STATE OF MICHIGAN

COURT OF APPEALS

VIRCHOW KRAUSE & CO,

Plaintiff/Counter-Defendant-Appellant,

and

NA HOLDINGS I,

Plaintiff-Appellant,

v

SUSAN SCHMIDT,

Defendant/Counter-Plaintiff-Appellee,

and

GRANT, MILLMAN & JOHNSON,

Defendant-Appellee.

UNPUBLISHED
June 27, 2006

No. 266271
Oakland Circuit Court
LC No. 05-064313-CK

Before: White, P.J., Fitzgerald and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants. We reverse.

This action arises from the former employment relationship between defendant Susan Schmidt and Nemes Allen & Co. ("Nemes"). On October 7, 1996, Schmidt began working as an accountant for Nemes. On October 28, 1996, Nemes required Schmidt to execute a document titled, "At-Will Statement/Non-Competition Agreement" ("agreement"), which provided that, if her employment was terminated, she would not directly or indirectly cause a client to terminate its relationship with Nemes, solicit a client, or provide any accounting services for any company which was a Nemes client, for a period of 24 months after the termination. The agreement provided that if Schmidt breached its terms, she would have to pay Nemes liquidated damages pursuant to the formula contained in the agreement.

On October 10, 2003, Schmidt resigned from her employment with Nemes. On December 3, 2003, Nemes entered into a Contribution and Partner Admission Agreement ("CPAA") with plaintiff Virchow Krause & Co. ("Virchow"). The CPAA required Nemes to distribute its assets to its shareholders, which would then contribute those assets to Virchow. The CPAA also provided that Nemes would contribute other goodwill related to the business and other intangible assets including client information and rights under employment relationships with Nemes' employees. Nemes changed its name to NA Holdings I and ceased doing business as an accounting firm. On December 29, 2003, Schmidt was hired by defendant Grant, Millman & Johnson ("GMJ") to provide accounting services. Thereafter, several former Nemes clients retained the services of GMJ. Plaintiffs Virchow and NA Holdings I brought the instant lawsuit against defendants Schmidt and GMJ for breach of the non-competition agreement, tortious interference, and unjust enrichment.

Although discovery was ongoing, GMJ moved for summary disposition pursuant to MCR 2.116 (C)(8) and (C)(10), arguing that plaintiffs failed to allege, and cannot prove, any facts that would make GMJ liable under plaintiffs' theories. Plaintiffs then moved for summary disposition against Schmidt pursuant to MCR 2.116(C)(10), and Schmidt moved for summary disposition against plaintiffs pursuant to MCR 2.116(C)(10). The trial court held that plaintiffs failed to present any evidence to show that GMJ knew of the non-competition agreement or induced Schmidt to breach it. The court also found that the covenant not to compete is a part of Schmidt's employment contract that cannot be separated or assigned without her consent. Further, the court found that the CPAA contained no reference to former employees or non-compete provisions in employment agreement and, therefore, Nemes never assigned Schmidt's non-competition agreement to Virchow. Lastly, the court found that NA Holdings I cannot enforce the agreement because it no longer performs accounting services, does not have any clients, and cannot prove any loss suffered as a result of the alleged breach.

Plaintiffs now appeal, arguing that (1) Schmidt's non-compete agreement with Nemes is assignable without her consent; (2) the agreement was, in fact, assigned to Virchow in the CPAA; (3) Schmidt breached the agreement; and (4) plaintiffs presented sufficient evidence, or, alternatively, further discovery stands a reasonable chance of producing sufficient evidence, of creating a fact question regarding whether GMJ tortiously interfered with plaintiffs' contractual and business relationships by inducing Schmidt to break the agreement.

This Court reviews de novo the grant of a motion for summary disposition pursuant to MCR 2.116(C)(10). *Dressel v Ameribank,* 468 Mich 557, 561; 664 NW2d 151 (2003). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Scalise v Boy Scouts of America,* 265 Mich App 1, 9; 692 NW2d 858 (2005). The construction and interpretation of a contract present questions of law, which this Court reviews de novo on appeal. *Bandit Industries, Inc v Hobbs Int'l, Inc (After Remand),* 463 Mich 504, 511; 620 NW2d 531 (2001).

First, we address whether the agreement in this case is assignable without Schmidt's consent. We hold that it is.

Generally, contractual rights can be freely assigned unless the assignment is clearly restricted. *Burkhardt v Bailey,* 260 Mich App 636, 653; 680 NW2d 453 (2004). An assignee stands in the same position as the assignor and acquires the same rights, subject to the same

defenses, that the assignor possessed. *Id.* However, it has long been established that contracts of a personal nature, which contemplate personal association and services, are an exception to this rule and are not assignable without consent. *Northwestern Cooperage & Lumber Co v Byers,* 133 Mich 534, 538; 95 NW 529 (1903); see also *Board of Trustees of Michigan State Univ v Research Corp,* 898 F Supp 519, 521-522 (WD Mich, 1995). "Personal contracts are those involving a personal trust in a party or the special skills and knowledge of a particular individual or group of individuals." *Board of Trustees, supra* at 522.

Although Schmidt's employment as an accountant at Nemes involved personal trust and her special skills and knowledge, there is no language in the agreement that calls for Schmidt's personal trust or use of her special skills and knowledge. Rather, it merely acknowledges Schmidt's at-will status at Nemes and her agreement not to solicit or service any of Nemes' clients for a period of two years after her termination.[1] Because complying with such an agreement requires no personal trust, special skills, or knowledge, the agreement itself is not a personal contract and, therefore, is freely assignable without Schmidt's consent.

Schmidt argues that, even if the non-compete agreement is not a personal contract, it is an inseverable part of her employment contract with Nemes.[2] In determining whether a contractual provision is severable, the intent of the parties is the primary consideration. *Professional Rehabilitation Assoc v State Farm Mutual Automobile Ins Co*, 228 Mich App 167, 174; 577 NW2d 909 (1998). "If the agreements are interdependent and the parties would not have entered into one in the absence of the other, the contract will be regarded . . . as entire and not divisible." *AFSCME v Detroit*, 267 Mich App 255, 262; 704 NW2d 712 (2005)(citations omitted).

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[1] Although the agreement is labeled as a "Non-Competition Agreement," which agreements were unenforceable in Michigan until 1985, it is almost identical to the agreement not to contact or solicit or perform services for a client of a former employer that this Court held valid and enforceable, even under the former law, in *Rehmann, Robson & Co v McMahan*, 187 Mich App 36, 47; 466 NW2d 325 (1991).

[2] Although not raised by the parties, we note that we have not found valid consideration to support the agreement on the record as it stands. Plaintiffs admit that Schmidt began working for Nemes three weeks before she signed the agreement. The agreement, therefore, was not part of any larger employment contract, as Schmidt argues, and, thus, was not supported by her employment as consideration. Plaintiffs argue that Nemes required Schmidt to sign the agreement in exchange for allowing Schmidt access to its confidential customer list and proprietary practices. As Nemes had already hired Schmidt to provide accounting services to its customers, which would require access to this information, plaintiffs' purported consideration for Schmidt's agreement appears to run afoul of the pre-existing duty rule. See *Yerkovich v AAA*, 461 Mich 732, 740-741; 610 NW2d 542 (2000). Additionally, the "in view of" language in the agreement seems dubious given that this Court has previously held that the use of the terms "in recognition of and appreciation to" do not indicate a bargained for exchange. *Prentis Family Foundation v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 59; 698 NW2d 900 (2005). However, as no factual record with regard to this issue was developed below, and the parties have not briefed it, we confine our opinion to the issues raised by the parties.

Schmidt's argument is unconvincing because she never had an employment contract with Nemes from which the non-competition agreement could be severed. To the contrary, Schmidt acknowledged in the agreement that she was an at-will employee, who could quit or be terminated for any reason or no reason at all. The plain language of the agreement does not indicate that the parties intended it to serve as part of a larger employment contract, and no evidence of any larger agreement, of which the agreement would be a part, has ever been offered. Schmidt's argument that the lack of an assignment provision in the agreement indicates the intent that it not be assignable simply misstates the law. Rather, contractual rights can be freely assigned unless assignment is clearly restricted. *Burkhardt, supra*. Because the agreement is not itself a personal contract, not part of a larger personal employment contract, and contains no restrictions on assignment, it can be freely assigned without Schmidt's consent.

Next we address whether Schmidt breached the agreement. We hold that she did.

In the non-competition agreement, Schmidt agreed not to "provide any accounting services, of whatever type or nature, . . . for any company which was a client of the COMPANY at the time of EMPLOYEE's termination or who were clients of the COMPANY within six (6) months prior to EMPLOYEE's termination." In the agreement, the term "COMPANY" refers to Nemes. Schmidt admits that, within two years of her termination from Nemes, she provided accounting services for several customers who were Nemes' clients at the time of her termination. Schmidt argues that this does not constitute a breach of her agreement because, at the time she provided services to Nemes' former clients, Nemes no longer existed, having become NA Holdings I, which no longer provided accounting services and transferred its clients to Virchow. The agreement, however, contains no requirement that the clients must be Nemes' clients at the time Schmidt provides them with accounting services; it merely requires that they were Nemes' clients at the time of, or six months prior to, Schmidt's termination. Thus, Schmidt breached the unambiguous terms of the agreement. Schmidt's argument regarding who may properly enforce the agreement is irrelevant to this determination.

Addressing plaintiffs' next argument, we hold that, through the CPAA, Nemes assigned all of its non-excluded assets to Virchow, including Schmidt's non-competition agreement.

The CPAA assigned to Virchow "all of the assets, properties and business of Nemes Allen . . . used or held in the conduct or in connection with the business, whether tangible, real, personal or mixed, and wherever located," including "[a]ll contacts, . . . [a]ll other properties, assets and rights of every kind, character or description which are owned or used by Nemes Allen and which are not Excluded assets." Schmidt's non-competition agreement was an asset that Nemes owned and used in the conduct of its business, and it was not listed as an excluded asset. Therefore, by the plain terms of the CPAA, Nemes assigned Schmidt's non-competition agreement to Virchow.

Plaintiffs argue, and the trial court agreed, that the specific assignment of "rights under employment relationships with Nemes Allen employees" in the CPAA indicates a lack intent to assign rights under employment relationships with *former* Nemes employees, including non-competition agreements. Plaintiffs' argument appears to rely on the general principle of construction, *expressio unius est exclusio alterius,* which means the express mention of one thing implies the exclusion of another. *Wayne County v Wayne County Retirement Comm*, 267 Mich App 230, 248; 704 NW2d 117 (2005). However, "this maxim is merely an aid to interpreting

[contractual] intent and cannot govern if the result would defeat the clear . . . intent [of the parties]. . . ." *AFSCME, supra* at 260-261, quoting *Grand Rapids Employees Independent Union v Grand Rapids,* 235 Mich App 398, 406; 597 NW2d 284 (1999) (alterations added). Because the CPAA clearly and unambiguously assigned all non-excluded assets, of which Schmidt's non-competition agreement was a part, *expressio unius est exclusio alterius* cannot be used to defeat the plain language of the contract. Additionally, because we find that the agreement was validly assigned to Virchow, it is unnecessary to address plaintiffs' argument that NA Holdings I has standing to enforce the agreement.

Next we address plaintiffs' claims against GMJ. Plaintiffs argue that they presented sufficient evidence to the trial court to create a question of fact regarding whether GMJ tortiously interfered with their contractual relationship with Schmidt and their business relationships with their clients when it "unjustifiably instigated and induced Susan Schmidt to breach her Non-Compete Agreement by actively participating in and providing her with the resources and personnel to solicit and service Plaintiffs' former clients," and, as a result was unjustly enriched. We find that, although plaintiffs failed to present sufficient evidence to sustain their claims at the time of the motion, continuing discovery could provide a reasonable opportunity to find or uncover factual support for plaintiffs' assertions.

Interference with a contract requires: "(1) a contract, (2) a breach, and (3) unjustified instigation of the breach by the defendant." *Badiee v Brighton Area Schools*, 265 Mich App 343, 366; 695 NW2d 521 (2005)(quoted citation omitted). Interference with a business relationship requires: (1) the existence of a valid business relation (not necessarily evidenced by an enforceable contract) or expectancy; (2) knowledge of the relationship or expectancy on the part of the interferer; (3) an intentional interference inducing or causing a breach or termination of the relationship or expectancy; and (4) resultant damage to the party whose relationship or expectancy has been disrupted. *Mino v Clio School Dist,* 255 Mich App 60, 78; 661 NW2d 586 (2003).

> In order to establish tortious interference with a contract or business relationship, *plaintiffs must establish that the interference was improper*. *Patillo v Equitable Life Assurance Society of the United States,* 199 Mich App 450, 457; 502 NW2d 696 (1992). In other words, the intentional act that defendants committed must lack justification and purposely interfere with plaintiffs' contractual rights or plaintiffs' business relationship or expectancy. *Winiemko v Valenti,* 203 Mich App 411, 418 n 3; 513 NW2d 181 (1994) (citations omitted); *Feldman v Green,* 138 Mich App 360, 369; 360 NW2d 881 (1984). The "improper" interference can be shown either by proving (1) the intentional doing of an act wrongful per se, or (2) the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading plaintiffs' contractual rights or business relationship. *Id.* [*Advocacy Organization for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 383; 670 NW2d 569 (2003)(emphasis added).]

Further, with regard to plaintiffs' claim of unjust enrichment, when one party receives a benefit from another, the retention of which would be inequitable, the law implies a contract to

prevent unjust enrichment. *Martin v East Lansing School Dist*, 193 Mich App 166, 177; 483 NW2d 656 (1992). However, a contract will be implied only if there is no express contract. *Id*.

Here, plaintiffs claim that GMJ was aware of Schmidt's non-compete agreement and, not only induced her to breach the agreement, but provided her with the personnel and resources necessary to do so. Alternatively, plaintiffs claim that even if GMJ was not aware of Schmidt's non-compete agreement when they hired her or when she first breached it by soliciting former Nemes clients, GMJ was certainly aware of Schmidt's agreement as of December 14, 2004, when plaintiffs notified GMJ that Schmidt was violating her agreement by providing services to ten of Nemes' former clients. Plaintiffs claim that, despite this notice, GMJ continued to facilitate Schmidt in breaching her agreement. These allegations, if supported by evidence, are sufficient to establish at least a question of fact regarding GMJ's knowledge of Schmidt's agreement and whether GMJ intentionally induced her to breach it.[3] However, because the trial court granted summary disposition before discovery was complete and before plaintiffs had an opportunity to depose either Schmidt or members of GMJ, there is no record evidence to support plaintiffs' allegations.

A motion for summary disposition may be raised at any time, except that granting a motion under MCR 2.116(C)(10) is generally premature if discovery on a disputed issue is incomplete. MCR 2.116(B)(2); *Stringwell v Ann Arbor Pub School Dist,* 262 Mich App. 709, 714, 686 NW2d 825 (2004). However, summary disposition may nevertheless be appropriate if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Trentadue v Buckler Automatic Lawn Sprinkler Co*, 266 Mich App 297, 306; 701 NW2d 756 (2005). Although GMJ's managing officer, Barry Grant, stated in his affidavit that he asked Schmidt during her employment interview if she was aware of being bound by any non-competition agreement and that she said she was not, plaintiffs have not had the opportunity to depose him regarding the specifics of his interview with Schmidt. Additionally, there may have been other members of GMJ that were aware of Schmidt's agreement, as evidenced by several GMJ interview notes and Schmidt's e-mail to Steve Boggs, both of which reference solicitation of Nemes' former clients. Given the evidence on the record, or lack thereof, it is impossible to state with any certainty that further discovery does not stand a reasonable chance of providing factual support to plaintiffs' claims. The trial court, therefore, erred in granting summary disposition in favor of GMJ.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Michael J. Talbot

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[3] GMJ does not contest that plaintiffs' resultant damages are established according to the formula set forth in Schmidt's non-compete agreement.

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WHITE, P.J. (*concurring*).

I agree that Nemes' rights under the agreement were transferred to Virchow. I also agree that the circuit court erred in concluding that Nemes' rights under this contract, transferred after Schmidt left Nemes' employ, were not assignable as a matter of law. Lastly, I agree that the grant of summary disposition to Grant, Millman & Johnson was premature.

/s/ Helene N. White