

STATE OF MICHIGAN
COURT OF APPEALS

PRIMARY INSURANCE AGENCY GROUP,
LLC,

UNPUBLISHED
March 17, 2015

Plaintiff/Counter Defendant-
Appellant,

v

NEVILLE NOFAR and GREAT NORTHERN
INSURANCE AGENCY, LLC,

No. 320039
Macomb Circuit Court
LC No. 2012-005520-CZ

Defendants/Counter
Plaintiffs/Third-Party Plaintiffs-
Appellees,

v

GEORGE GJOKAJ,

Third-Party Defendant.

Before: DONOFRIO, P.J., and RIORDAN and GADOLA, JJ.

PER CURIAM.

Plaintiff, Primary Insurance Agency Group, LLC (“Primary”), appeals as of right the trial court’s order granting defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

I. BASIC FACTS

George Gjokaj is an Albanian-American who owns Primary. Primary is located on 15 Mile Rd., just east of Dequindre Rd., in Sterling Heights. When Gjokaj opened Primary in 2005, he hired Valbona Lucaj to work for him as a customer service representative. Lucaj was very helpful for Gjokaj because Primary marketed to ethnic Albanians and Albanian-Americans and Lucaj was fluent in Albanian. In this capacity, Lucaj dealt with nearly all of Primary’s clients. Lucaj worked full time at Primary until April 2011, when, upon her request, she started working part time. This arrangement continued until November 2011 when Lucaj took some time off from work completely to deal with moving into a new home. However, because Gjokaj wanted a

full-time employee and Lucaj was unable to do so upon her return, Lucaj never returned to Primary. Instead, in June 2012, Lucaj started working at defendant Great Northern Insurance Agency, LLC (“Great Northern”), which was located on Dequindre Rd., just south of 15 Mile Rd., in Sterling Heights. At Great Northern, Lucaj was able to work part time as a customer service representative.

In the fall of 2012, Lucaj authored a letter written in Albanian that was to be sent out for marketing purposes to Albanian individuals in Michigan. Lucaj showed the letter to Great Northern’s manager, who then transferred the letter to the company’s letterhead. A certified translation of the letter provides as follows:

Greetings[.]

I would like to notify everyone that I have changed my work place. I am still serving your autos and homes.

I no longer am an employee of Primary Insurance on 15 Mile and Dequindre.

The new company is located also on 15 Mile and Dequindre but it is located on SE corner of this intersection. The new company is [Great Northern Insurance Agency.]

This company offers also tax services besides numerous insurance services with Major Companies, Citizens, Great Lakes, Grange, Safeco, Progressive, Foremost and other companies all over the US. If you own properties in other States, this company offers insurance for your properties there. For example, if you own property in Florida, you don’t have to find a company to insure your property in the State of Florida but you can insure it at our company. Our company offers Health insurance for everyone including Medicaid too.

I am very grateful for all your support and I thank your from the bottom of my heart for all your trust. I hope and will continue to serve you with the same effort and diligence if you would give me the opportunity to serve you one more time.

I thank you for your respect.

Sincerely, Valbona[.]

Lucaj testified that she then searched the White Pages on the Internet for Albanian names and addressed envelopes to people she found. Overall, she sent approximately 30 of these letters out, but she did not keep a record of who she sent these letters to.

In September 2012, one of Primary’s clients, Ndue Hila, received one of Lucaj’s mailings and contacted Gjokaj about it. The following day, Gjokaj met with Great Northern’s owner, defendant Neville Nofar, where Gjokaj voiced his concern about Lucaj’s letter. Nofar stated that he had no knowledge of the mailings. After Nofar and Gjokaj’s discussion, Nofar instructed his office to not send any more of the letters out. Nofar then personally shredded a stack of envelopes that Lucaj had prepared that had yet to be mailed.

Gjokaj testified that since September 2012, his company has lost about 100 policies. He suspected that Nofar and Great Northern were responsible for a good portion of those losses. Afterward, Gjokaj prepared a list of policies Primary had lost, which actually totaled 201. Of those 201 clients, 20 had gone to Great Northern.

Plaintiff filed suit alleging six counts: conversion, statutory conversion, violation of the Uniform Trade Secrets Act, tortious interference with prospective business relations, unfair competition, and injunctive relief under the Uniform Trade Secrets Act.¹

Defendants moved for summary disposition, arguing that Lucaj's use of the White Pages cannot be construed as a "trade secret" and any compiling of any lists does not qualify as "misappropriation" under the Uniform Trade Secrets Act. With respect to the conversion claims, defendants argued that no claims could survive because there was no evidence to show that defendants ever possessed a customer list from Primary. With respect to the tortious interference claim, defendants argued that legitimate personal and business reasons are shielded from liability.

The trial court determined that there was no evidence that any defendant used any personal property of Primary, that Lucaj's use of the White Pages was a generally known and readily ascertainable means of seeking prospective customers, and that the mere fact that Primary lost 201 customers and 20 of them were now served by Great Northern is insufficient to prove an improper interference with Primary's business relationships. Thus, the court granted defendants' motion.

II. ANALYSIS

Plaintiff argues that the trial court erred in granting defendants' motion for summary disposition. This Court reviews a trial court's decision on a motion for summary disposition de novo. *Johnson v Recca*, 492 Mich 169, 173; 821 NW2d 520 (2012). Defendants moved for summary disposition under MCR 2.116(C)(10), which tests the factual sufficiency of a complaint and is reviewed by considering the pleadings, admissions, and other evidence submitted by the parties in the light most favorable to the nonmoving party. *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). "Summary disposition pursuant to MCR 2.116(C)(10) is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012).

A. CONVERSION CLAIMS

"Conversion, both at common law and under the statute [MCL 600.2919a(a)], is defined as 'any distinct act of domain wrongfully exerted over another's personal property in denial of or

¹ Defendants countersued, naming Primary and George Gjokaj as counter-defendant and third-party defendant, respectively. However, defendants later stipulated to withdraw their claims, so they are not at issue.

inconsistent with the rights therein.” *Aroma Wines & Equip, Inc v Columbian Distribution Servs, Inc*, 303 Mich App 441, 447; 844 NW2d 727 (2013), quoting *Lawsuit Fin, LLC v Curry*, 261 Mich App 579, 591; 683 NW2d 233 (2004). The act of dominion is wrongful when it is inconsistent with the ownership rights of another. *Check Reporting Servs, Inc v Mich Nat’l Bank-Lansing*, 191 Mich App 614, 626; 478 NW2d 893 (1991).

Plaintiff failed to provide any evidence to the trial court that any personal property of it was converted by defendants. On appeal, plaintiff contends that “[t]he insurance accounts and identities of Primary’s customers are its property, either tangible or intangible, and the right of possession of those accounts and customer identities belongs to Primary.” Plaintiff further maintains that “[t]he improper solicitation of these customers by [Lucaj] and Great Northern was a ‘distinct act of domain wrongfully exerted over [Primary’s] personal property in denial of or inconsistent with the rights therein.’” However, the act of *soliciting* cannot be construed as an act of *dominion*. “Dominion” is a primary feature of ownership. See *Webster’s Encyclopedic Unabridged Dictionary of the English Language* (Deluxe ed, 1994) (listing various definitions of “owned,” such as “to acknowledge as one’s own; recognized as having full claim, authority, power, dominion, etc.”). Soliciting involves asking potential clients if they are interested in the company’s services. The permissive aspect of soliciting is inconsistent with the concept of ownership. Even Gjokaj conceded at his deposition that other insurance companies were free to solicit his existing clients. Therefore, the trial court did not err in granting defendants’ motion for summary disposition with respect to plaintiff’s claims of conversion.

B. TRADE SECRETS CLAIMS

Under Michigan’s Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, a “trade secret” is defined as

information, including a formula, pattern, compilation, program, device, method, technique, or process, that is both of the following:

(i) Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.

(ii) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. [MCL 445.1902(d).]

And a claim for misappropriation of trade secrets under this act requires the following:

(i) Acquisition of a trade secret of another person who knows or has reason to know that the trade secret was acquired by improper means.

(ii) Disclosure or use of a trade secret of another without express or implied consent by a person who did 1 or more of the following:

(A) Used improper means to acquire knowledge of the trade secret.

(B) At the time of disclosure or use, knew or had reason to know that his or her knowledge of the trade secret was derived from or through a person who had utilized improper means to acquire it, acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use, or derived from or through a person who owed a duty to the person to maintain its secrecy or limit its use.

(C) Before a material change of his or her position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake. [MCL 445.1902(b).]

Plaintiff asserts that Primary's "expirations, client information, business strategy, marketing plans and customer policy expiration dates constitute trade secrets" under the act. Plaintiff's reliance on *Hayes-Albion v Kuberski*, 421 Mich 170; 364 NW2d 609 (1984), for the proposition that Lucaj misappropriated its client list is misplaced because that case actually supports the opposite view. The plaintiff in *Hayes-Albion* sought to protect the identity of its customers as a trade secret. Also, the defendant did not steal a list of customers that the plaintiff had kept secret. Instead, the defendant had kept the names and addresses of customers in a personal memo book. Our Supreme Court held that "there is nothing improper in an employee establishing his own business and communicating with customers for whom he had formerly done work in his previous employment." *Id.* at 183. Similar to the defendant in *Hayes-Albion*, Lucaj in the present case did not steal any physical list of clients. Even if she merely went off her memory of Primary's clients, this would have the same effect as keeping a personal memo book. See *Raymond James & Assoc, Inc v Leonard & Co*, 411 F Supp 2d 689, 695 (ED Mich, 2006); *Al Minor & Assoc, Inc v Martin*, 117 Ohio St 3d 58, 64; 881 NE2d 850 (2008). But here, there is no evidence that she even did that. Instead, the evidence shows that Lucaj referenced public White Pages in determining who to send the mailings to. Thus, it is clear that no misappropriation of trade secrets was implicated, and the trial court properly granted summary disposition in favor of defendants for these claims. See *McKesson Medical-Surgical, Inc v Micro Bio-Medics, Inc*, 266 F Supp 2d 590, 594 (ED Mich, 2003) (stating that compiled list from personal and public sources cannot constitute trade secrets).

C. TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIPS

The elements of tortious interference with a business relationship or expectancy are (1) the existence of a valid business relationship or expectancy that is not necessarily predicated on an enforceable contract, (2) knowledge of the relationship or expectancy on the part of the defendant interferer, (3) an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and (4) resulting damage to the party whose relationship or expectancy was disrupted. [*Health Call of Detroit v Atrium Home & Health Care Servs, Inc*, 268 Mich App 83, 90; 706 NW2d 843 (2008).]

Additionally, a plaintiff must prove that the "intentional interference" was accomplished through a per se wrongful act or the doing of a lawful act with malice and unjustified in the law for purposes of invading plaintiff's business relationship with another. *CMI Int'l, Inc v Internet*

Int'l Corp, 251 Mich App 125, 131; 649 NW2d 808 (2002). A “per se wrongful act” is an act that is inherently wrongful or cannot be justified under any circumstances. *Formall, Inc v Community Nat'l Bank of Pontiac*, 166 Mich App 772, 780; 421 NW2d 289 (1988).

Plaintiff claims that defendants’ wrongful conduct is established through the mailing out of the letter that Lucaj authored.² Specifically, plaintiff claims that because Lucaj was not licensed to sell or solicit insurance, it was improper for her to write such a letter. Assuming without deciding that mailing the letter was per se wrongful conduct because it constituted a solicitation for insurance by an unlicensed person in violation of MCL 500.1201a(1), the fundamental premise of plaintiff’s claim is not supported by the evidence. In particular, there is no evidence that Lucaj’s mailings caused any client to leave Primary and go to Great Northern. Specifically, plaintiff provided the names of only two people who received Lucaj’s letter: Ndue Hila and someone identified only as “Vicky.” However, there is no evidence that Hila or Vicky terminated their insurance policies with plaintiff and obtained new policies at Great Northern. The only evidence describing the clients that left Primary and obtained insurance at Great Northern is found in a list of 20 names that Great Northern compiled after cross-referencing the identities of the 201 clients that left Primary. Notably, neither Hila’s nor Vicky’s name appears on that list of 20 clients. Thus, at a minimum, it is clear that the evidence demonstrates that there is no genuine issue of this crucial fact, and summary disposition was properly granted in defendants’ favor.

D. UNFAIR COMPETITION

“Michigan follows the general law of unfair competition.” *Clairol, Inc v Boston Discount Center of Berkley, Inc*, 608 F2d 1114, 1118 (CA 6, 1979). As described in 54A Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices, § 1066:

Originally, the law of unfair competition dealt generally with the palming off of one’s goods as those of a rival trader. Thus it was said that the essence of common-law unfair competition was the bad-faith misappropriation of the labors and expenditures of another likely to cause confusion or to deceive purchasers as to the source or the origin of goods[.] In other words, under such a theory, unfair competition is seen as a species of deceit.

Later, unfair competition was extended to outlawing “parasitism” under the principle that one may not appropriate a competitor’s skill, expenditures, and labor. Today, the incalculable variety of illegal practices denominated as unfair competition is proportionate to the unlimited ingenuity that overreaching entrepreneurs and trade pirates put to use. It is a broad and flexible doctrine.

² Gjokaj alleged during his deposition that Great Northern’s use of Lucaj’s image in some of its television commercials also constituted an improper act that tortiously interfered with Primary’s business relationships because people had associated Lucaj with Primary.” However, plaintiff (wisely) abandoned such arguments when it never relied on them in opposing defendants’ motion for summary disposition at the trial court and never relied on them here on appeal.

Thus it is now said that the essence of unfair competition law is fair play.
[Footnote citations omitted; emphasis added.]

However, it is entirely unclear what particular conduct plaintiff claims constitutes the basis for its unfair competition claim. In its complaint, plaintiff makes general allegations that focus on “the wrongful solicitation of Primary’s clients and prospective clients.” But there is nothing wrongful about a company soliciting people who happen to be another company’s clients. Indeed, “[s]ubject to qualifications against fraud, misappropriation of trade secrets, and covenants not to compete, a former employee may solicit the business of the former employer’s customers.” 54A Am Jur 2d, Monopolies, Restraints of Trade and Unfair Trade Practices, § 1067. As already discussed, there is no evidence of the misappropriation of any trade secrets. Further, there is no evidence of fraud, and it is not disputed that Lucaj did not have a covenant not to compete with Primary. Additionally, a review of Lucaj’s letter that Great Northern sent out reveals that it did not contain anything that implicated the notion of “fair play.” Lucaj clearly explains in the letter that she used to work for Primary and that she now works for Great Northern. Thus, there is no chance that someone could read the letter and believe that Lucaj was actually representing Primary, which would have worked to “deceive purchasers as to the source or the origin of [the services].” In short, there was nothing inherently unfair with the letter’s contents. As a result, there is no evidence to support plaintiff’s claim of unfair competition, and the trial court properly granted summary disposition in favor of defendants.

We also note that plaintiff’s bare assertions in its brief on appeal that “[f]actual questions remain as to [Lucaj’s] unlawful solicitations” and that “factual questions remain as to whether Great Northern conducted a scheme of strategic business activities,” without providing (or citing to) any evidence to support its allegations, is insufficient to create a question of fact. The time to produce evidence is at the time of the motion for summary disposition—even a plaintiff’s promise to offer factual support at trial is sufficient. *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999); *Karaus v Bank of New York Mellon*, 300 Mich App 9, 17; 831 NW2d 897 (2012).

Affirmed. Defendants, as the prevailing parties, may tax costs pursuant to MCR 7.219.

/s/ Pat M. Donofrio
/s/ Michael J. Riordan
/s/ Michael F. Gadola