

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN ONE FUNDING, LLC and
PRIMEONE INSURANCE COMPANY,

UNPUBLISHED
September 20, 2012

Plaintiffs-Appellants,

v

No. 303799
Oakland Circuit Court
LC No. 2010-110491-CK

MATTHEW L. MACLEAN,

Defendant-Appellee.

Before: SERVITTO, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

Plaintiffs appeal by right from the trial court's order granting summary disposition in favor of defendant. We affirm.

This case arises out of defendant's employment with PrimeOne, which is an entity that was formed by Michigan One Funding, LLC. Shortly after defendant's employment began, he resigned as president of PrimeOne and began to work for a competing insurance company. Before his resignation, defendant deleted approximately 416 files from his work computer, most of which consisted of an old brief bank and outdated work product. In his deposition, Richard Miller, the Information Technology manager at PrimeOne, testified that such a deletion was not unauthorized or improper "unless it was malicious." Plaintiffs were able to restore this information before it was deleted permanently. Defendant, who often worked at home, had also copied voluminous amounts of PrimeOne's information onto his home computers. Defendant worked from home with the approval of PrimeOne.

As part of defendant's employment, he signed an employment agreement with plaintiffs. The agreement required, among other things, that defendant would return all of PrimeOne's property upon termination of his employment, including all copies of plaintiffs' property. In the month following defendant's resignation, plaintiffs asked defendant to confirm that he had complied with his employment agreement. Defendant, who returned a portable electronic storage device on his last day of employment, responded that he was in compliance with the terms of the employment agreement.

Plaintiffs filed suit against defendant and sought a preliminary injunction requiring defendant to preserve any of PrimeOne's confidential information in his possession and not disclose it. Two days later, defendant stipulated to the issuance of a preliminary injunction, and

thereby agreed to preserve and not disclose PrimeOne's information. He also agreed to make his home computers and portable electronic storage devices available to a court-appointed computer forensic expert who would make a mirror image copy of his computers and electronic storage devices, and afterwards would completely and permanently remove all of the information from defendant's computers and electronic storage devices. In addition to their claim for injunctive relief, plaintiffs also sought monetary damages from defendant and brought claims for conversion, breach of contract, breach of fiduciary duty, unjust enrichment, and violation of the Computer Fraud and Abuse Act, 18 USC 1030 *et seq.*

Plaintiffs moved to remove the litigation from case evaluation by asserting that injunctive relief was the primary request, and the case evaluators did not have the authority to grant such relief. Defendant offered to stipulate to further injunctive relief if that was the only requested relief. However, he objected to the removal of the litigation from case evaluation if plaintiffs sought to obtain monetary damages. Plaintiffs asserted that the preliminary review of the forensic data had not occurred because of the vacation of the expert and the need to have some of the work contracted to others. The trial court noted that plaintiffs could dismiss the litigation without prejudice pending the outcome of the review of the computer data. In light of the refusal by plaintiffs to stipulate to a claim for injunctive relief or dismiss the case without prejudice, the trial court denied the motion to remove the matter from case evaluation. Ultimately, the trial court granted summary disposition on all of plaintiffs' claims in favor of defendant. Plaintiffs appeal that decision.

The lower court's decision regarding a motion for summary disposition is reviewed *de novo* with the evidence examined in the light most favorable to the nonmoving party. *In re Egbert R Smith Trust*, 480 Mich 19, 23-24; 745 NW2d 754 (2008). Summary disposition pursuant to MCR 2.116(C)(10) is proper where there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Cowles v Bank West*, 476 Mich 1, 32; 719 NW2d 94 (2006). Initially, the moving party bears the burden of supporting its claim to summary disposition with affidavits, depositions, or other documentary evidence. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Once this burden is established, the nonmoving party may not rely on mere allegations or denials in its pleadings, but must establish that a genuine issue of disputed fact exists for trial. *Id.* Affidavits, depositions, and documentary evidence offered in support of, and in opposition to, a dispositive motion shall be considered only to the extent that the content or substance would be admissible as evidence. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999).

The construction and interpretation of a contract presents a question of law that is reviewed *de novo*. *Bandit Indus, Inc v Hobbs Int'l Inc (After Remand)*, 463 Mich 504, 511; 620 NW2d 531 (2001). If contract language is clear and unambiguous, its meaning presents a question of law for the court. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 579 NW2d 411 (1998). "The essential elements of a contract are parties competent to contract, a proper subject matter, legal consideration, mutuality of agreement, and mutuality of obligation." *Mallory v City of Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989).

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party

asserting breach of contract suffered damages as a result of the breach.” *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; ___ NW2d ___ (2012). “Damages are an element of a breach of contract action.” *New Freedom Mtg Corp v Globe Mtg Corp*, 281 Mich App 63, 69; 761 NW2d 832 (2008). “[I]f there are no damages, it is appropriate to grant summary disposition on . . . breach of contract . . . claims.” *Id.* at 69-70. In a breach of contract action, the plaintiff must establish a causal link between the defendant’s alleged improper conduct and the damages sustained by the plaintiff. *Miller-Davis Co*, 296 Mich App at 72. “The party asserting a breach of contract has the burden of proving its damages with reasonable certainty, and may recover only those damages that are the direct, natural, and proximate result of the breach.” *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 512; 667 NW2d 379 (2003).

Here, the trial court properly granted summary disposition of the claim for breach of contract. Plaintiffs failed to offer evidence that defendant used or disclosed their confidential information; thus their claim for damages rests on speculation that he might have used or disclosed it, and they might have been damaged by his doing so. Because “damages that are speculative or based on conjecture are not recoverable,” *Chelsea Investment Group, LLC v City of Chelsea*, 288 Mich App 239, 255; 792 NW2d 781 (2010), summary disposition in favor of defendant was appropriate, *New Freedom Mtg Corp*, 281 Mich App at 69-70. Plaintiffs attempted to establish their damages by demonstrating that defendant’s new employer increased its business after defendant’s arrival. Although circumstantial evidence can create a genuine issue of material fact, speculation does not. *Skinner v Square D Co*, 445 Mich 153, 163-164; 516 NW2d 475 (1994). Here, plaintiffs failed to offer any evidence that defendant disclosed any of PrimeOne’s information to his new employer or that defendant’s new employer’s increase in business was related to any such disclosure. Because plaintiffs failed to establish a causal link, *Miller-Davis Co*, 296 Mich App at 72, they offer nothing more than speculation that does not create a genuine issue of material fact on the issue of damages. *Id.*

Next, plaintiffs contend that they established their damages by arguing that they were entitled to a permanent injunction. A claim for damages may be predicated on injunctive relief. *Cramer v Metro S&L Ass’n*, 401 Mich 252, 261; 258 NW2d 20 (1977). However, in this case, there was no genuine issue of material fact as to whether plaintiffs were entitled to a permanent injunction. Because defendant returned PrimeOne’s property and had it permanently deleted from his home computers and electronic storage devices, there was no risk of real and imminent danger to plaintiffs. Thus, permanent injunctive relief would not have been appropriate. *Higgins Lake Prop Owners Ass’n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003).

In spite of being unable to prove that they suffered damages from defendant’s use or disclosure of their information, plaintiffs contend that they established their damages via their expenses incurred in recovering the information deleted by defendant and in obtaining a preliminary injunction against defendant. With regard to the expenses incurred in recovering the deleted information, plaintiffs fail to allege how defendant’s deletion of the files was a breach of his employment agreement. Because plaintiffs fail to support their position with argument or authority, the argument is abandoned. *Peterson Novelties, Inc v City of Berkley*, 259 Mich App 1, 14; 672 NW2d 351 (2003). Moreover, with regard to attorney fees as damages, plaintiffs fail to demonstrate that defendant’s conduct fell into one of the exceptions for awarding such fees. *Popma v Auto Club Ins Ass’n*, 446 Mich 460, 474; 521 NW2d 831 (1994) (attorney fees are not

recoverable “unless a statute, court rule, or common-law exception provides to the contrary . . .”). Accordingly, because plaintiffs are not entitled to damages, they did not establish their breach of contract claim, and summary disposition in favor of defendant was appropriate. *New Freedom Mtg Corp*, 281 Mich App at 69.

Regarding plaintiffs’ conversion claims, the trial court did not err when it granted summary disposition with regard to plaintiffs’ claim that defendant converted their property by deleting certain files and the later return of other files after the lawsuit was commenced. “[C]onversion is defined as any distinct act of domain wrongfully exerted over another’s personal property in denial of or inconsistent with the rights therein.” *Foremost Ins Co v Allstate Ins Co*, 439 Mich 378, 391; 486 NW2d 600 (1992). Here, plaintiffs failed to offer evidence that defendant’s deletion of the files was wrongful or inconsistent with PrimeOne’s rights. Therefore, there was no genuine issue of material fact on the issue of conversion through deletion of files. See *id.* Moreover, defendant’s possession of the property was initially with permission. Plaintiffs did not dispute that defendant was entitled to work from home and properly utilized his home computer to access plaintiffs’ files. Plaintiffs did not present evidence that between the time of defendant’s departure and the recovery of any information on defendant’s home computer that there was any act of dominion over the property. Accordingly, the trial court properly dismissed the claim of conversion. See *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591-592; 683 NW2d 233 (2004).

Addressing the remainder of the claims alleged in plaintiffs’ complaint, the trial court correctly granted summary disposition in favor of defendant. With regard to plaintiffs’ claim for breach of fiduciary duty, it is well-established that officers of a corporation owe the corporation a duty of good faith and loyalty. See, e.g., *Prod Finishing Corp v Shields*, 158 Mich App 479, 485-486; 405 NW2d 171 (1987). However, plaintiffs failed to demonstrate that defendant breached a duty owed to PrimeOne because they failed to provide any evidence that defendant used or disclosed PrimeOne’s confidential information. Thus, plaintiffs could not survive a motion for summary disposition on this claim. See *Alpha Capital Mgt, Inc v Rentenbach*, 287 Mich App 589, 599-600, 610; 792 NW2d 344 (2010) (a successful claim for breach of fiduciary duty must establish that the defendant actually breached his or her duties).

Summary disposition was also appropriate on plaintiffs’ claim that defendant was unjustly enriched by using or disclosing PrimeOne’s confidential information. A claim for unjust enrichment requires a plaintiff to establish: “(1) the receipt of a benefit by the defendant from the plaintiff and (2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 195; 729 NW2d 898 (2006) (citation omitted). Plaintiffs failed to produce any evidence that defendant used or disclosed their information or that he received a benefit from doing so. Meanwhile, defendant produced documentary evidence demonstrating that he did not disclose any of PrimeOne’s confidential information. Accordingly, because plaintiffs failed to produce any evidence that would create genuine issue of material fact, summary disposition in favor of defendant was appropriate. *Coblentz v Novi*, 475 Mich 558, 569; 719 NW2d 73 (2006).

Additionally, summary disposition was appropriate on plaintiffs remaining claim for relief under the Computer Fraud and Abuse Act, 18 USC 1030 *et seq.* Plaintiffs alleged that defendant violated §§ 1030(a)(2) and (b) of the act by either accessing their network without

authorization or by exceeding the scope of his authorized access. Summary disposition in favor of defendant was appropriate because plaintiffs failed to offer any evidentiary support that defendant either accessed PrimeOne's computers without authorization or that he accessed them in a manner that exceeded the scope of his authorization. Thus, there was no genuine issue of material fact concerning whether defendant's use of PrimeOne's computers was either unauthorized or in excess of what was authorized.

In addition to arguing that the trial court erred in deciding the merits of their claims, plaintiffs assert that the trial court's grant of summary disposition was premature because the results of a forensic review of the data retained by defendant had not been completed nor had the trial court granted plaintiffs' request for an in camera review of the material obtained from the forensic review that defendant claimed was privileged. "Generally, summary disposition under MCR 2.116(C)(10) is premature if it is granted before discovery on a disputed issue is complete." *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009) (footnote omitted). However, incomplete discovery on an issue "does not automatically mean that the trial court's decision to grant summary disposition was untimely or otherwise inappropriate." *Id.* Instead, "[t]he question is whether further discovery stands a fair chance of uncovering factual support for the opposing party's position." *Id.* (footnote omitted). The party contending that summary disposition was premature based on incomplete discovery is not entitled to relief without providing "some independent evidence that a factual dispute exists." *VanVorous v Burmeister*, 262 Mich App 467, 477; 687 NW2d 132 (2004) (quotation and citation omitted).

Summary disposition was not premature because plaintiffs failed to provide independent evidence that a factual dispute existed. *Id.* Instead of providing evidence of a factual dispute, plaintiffs merely repeated their unfounded assertions that defendant misappropriated their confidential information. Thus, plaintiffs' allegations consisted of mere conjecture. *Id.* "Allowing discovery on the basis of conjecture would amount to allowing an impermissible fishing expedition." *Id.* Accordingly, because further discovery, including the requested in camera review was unnecessary, the trial court did not abuse its discretion by denying plaintiffs' request for an in camera review of the files. See *id.* at 476 ("[w]e review a trial court's decision regarding discovery for an abuse of discretion.").

In addition to contending that the trial court erred by dismissing their claims, plaintiffs also argue that the trial court abused its discretion by denying their motion to amend their complaint. Just prior to the hearing on the parties' competing motions for summary disposition, plaintiffs sought leave to amend their complaint to add claims for fraudulent misrepresentation and indemnification. The fraudulent misrepresentation claim related to promises that defendant made in his employment agreement. Plaintiffs contended that defendant may have been bound by an agreement with his former employer at the time he signed his employment agreement with PrimeOne, and that if he was bound, that his representation to the contrary was fraudulent. The indemnification claim was related to potential liability that plaintiffs might have faced from defendant's former employer because plaintiffs alleged that defendant may have given PrimeOne confidential information that belonged to his former employer. At the time plaintiffs filed their motion for leave to amend their complaint, defendant's former employer had filed a motion to intervene as a plaintiff in this suit against defendant. That motion was denied and has not been appealed.

We review for an abuse of discretion the trial court's decision to grant or deny a plaintiff's motion for leave to amend the complaint. *PT Today, Inc v Comm'r of Office of Fin & Ins Servs*, 270 Mich App 110, 141; 715 NW2d 398 (2006). "[A]n abuse of discretion occurs only when the trial court's decision is outside the range of reasonable and principled outcomes." *In re Kostin*, 278 Mich App 47, 51; 748 NW2d 583 (2008). "Leave [to amend] shall be freely given when justice so requires." MCR 2.118(A)(2). "[A] motion to amend should ordinarily be denied only for particularized reasons" *PT Today, Inc*, 270 Mich App at 143.

In light of the lower court record, the trial court's denial of the motion to amend did not constitute an abuse of discretion. *Id.* Amendment would have been futile. Regarding plaintiffs' claim for fraudulent misrepresentation, fraud "is not to be lightly presumed, but must be clearly proved by clear, satisfactory and convincing evidence" *Cooper v Auto Club Ins Ass'n*, 481 Mich 399, 414; 751 NW2d 443 (2008) (quotation and citation omitted). Plaintiffs' claim was legally insufficient and, therefore, futile because plaintiffs merely set forth general allegations that defendant was bound by an agreement to his former employer and that he fraudulently represented this fact to plaintiffs. Indeed, although plaintiffs alleged that defendant may have been bound by such an agreement, they pleaded no specific facts in support of their claim beyond their general allegation that defendant actually was bound by such an agreement, or that he fraudulently misrepresented this fact. Thus, they failed to plead their fraud claim with particularity, *Cooper*, 481 Mich at 414, and the trial court did not abuse its discretion by denying plaintiffs' motion. *PT Today, Inc*, 270 Mich at 143.

Likewise, we conclude that plaintiffs' claim for indemnification was also futile. Defendant sought to add claims for both common law and contractual indemnification in the event that they were held liable to defendant's former employer, who attempted to intervene. Common law indemnity is "the equitable right to restitution of a party *held liable for another's wrongdoing*." *North Community Healthcare, Inc v Telford*, 219 Mich App 225, 229; 556 NW2d 180 (1996) (emphasis in original). As noted above, defendant's former employer's motion to intervene was denied, and it did not appeal that denial. Thus, because defendant's former employer ended its participation in the action, plaintiffs were not in danger of facing liability to defendant's former employer. Accordingly, their claim for common law indemnity was insufficient as a matter of law. *Id.* Additionally, plaintiffs' claim for contractual indemnity was futile because plaintiffs failed to cite a provision of their employment agreement with defendant whereby defendant agreed to indemnify them. Consequently, the trial court did not abuse its discretion in denying plaintiffs' motion for leave to amend. *PT Today, Inc*, 270 Mich App at 143.

Next, plaintiffs assert that the trial court abused its discretion by denying their motion to have their case removed from the case evaluation docket, or, alternatively, in denying their motion to adjourn case evaluation until after the review of the data obtained from defendant's computers had been analyzed.

With regard to plaintiffs' motion for removal of the matter from the case evaluation docket, the trial court did not abuse its discretion because plaintiffs refused to dismiss their request for monetary damages. See MCR 2.403(A)(1). Pursuant to MCR 2.403(A)(1), "[a] court may submit to case evaluation any civil action in which the relief sought is primarily money damages" Here, plaintiffs sought monetary damages with respect to several of their claims;

thus, the trial court's decision to submit the matter to a case evaluation panel was not outside the range of reasonable and principled outcomes. See *In re Kostin*, 278 Mich App at 51. Likewise, the trial court did not abuse its discretion when it denied plaintiffs' request to adjourn case evaluation until the review of the data obtained from defendant's computers had been completed. Pursuant to MCR 2.403(G)(2), "[a]djournments may be granted only for good cause" A denial of a motion to adjourn is proper, among other reasons, because of the "failure of the movant to exercise due diligence" *Tisbury v Armstrong*, 194 Mich App 19, 20; 486 NW2d 51 (1991). In this case, the review of the data was delayed, at least in part, because of plaintiffs' lack of diligence. Accordingly, the trial court's decision to deny plaintiffs' motion to adjourn case evaluation was not an abuse of discretion. *Id.*

Finally, plaintiffs contend that upon remand, this Court should assign the matter to a different judge because the trial judge displayed a bias against plaintiffs during the proceedings. In light of our conclusion that the trial court properly granted defendant's motion for summary disposition, we need not address this issue.

Affirmed. Defendant, the prevailing party, may tax costs.

/s/ Deborah A. Servitto
/s/ Patrick A. Meter
/s/ Karen M. Fort Hood