language nugatory. See *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 468; 663 NW2d 447 (2003) (“[C]ourts must also give effect to every word, phrase, and clause in a contract and avoid an interpretation that would render any part of the contract surplusage or nugatory.”). Thus, when plaintiff became aware of the trade secret misappropriation is relevant and the “known or unknown” release language does not automatically preclude the claim. Rather, it is necessary to determine when plaintiff became aware of the alleged misappropriation.

At this stage, discovery is necessary to determine whether and when any misappropriation occurred. Only after discovery is completed can it be determined whether the release bars Counts II and IV against EnterMarket. Accordingly, we conclude that the grant of summary disposition as to Counts II and IV was premature and remand for discovery and other proceedings not inconsistent with this opinion.<sup>2</sup>

## CONCLUSION

We affirm the trial court’s grant of summary disposition in favor of EnterMarket as to Count III, but reverse as to Counts II and IV and remand for discovery and additional proceedings not inconsistent with this opinion. We do not retain jurisdiction. No costs, neither party having prevailed in full. MCR 7.219.

/s/ Deborah A. Servitto

/s/ Douglas B. Shapiro

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<sup>2</sup> We have not addressed whether summary disposition was proper under MCR 2.116(C)(8) because the trial court indicated that plaintiff’s claims were not deficient and EnterMarket has not appealed that decision.