

STATE OF MICHIGAN
COURT OF APPEALS

COMPUTER TRAINING & SUPPORT
CORPORATION, MARK MCMANUS, SR., and
MARK MCMANUS, JR.,

UNPUBLISHED
September 28, 1999

Plaintiffs-Appellants,

v

ROBERTA GRAVES,

No. 211079
Oakland Circuit Court
LC No. 98-004161 CK

Defendant-Appellee.

Before: Bandstra, P.J., and Whitbeck and Talbot, JJ

PER CURIAM.

Plaintiffs appeal as of right the trial court's dismissal of this action alleging breach of a confidentiality/noncompetition agreement, misappropriation of trade secrets, intentional interference with contractual relations, and libel and slander. We affirm in part, reverse in part and remand for further proceedings.

Plaintiffs first argue that the trial court erred in denying their motion for a preliminary injunction based on a confidentiality/noncompetition agreement allegedly entered into by the parties. We disagree. This Court reviews a trial court's decision whether to grant injunctive relief for an abuse of discretion. *Thermatool Corp v Borzym*, 227 Mich App 366, 372; 575 NW2d 334 (1998). "We will sustain the trial court's findings of fact unless we are convinced that we would have reached a different result." *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995).

In determining whether to issue a preliminary injunction, a court must consider: (1) the likelihood that the applicant will prevail on the merits; (2) the danger that the applicant will suffer irreparable injury if the injunction is not issued; (3) whether harm to the applicant in the absence of temporary relief outweighs the harm to the opposing party if relief is granted; and (4) the harm to the public interest if injunction issues. *Michigan State Employees Ass'n v Dep't of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984); *Thermatool Corp, supra* at 376. The party seeking the injunction has the burden of establishing that it should be issued. MCR 3.310(A)(4).

In the present case, the trial court denied plaintiffs' request for injunctive relief on the ground that the confidentiality/noncompetition agreement was neither signed nor dated. Presumably then, the trial court's ruling was based on a finding that plaintiffs would not prevail on the merits. However, we need not decide that issue because we find that even had plaintiffs established the existence of an agreement, they failed to establish irreparable injury.

"A breach of the contract, by itself, does not establish that a party will suffer irreparable injury." *Thermatool Corp*, *supra* at 377. Instead, "the moving party must demonstrate a noncompensable injury for which there is no legal measurement of damages or for which damages cannot be determined with a sufficient degree of certainty." *Id.* Furthermore, "[t]he injury must be both certain and great, and it must be actual rather than theoretical." *Id.* A review of plaintiffs' motion reveals that plaintiffs alleged no specific facts and provided no evidence to support their contention that defendant had breached the alleged agreement or that plaintiffs suffered any harm, let alone irreparable harm, from defendant's actions. The sole basis for plaintiffs' claim rested on a conclusory, unsupported statement that defendant, "is using confidential information and trade secrets in an attempt to destroy Plaintiff's good will and reputation." Moreover, while plaintiffs stated that defendant gained specialized knowledge and information through her employment with plaintiffs, they did not allege or present evidence demonstrating that defendant used that knowledge to plaintiffs' detriment. See *Dunlap v City of Southfield*, 54 Mich App 398, 403; 221 NW2d 237 (1974) ("[i]t is well established that an injunction will not lie upon the mere apprehension of future injury or where the threatened injury is speculative or conjectural"). Accordingly, the trial court did not abuse its discretion in denying plaintiffs' request for injunctive relief.

Plaintiffs also contend that the trial court was required to hold an evidentiary hearing before denying their motion to determine whether an agreement was, in fact, reached by the parties. However, although plaintiffs stated this issue in their statement of questions presented, they did not argue it in their brief. Therefore, plaintiffs have abandoned the issue and we decline to address it. *Severn v Sperry Corp*, 212 Mich App 406, 415; 538 NW2d 50 (1995).

Next, plaintiffs argue that the trial court clearly erred in imposing sanctions in the amount of \$500 against them for filing their motion for a preliminary injunction. We disagree.

MCR 2.114(D)(2) requires the signatory of a document to have made a "reasonable inquiry" that the document "is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification or reversal of existing law." *FMB-First Michigan Bank v Bailey*, 232 Mich App 711, 720; 591 NW2d 676 (1998). If a document is signed in violation of MCR 2.114, the court must impose upon the person who signed it, an appropriate sanction, which may include the amount of reasonable expenses incurred because of the filing of the document, including reasonable attorney fees. MCR 2.114(E); *FMB-First Michigan Bank*, *supra* at 720. In light of our conclusion that plaintiffs failed to allege facts or provide evidence demonstrating that they would suffer irreparable harm in the absence of a preliminary injunction, we hold that the trial court did not clearly err in imposing sanctions against plaintiffs for filing their motion for a preliminary injunction. *In re Brown*, 229 Mich App 496, 500; 582 NW2d 530 (1998); *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990).

Finally, plaintiffs contend that the trial court erred in dismissing their complaint for failure to comply with the court's order imposing sanctions. We agree. "This Court has recognized that dismissal of a claim is a drastic sanction that should be taken cautiously." *VandenBerg v VandenBerg*, 231 Mich App 497, 502; 586 NW2d 570 (1998). Before imposing such a sanction, the trial court is required to carefully "evaluate all available options on the record and conclude that dismissal is just and proper." *Id.* Here, because no hearing was held prior to dismissal, and therefore, the trial court did not evaluate other available options on the record, we conclude that it abused its discretion in dismissing the case. *Vicencio v Ramirez*, 211 Mich App 501, 506-507; 536 NW2d 280 (1995).

Moreover, dismissal was inappropriate under the circumstances of this case. Our legal system favors disposition of litigation on the merits. *Vicencio, supra* at 507. Some of the factors a court should consider before imposing the sanction of dismissal include: "(1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice." *Id.*; *Zantop Int'l Airlines, Inc v Eastern Airlines*, 200 Mich App 344, 360; 503 NW2d 915 (1993).

In the present case, it is apparent that plaintiffs willfully refrained from paying the \$500 sanction. Although plaintiff offered to pay the sanction if the court reinstated their complaint, the offer came more than one month after the court imposed the sanction and several weeks after the court unequivocally denied their motion to stay the payment of the sanction. However, there is no record evidence that plaintiff had a history of refusing to comply with previous court orders, of deliberately delaying the proceedings, or of not complying with other parts of the court's orders. Nor is there any indication that the plaintiffs' failure to pay the \$500 sanction prejudiced defendant. Under these circumstances, trial court abused its discretion in imposing the harsh sanction of dismissing all plaintiffs' claims based on the single violation at issue. *Vicencio, supra* at 506-507. On remand, however, the trial court may impose additional sanctions on plaintiffs for their failure to timely comply with the order as a precondition to reinstating the complaint.¹

In light of our disposition of the preceding issue, we need not address plaintiffs' remaining argument concerning whether the entry of default precluded the trial court from deciding her motion for involuntary dismissal.

Affirmed in part, reversed in part, and remanded for further proceedings. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ William C. Whitbeck
/s/ Michael J. Talbot

¹ Plaintiffs also claim that defendant entered into ex parte communications with the court. Plaintiffs' contention, however, is not supported by the record.