

STATE OF MICHIGAN
COURT OF APPEALS

WILLIAM R. JOHNS, Jr. and CLINTON
INTERIORS, INC.,

UNPUBLISHED
September 4, 2012

Plaintiffs/Counter-Defendants-
Appellees/Cross-Appellants,

v

No. 299542
Macomb Circuit Court
LC No. 2008-002796-CK

WIXOM BUILDERS SUPPLY, INC. d/b/a
BRIGHTON BUILDERS SUPPLY, INC., B & D
DRYWALL SUPPLY, INC., MID-WEST
BUILDING PRODUCTS, INC., CAPITAL
DRYWALL SUPPLY, INC., and KEN'S
DRYWALL, INC.,

Defendants/Counter-Plaintiffs-
Appellants/Cross-Appellees,

and

WILLIAM R. JOHNS, Sr.,

Defendant-Appellant/Cross-
Appellee.

Before: GLEICHER, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Defendants appeal and plaintiffs cross-appeal the trial court's decision on their motions for summary disposition. For the reasons set forth below, we affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

William Johns, Sr. ("Senior"), through various business entities, and his son, William Johns, Jr. ("Junior"), each owned a 50 percent interest in Clinton Interiors, Inc., a drywall installation company. According to Junior, in 2002, Senior started a drywall business with his other son, Eric Johns, a company that eventually became Jeddo Drywall, Inc. Various family disagreements arose, in part because the newly-formed company was a direct competitor of

Clinton Interiors. To avoid fully litigating their disputes, the parties agreed that Junior would assume total ownership of Clinton Interiors and, on August 2, 2004, the parties entered into a stock purchase agreement, a supply agreement, and a limited covenant not to compete and non-disclosure agreement.

The supply agreement required Junior, through Clinton Interiors, to purchase a certain amount of drywall board, over several years, from Senior's company, B & D Drywall, Inc. However, Junior stopped buying drywall board from B & D Drywall in the summer of 2007 after he concluded that Senior had substantially breached the covenant not to compete and non-disclosure agreements. Thereafter, Junior filed this lawsuit against defendants for interference with a business relationship or expectancy and breach of contract. Junior also sought a declaratory judgment that he is no longer required to buy drywall board from Senior's company, B & D Drywall, under the supply agreement because of Senior's intentional misconduct. Senior filed a counterclaim against Junior and Clinton Interiors and alleged that they breached the supply agreement by failing to purchase the required \$7.5 million in drywall board over the period of the contract. Senior asked the court to order Junior and Clinton Interiors to pay a shortfall compensation payment contemplated in the supply agreement.

Plaintiffs and defendants filed motions for summary disposition pursuant to MCR 2.116(C)(10). After oral argument, the trial court entered a written opinion and order in which it granted each motion in part and denied each motion in part. Specifically, the trial court ruled that plaintiffs failed to establish that defendants interfered with a business relationship or expectancy. The court further ruled that there is no genuine issue of material fact that defendants breached the noncompete agreement by bidding on work for two of plaintiffs' clients, MJC and The Lxor Group, but that an issue of fact remains in dispute about whether defendant may be liable for bidding on work for a third client, George Lini. The court also found there is a genuine issue of material fact about whether defendants breached the nondisclosure agreement by using pricing or invoicing information from Junior's purchases of drywall in an attempt to underbid two of Junior's jobs for MJC. With regard to the declaratory judgment, the trial court ruled that plaintiffs are no longer bound by the terms of the supply agreement because defendants first substantially breached the noncompetition agreement. The court also rejected defendants' counterclaim because of defendants' substantial breaches and because, under the terms of the supply agreement, defendants' claim for a shortfall compensation payment was premature. Thereafter, the trial court entered an order directing the parties to submit all remaining issues to arbitration.

II. DISCUSSION

A. STANDARD OF REVIEW

The trial court decided the motions pursuant to MCR 2.116(C)(10). As this Court explained in *Ajax Paving Industries, Inc v Vanopdenbosch Const Co*, 289 Mich App 639, 643; 797 NW2d 704 (2010):

A motion for summary disposition under MCR 2.116(C)(10) is properly granted if no factual dispute exists, thus entitling the moving party to judgment as a matter of law. *Rice v Auto Club Ins Ass'n*, 252 Mich App 25, 31; 651 NW2d

188 (2002). In deciding a motion brought under subrule (C)(10), a court considers all the evidence, affidavits, pleadings, and admissions in the light most favorable to the nonmoving party.

“We also review de novo questions involving the proper interpretation of a contract and the legal effect of a contractual clause.” *Alpha Capital Management, Inc v Rentenbach*, 287 Mich App 589, 611; 792 NW2d 344 (2010).

B. COVENANT NOT TO COMPETE

The trial court ruled that defendants breached the covenant not to compete with regard to Jeddo Drywall’s bids on jobs for MJC and Lexor. Defendants challenge the trial court’s ruling and plaintiffs contend that defendants also breached the noncompete agreement with regard to a job Jeddo Drywall bid for George Lini. “A party claiming a breach of contract must establish by the preponderance of 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 Const, Inc*, 296 Mich App 56, 71; ___ NW2d ___ (2012). As our Supreme Court further opined in *In re Smith Trust*, 480 Mich 19, 24; 745 NW2d 754 (2008):

In interpreting a contract, it is a court's obligation to determine the intent of the parties by examining 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, because an unambiguous contract reflects the parties' intent as a matter of law. However, if the contractual language is ambiguous, extrinsic evidence can be presented to determine the intent of the parties.

The noncompete agreement provides, in relevant part:

Seller agrees that he will not, directly or indirectly, during the Applicable Period, engage in the Business with a Protected Customer, regardless of where such Protected Customer is located. As used in this Agreement, the term “Protected Customer” shall refer to each customer listed on attached Exhibit A. An “indirect” breach of this Agreement would include, for example, the engaging of the Business with a Protected Customer by any member of the Seller Group, as defined in the Supply Agreement executed contemporaneously between Buyer and said Seller Group, or by any other entity in which Seller is involved in any capacity (including, without limitation, as an owner, officer, employee, consultant, lender or any other capacity whatsoever).

It is undisputed that Senior owns an interest in Jeddo Drywall and that Jeddo Drywall submitted proposals to perform drywall installation for MJC, Lexor, and Lini during the applicable period of May 1, 2004 to May 1, 2006.

Defendants complain that their proposal to MJC did not breach the noncompete agreement because MJC was not a “protected customer.” As set forth in the covenant not to compete, defendants agreed not to engage in the “Business” with those customers listed on an

exhibit attached to the agreement. Among dozens of other entities, the document listed MJC Chesterfield LLC, MJC-Legacy, and MJC Weschester as “protected customers.” Defendants, through Jeddo Drywall, submitted a proposal to “MJC” on January 31, 2006. The parties appear to agree that the quoted job was not for MJC jobs at Chesterfield, Legacy, or Weschester. However, as set forth above, the covenant not to compete specifically states that defendants are prohibited from engaging in business with a protected customer “regardless of where such Protected Customer is located.” However, because the protected customer list was specific with regard to the MJC job locations at Chesterfield, Legacy, and Weschester, we hold that the contract is ambiguous with regard to whether “MJC” itself is a protected customer or whether the parties intended only that defendants could not bid on work for MJC jobs at Chesterfield, Legacy, or Weschester.¹

We further hold that, in light of this ambiguity, there is a genuine issue of material fact about whether defendants breached the noncompete agreement with regard to MJC. As the trial court correctly observed, Eric Johns, who submitted the bids for Jeddo Drywall, which is partially owned by Senior, “acknowledged that he had been aware of the noncompete clause, he knew that MJC was a client of Junior’s company, and that Senior had instructed him to bid on these projects.” Indeed, when confronted by Junior about his MJC bid, Eric told Junior that he was specifically directed to bid on MJC work by Senior. Thus, it appears that both Eric and Senior may have *regarded* MJC as a protected customer, despite the ambiguous language in the noncompete agreement and protected customer list. Accordingly, there is an issue of fact with regard to whether Senior deliberately sought to compete with Clinton Interiors for MJC’s work and whether the bid amounted to a breach of the non-compete agreement.

Evidence also showed that defendants, through Jeddo Drywall, submitted a proposal to Lexor during the applicable noncompete period, on December 8, 2005. Lexor was specifically listed as a “protected customer” on the exhibit attached to the noncompete agreement. Accordingly, there is no genuine issue of material fact that defendants breached the covenant not to compete with regard to Lexor.

The trial court ruled that there remains an issue of fact with regard to whether Jeddo Drywall’s proposal to Lini violated the noncompete agreement. Evidence established that Eric, on behalf of Jeddo Drywall, submitted a bid within the noncompete period to Lini, who was also listed as a “protected customer.”² There is conflicting evidence in the record with regard to Jeddo Drywall’s proposal to Lini. The covenant not to compete contains a provision that acknowledges the possibility that an inadvertent breach may occur if one of Senior’s businesses

¹ “A contract is ambiguous if it allows two or more reasonable interpretations, or if the provisions cannot be reconciled with each other.” *Woodington v Shokoohi*, 288 Mich App 352, 374; 792 NW2d 63 (2010).

² The protected customer list actually named “George Ling” as a protected customer. At oral argument, plaintiffs’ counsel acknowledged that this may have simply been a typographical error. Further, the record confirms that the parties appear to agree that they intended to designate “George Lini” as a protected customer.

breaches the agreement and if Senior is not actively involved in running the business. The provision gives defendants the opportunity to cure the breach if Junior notifies Senior of the breach. Senior submitted an affidavit in which he stated that he was unaware that Eric submitted the bid for Lini's project on behalf of Jeddo Drywall. No evidence directly contradicts Senior's affidavit. However, other evidence shows that Senior regularly directed Eric to bid on certain projects and that he was generally aware of the projects in which Jeddo Drywall was involved. Further, Junior asserts that he had no opportunity to permit Senior to cure the breach because he did not find out about the Lini proposal until this litigation. Under these circumstances, we agree with the trial court that there remain genuine issues of material fact in dispute with regard to whether defendants breached the covenant not to compete by submitting a proposal to Lini.

Defendants contend that, because their bids to MJC, Lexor, and Lini were not accepted or the projects were not completed, they did not "engage in the Business" as contemplated by the noncompete agreement. Defendants base this argument on language from the "Background" section of the agreement which provides, "Buyer is engaged in the business of performing construction work regarding the provision and installation of drywall (the "Business"). The noncompete clause states that defendants shall not "engage in the Business" with a protected customer. Defendants maintain that, regardless whether they submitted proposals to protected customers, they did not actually provide or install drywall for them and, therefore, cannot be liable for breaching the agreement. We hold that the trial court correctly ruled that, at least as to Lexor, under the plain meaning and spirit of the agreement, Jeddo Drywall clearly sought to engage in the business of installing drywall by submitting specific bids to perform the work. In so doing, defendants engaged in direct competition with plaintiffs for the job and plaintiffs were entitled to summary disposition on this claim. This holding would also pertain if the factfinder concludes that Jeddo Drywall improperly submitted bids to MJC and Lini as "protected customers."

C. NONDISCLOSURE AGREEMENT

We disagree with the trial court's ruling that there is a genuine issue of material fact about whether defendants used or disclosed confidential information under the terms of the nondisclosure agreement. The nondisclosure provision states, in relevant part:

The Seller shall not, directly or indirectly, disseminate, or otherwise disclose in any manner, either orally, in writing or otherwise, any Confidential Information, not make any use of same other than to the extent that Seller is already using same in his other entities.

As used in this Agreement, the term "Confidential Information" shall mean all information whether written or oral, tangible or intangible, of a confidential or proprietary nature concerning the Buyer and its business and operations, including without limitation, information regarding pricing, financial data and projections, business plans and strategies, marketing and sales information, trade secrets, drawings and designs, tax and financial information, information relating to methods of doing business, inventions, ideas, processes, formulas, software, source and object codes, know-how, improvements,

discoveries, developments, designs, licenses, prices, costs, suppliers and customers

Invoicing and other pricing materials between Buyer and other entities in which Seller has an interest who are parties to a supply agreement of even date herewith with Buyer (the “Board Suppliers”) shall be included within the definition of Confidential Information under this Agreement

Plaintiffs presented evidence that, in 2006, they submitted orders to B & D Drywall for one of Clinton Interiors’s MJC projects. Junior testified that his order disclosed the amount of material needed for the job, how the job was configured, and where the job was located. At the direction of Senior, Eric, through Jeddo Drywall, submitted a bid to MJC that undercut Clinton Interiors’s bid by approximately \$6,000 per unit. According to Junior, the proposal submitted by Jeddo Drywall contained flat dollar amounts rather than specific calculations, which suggests that Jeddo Drywall simply relied on Clinton Interiors’s drywall board order to submit a competing bid. Clinton Interiors had to lower its quoted price to MJC because of Jeddo Drywall’s conduct. This constitutes competent evidence that defendants violated the plain language of the nondisclosure agreement and supply agreement and, again, the proposal submitted by Jeddo Drywall was also to a “protected customer” under the noncompete agreement. Junior also testified that Jeddo Drywall used similar information from B & D Drywall to underbid Clinton Interiors again for an MJC project in the summer of 2007. We hold that the trial court should have granted summary disposition to plaintiffs on this issue and determined the specific amount of damages for both instances, or ordered the matter of damages to be determined at arbitration.

D. OBLIGATIONS UNDER THE SUPPLY AGREEMENT

Defendants contend that the trial court erred in holding that plaintiffs do not need to fulfill their buying obligations under the supply agreement because of defendants’ breaches of the covenant not to compete. Specifically, defendants assert that a breach of the covenant not to compete should have no bearing on the supply agreement. However, as the trial court correctly ruled, the supply agreement specifically incorporates the covenant not to compete and nondisclosure agreement. Further, the supply agreement itself contains confidentiality provisions to ensure that no party would share or use any information that may interfere with or compromise the buyer or seller’s businesses. The covenant was also an essential part of the contract, in light of the purpose of the agreements and the obligations within them. Junior was buying a company that conducted the same kind of business as Senior’s other companies and, therefore, would be in direct competition with his businesses. At the same time, Junior was obligated to buy materials from one of Senior’s companies for a period of time, while also giving Senior the chance to match or beat competitive prices. Given the nature of these businesses and the ongoing transactions required, it is clear that the covenant not to compete and nondisclosure covenant were integral parts of both the stock purchase and the supply agreement. Further, for the reasons set forth above, defendants breached the agreements with regard to competing with plaintiffs for work of at least one protected customer, and possibly three, and by using confidential information to underbid Clinton Interiors. The record also reflects that Senior went to two other sellers of drywall board, Ryan Building Materials and Gypsum Supply, in an attempt to interfere with plaintiffs’ ability to purchase board at competitive prices.

While plaintiffs stopped purchasing drywall board from Senior's company in the summer of 2007 without meeting the \$7.5 million buying requirement under the supply agreement, the record, as discussed above, provides ample evidence to support the trial court's conclusion that defendants were the first to substantially breach the parties' agreement. In light of defendants' conduct in submitting at least one competing proposal to a protected customer, using confidential information based on Junior's board purchases from B & D Drywall, and interfering with plaintiffs' attempts to purchase drywall from competitors, it is clear that defendants' "breach has effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citations omitted). Indeed, Junior cannot be expected to continue purchasing material from Senior in light of his pattern of conduct which specifically and substantially violates the parties' agreement and undermines plaintiffs' business. Accordingly, the trial court correctly ruled that Junior is relieved from his obligations under the supply agreement.³

E. INTERFERENCE WITH BUSINESS RELATIONSHIP OR EXPECTANCY

Plaintiffs claim on cross-appeal that the trial court should have ruled in its favor on their claim that defendants interfered with business relationships. To establish a claim of tortious interference with a business expectancy, a plaintiff must prove (1) the existence of a valid business expectancy, (2) knowledge of the expectancy on the part of the defendant, (3) an intentional interference by the defendant inducing or causing a termination of the expectancy, and (4) resultant damage to the plaintiff. *Cedroni Associates, Inc v Tomblinson, Harburn Associates, Architects & Planners, Inc*, ___ Mich ___; ___ NW2d ___ (Docket No. 142339, issued July 27, 2012), slip op at 3. To establish a valid business expectancy, the expectancy "must be a reasonable likelihood or probability, not mere wishful thinking." *Id.* at 4, quoting *Trepel v Pontiac Osteopathic Hosp*, 135 Mich App 361, 377; 354 NW2d 341 (1984).

Plaintiffs presented evidence that Senior approached Ken Armour of Gypsum Supply and told him not to sell drywall board to Junior. According to Junior, this prevented him from finding competitive material prices to bid on work for Clinton Interiors. Junior testified that he and Armour believed that, if Armour sold materials to Junior, Senior might retaliate by steering customers away from Gypsum Supply or he might use Jeddo Drywall to steer clients away from

³ Moreover, the trial court correctly ruled that defendants are not entitled to the shortfall compensation payment in the supply agreement because they committed the first substantial breach. Further, under the terms of the supply agreement, the shortfall compensation payment would not apply until April 30, 2010 which was the deadline for plaintiffs to decide whether to pay the penalty or continue to purchase drywall board from B & D Drywall. When defendants filed their counterclaim, plaintiffs had almost two remaining years to comply with the deadline and, as the trial court noted, "[i]t is not known what, if anything, had transpired subsequent to the expiration of the April 30, 2010 deadline." For these reasons, the trial court correctly granted summary disposition to plaintiffs on this issue.

Clinton Interiors. Armour testified that Senior “made some pretty tough threats” to him while specifically telling him not to give Junior any quotes for drywall board. Armour sold board to Junior anyway and, according to Armour, Senior became angry and defaulted on other agreements he had with Armour.

Plaintiffs also presented evidence that Senior confronted David McCatty of Ryan Building Materials about the low prices he was quoting to Junior. McCatty testified that he felt threatened by Senior’s conduct in attempting to discover and discuss his board pricing. However, McCatty further testified that Senior did not specifically demand that he raise his prices or that he stop doing business with Junior.

While the evidence clearly shows that Senior intentionally interfered with Junior’s business expectancies with both Armour and McCatty, the evidence shows that Armour continued to sell drywall board to Junior and plaintiffs, therefore, did not show that they were actually damaged by Senior’s conduct. It appears that, in Armour’s view, Senior actually retaliated against *him* in their other business dealings, but this is not related to any claims by plaintiffs. With regard to McCatty and Ryan Building Materials, the question is much closer. While defendants presented evidence that Ryan Building Materials continued to sell drywall board to Junior at prices that tended to fluctuate with the market, McCatty specifically testified that Senior’s confrontation changed his business relationship with Junior and Clinton Interiors and made it less likely that he will want to compete for Clinton Interiors’s business. Several months before Senior’s confrontation, McCatty had specifically met with Junior to open up a continuing business relationship to supply materials to Clinton Interiors. In light of the limited number of suppliers in a narrow field of drywall work, we hold that plaintiffs at least raised a genuine issue of material fact about whether Junior was damaged by Senior’s conduct toward McCatty because he no longer wants to provide competitive pricing to Junior. Accordingly, we hold that the trial court incorrectly granted summary disposition to defendants on this issue.

F. ARBITRATION AGREEMENT

We disagree with plaintiffs that this Court lacks jurisdiction to decide the issues on appeal. Neither party disputes that they agreed to arbitrate any issues remaining after the cross motions for summary disposition which apparently would include matters related to MJC, Lini, and the amount of damages, costs, and fees. However, nothing in the record suggests that the parties intended to waive any right to appeal the trial court’s decisions with regard to the substance of the motions. Moreover, at oral argument on appeal, both parties agreed that, if this Court rules that there remain any genuine issues of material fact, those matters will be subject to arbitration. Accordingly, we remand the case to the trial court, which shall remand to the arbitrator for a determination of all remaining issues.

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

/s/ Elizabeth L. Gleicher
/s/ Henry William Saad
/s/ Jane M. Beckering