

DEPARTING ASSOCIATE BROKERS AND SALESPERSONS: THE ISSUES

Unfortunately, when associate brokers and salespersons decide to change their affiliation with brokers, the situation can become ripe for contention and controversy. Part of the contention and controversy is a result of either a misunderstanding of the relationship between brokers, associate brokers and salespersons or a lack of preparation for a fairly common event, *i.e.*, associate brokers or salespersons affiliating with a new broker.

1. Who Owns What?

A. Unless the Independent Contractor Agreement between the broker and the salesperson provides otherwise, listings and commissions are the property of the broker.

B. There are no reported Michigan cases describing a departing salesperson's entitlement to compensation for a pending sale or for a listing under any circumstances.

C. Upon entering into the Independent Contractor Agreement, it is incumbent upon the broker and salesperson to decide their own fate (as opposed to a court deciding it) and providing contractually how these issues will be resolved upon the salesperson's departure. The MAR form of Independent Contractor Agreement provides a template for resolving these issues. Paragraph 12 of MAR's Independent Contractor Agreement provides:

In the event this Agreement is terminated for any reason, Salesperson shall immediately deliver all files to Broker, including active files.

a. **Pending Listings.** For listings procured by Salesperson which are pending at the time of termination **(select/modify as appropriate)**:

- Salesperson shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker, in which case*

Salesperson shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.

- As to commissions actually received by Broker pursuant to binding purchase agreements in place prior to termination of this Agreement, Salesperson shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*
- As to commissions actually received by Broker pursuant to purchase agreements signed after the termination of this Agreement, Salesperson shall receive _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place. Salesperson shall not be entitled to any compensation in connection with purchase agreements signed during extensions to any such listings or on any re-listings.*

b. Pending Cooperating Sales. For cooperating sales procured by Salesperson which are pending at the time of termination (**select/modify as appropriate**):

- Salesperson shall not be entitled to a commission on any sales which close after termination, unless this Agreement is terminated by Broker, in which case Salesperson shall receive all commissions earned prior to termination which are actually received by Broker. For purposes hereof, "earned" shall refer to transactions with a binding purchase agreement in place at the time of termination.*
- As to commissions actually received by Broker pursuant to binding purchase agreements in place prior to termination of this Agreement, Salesperson shall be entitled to _____ percent of the commission to which he/she would have otherwise been entitled if the Agreement was still in place.*

2. How Does a Departing Associate Broker or Salesperson Terminate and What Can They Do About Existing Listings?

A. There is no statute or rule which governs how salespersons terminate their affiliation with a broker or vice versa. The Independent Contractor Agreement between the broker and the salesperson should provide the procedure for termination of the Independent Contractor Agreement. Paragraph 10 of MAR's form of Independent Contractor Agreement provides as follows:

This contract and the association created hereby may be terminated by either party, with or without cause, at any time, upon ___ days notice given to the other. The rights of the parties to any commission which accrued prior to notice of termination shall not be divested by the termination of this contract. Broker and Salesperson agree that the notice provided under this paragraph constitutes reasonable notice to the Salesperson to derive the potential economic benefit to the Salesperson of any listings or customers solicited for the Broker.

B. Departing associate brokers and salespersons are ethically prohibited from pursuing listings of the firm they are leaving. Standard of Practice 16-20 of NAR's Code of Ethics provides as follows:

REALTORS[®], prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS[®] (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements.

Obviously, if the terms of an Independent Contractor Agreement grants an associate broker or salesperson the right to solicit "their" clients prior to or after termination of an affiliation with their current broker, it would not be a violation of Standard of Practice 16-20. The last sentence of the Standard of Practice specifically acknowledges that brokers, associate brokers and salespersons may agree contractually for the assignment of exclusive listing agreements.

C. Occasionally, there are “mass” transfers of listings from one firm to another firm which is many times required after one firm purchases the assets of the other brokerage firm. Since exclusive listing agreements are personal service contracts, in these instances sellers would need to at least acknowledge and approve of the assignment of their listing agreement to a new firm in order to ensure that the listing agreement remains enforceable against the seller at the time of closing on the sale of the seller’s property.

3. Can the Departing Associate Broker or Salesperson be Stopped from “Damaging” the Business of Their Former Broker?

A. Many brokers invest a lot of time and resources in either initially training new licensees to be competent salespersons or, alternatively, training experienced licensees in more advanced sales techniques and processes. The brokers are understandably concerned when the product of their time and money ends up affiliated with a local competitor. Some brokers have inquired as to whether they could address this problem by requiring associate brokers and salespersons to sign covenants not to compete.

B. Until March 29, 1985, generally covenants not to compete in Michigan could only be enforced against persons who granted the covenant not to compete in the context of the sale of their business and so long as the covenant not to compete was reasonable in its scope and time. Although the enforceability of a covenant not to compete is based upon the specific facts of each case, it was generally assumed that a covenant not to compete that did not exceed three years and did not cover a geographic area larger than that covered by the former employer’s business would be deemed reasonable. Prior to March 29, 1985, covenants not to compete, were not enforceable against individuals under any other circumstances.

C. The Michigan Antitrust Reform Act (MCL 445.771 *et seq.*) was amended in 1984 to permit enforceable covenants not to compete between an employer and an employee. MCL 445.774a(1) provides as follows:

An employer may obtain from an employee an agreement or covenant which protects an employer's reasonable competitive business interests and expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited.

(the “Statute”).

D. A covenant not to compete may be invalid pursuant to the Statute if it is unreasonably broad. Michigan courts are “circumspect” when considering non-compete clauses in employment contracts. *A Complete Home Care Agency, Inc v Gutierrez*, docket number 246280, 2004 WL 1459450 (June 2004).

E. A covenant not to compete is enforceable to “protect an employer’s reasonable competitive business interests.”

F. A covenant not to compete is enforceable if it expressly prohibits an employee from engaging in employment or a line of business after termination of employment if the covenant is reasonable as to its duration, geographical area and the type of employment or line of business. A 6-month duration for a covenant not to compete is generally deemed reasonable. *A Complete Home Care Agency*, *supra*.

G. A covenant not to compete must be carefully crafted to make sure it actually permissibly limits competition. A covenant not to disclose confidential information is not

construed as a covenant not to compete. *Your Home Town USA, Inc v Creative Graphics, Inc*, docket number 273136, 2007 WL 778569 (March 2007).

H. A covenant not to compete is enforceable if it protects an employer's "reasonable business interests," but is not enforceable if it is simply intended to prevent competition. *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*, docket number 248751, 2005 WL 599867 (March 2005).

I. There is no Michigan case in which a broker has attempted to enforce a covenant not to compete against a departing associate broker or salesperson. Thus, it is not even clear that a court would find the Statute applicable to covenants not to compete between a broker and a salesperson, as the Statute contains no definition of the terms "employer" and "employee." A departing associate broker or salesperson could argue that the Statute does not cover an independent contractor relationship and thus the covenant not to compete was unenforceable.

J. Enforceability of a covenant not to compete turns very specifically on the facts of each case. A case which arguably includes facts which could apply between a broker and a departing associate broker or salesperson is *Northern Michigan Title Co of Antrim-Charlevoix v Bartlett*. A copy of this case is attached to this outline and will be explored in detail at the presentation.

4. Will a Covenant Not to Compete in an Independent Contractor Agreement Prevent a Competing Broker from Affiliating with a Departing Associate Broker or Salesperson?

A. It is fairly typical in cases where a former employer has sued a former employee for breaching a covenant not to compete to also sue the former employee's new employer alleging that the new employer has engaged in tortious interference with a contract.

B. While courts have described the claims necessary to establish tortious interference with a contract in various ways, generally the former employer must prove that the interference by the new employer was improper. The former employer shows the interference was proper by demonstrating that the new employer commenced an intentional act which lacked justification and purposely interfered with the former employer's contractual rights or business relationship. "Improper interference" can be established by either demonstrating the intentional doing of an act wrongful per se (*e.g.*, blackmailing the former employee to join the new employer), or the intentional doing of a lawful act with malice and unjustified in law for the purpose of invading the former employer's contractual rights or business relationship.

C. Actions by a new employer motivated by legitimate business reasons do not constitute improper motive or interference. *A Complete Home Care Agency*, supra and *BPS Clinical Labs v Blue Cross Blue Shield of Michigan* (on remand) 217 Mich App 687, 699 (1996).

D. Typically, if a covenant not to compete is found to be unenforceable, the court will also find that there was no tortious interference with the contract, inasmuch as the breach portion of the contract (*i.e.*, the covenant not to compete) was unenforceable.

2005 WL 599867

Only the Westlaw citation is currently available.

UNPUBLISHED OPINION. CHECK
COURT RULES BEFORE CITING.

Court of Appeals of Michigan.

NORTHERN MICHIGAN TITLE CO. OF
ANTRIM-CHARLEVOIX, Plaintiff-Appellant,

v.

Debra BARTLETT, Donna Dohm, Maura Snabes,
Corporate Title Agency-Charlevoix, LLC, Corporate
Title Agency-Charlevoix, Inc., and Corporate Title
& Escrow Company, Inc., Defendants-Appellees.

No. 248751. | March 15, 2005.

Before: MURPHY, P.J., and WHITE and KELLY, JJ.

Opinion

[UNPUBLISHED]

PER CURIAM.

Charlevoix County Circuit
Court LC No. 02-153319-CK¹

*1 In this case arising from employment contracts, plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition. We affirm.

I. Basic Facts

Debra Bartlett began working for plaintiff in the 1980s as a paralegal. She later became involved in the management of the company and ultimately held the position of president. Donna Dohm began working for plaintiff in 1990. Dohm eventually became vice president and, after Bartlett resigned, president of the company. Maura Snabes began working for plaintiff in 1994. She performed title examinations, issued commitments and policies and attended closings. She also functioned as plaintiff's legal counsel. At some point, each of these defendants signed an employment contract, which included a noncompete clause and a confidentiality agreement.

Bartlett resigned in March 2001. Dohm and Snabes resigned in April 2002. Soon after resigning, all three began working at Corporate Title Agency (CTA).² Plaintiff filed three complaints "for injunctive and other relief" alleging that Bartlett, Dohm, and Snabes breached the noncompete agreement because they began working for CTA within one year of resigning. Plaintiff also alleged that they breached their fiduciary duties by using plaintiff's "trade secret, confidential and/or proprietary information" for their own benefit. Plaintiff also alleged against CTA, Bartlett, Dohm and Snabes tortious interference with employment contracts, breach of duty under the Michigan Uniform Trade Secrets Act, MCL 445.1901 *et seq.*, tortious interference with business relations and contract, and civil conspiracy.

Defendants filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10). Defendants argued that the noncompete clauses were unenforceable because MCL 445.774a only permits noncompete agreements that "protect an employer's reasonable competitive business interest." Defendants argued that the agreements do not protect a "reasonable competitive business interest," but rather, protect plaintiff from competition itself. Defendants also argued that the business of title insurance has no trade secrets. Bartlett also argued that her employment contract containing the noncompete clause was superceded by a subsequent employment contract without such a clause.

In response, plaintiff argued that defendants had access to and were using "trade secrets" and "confidential information." Plaintiff argued that defendants could use their knowledge about how plaintiff's tract system was superior to CTA's to improve CTA's system. Plaintiff also argued that defendants' knowledge of "clients" habits, preferences, and personal matters, enabled them to take business from plaintiff. Plaintiff also argued that defendants knew of the strengths and weaknesses of plaintiff's finances and employees. Plaintiff argued that these things gave CTA an unfair competitive advantage. Plaintiff also requested that the trial court order Bartlett, Dohm, and Snabes to return the bonuses they received pursuant to their contracts if the contracts were determined to be void.

*2 The trial court granted defendants' motion for summary disposition. The trial court determined that the noncompete clauses were unenforceable under MCL 445.774a because "general knowledge, skill or facility acquired through training or experience while working for an employer appertain

exclusively to the employee” and a legitimate business interest must be something greater than mere competition. The trial court determined that there were no trade secrets, customer lists, or pricing information that the defendants used to unfairly compete and defendants were not using plaintiff’s tract system. The trial court granted summary disposition on all of plaintiff’s claims “because they depend entirely upon the enforceability of th[e] noncompetition agreement[s].”

II. Standard of Review

This Court reviews de novo a trial court’s grant of summary disposition. *Spiek v. Dep’t of Transportation*, 456 Mich. 331, 337; 572 NW2d 201 (1998). Defendants filed their motion pursuant to MCR 2.116(C)(8) and (C)(10). Because the trial court looked beyond the pleadings in deciding the motion, this Court reviews the motion as having been granted pursuant to MCR 2.116(C)(10). *Kefgen v. Davidson*, 241 Mich.App 611, 616; 617 NW2d 351 (2000). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm’rs*, 227 Mich.App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *Downey, supra* 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court considers the documentary evidence presented to the trial court in the light most favorable to the nonmoving party. *DeBrow v Century 21 Great Lakes, Inc, (After Remand)*, 463 Mich. 534, 538-539; 620 NW2d 836 (2001).

III. Noncompete Clauses

A. Bartlett

Although the 1990 employment agreement between plaintiff and Bartlett contained a noncompete clause, plaintiff admits that Bartlett entered into a new agreement in October 16, 1998 that does not include a noncompete clause. “When two agreements cover the same subject matter and include inconsistent terms, the latter agreement supercedes the earlier agreement.” *CMI Intern Inc v. Internet*, 251 Mich.App 125, 130; 649 NW2d 808 (2002). Because both agreements address the terms of Bartlett’s employment by plaintiff, we

conclude that the latter agreement, without the noncompete clause, supercedes the earlier agreement. Plaintiff argues that whether the latter agreement “was intended to replace the prior agreement is a disputed issue of fact.” But courts may look to extrinsic evidence only to clarify a contractual ambiguity. *Stine v. Continental Casualty Co*, 419 Mich. 89, 112; 349 NW2d 127 (1984). Plaintiff does not present any argument that there is contractual ambiguity. Therefore, we conclude that the trial court properly granted summary disposition of plaintiff’s claim that Bartlett breached the noncompete clause even though it granted the motion for the wrong reason. “A trial court’s ruling may be upheld on appeal where the right result issued, albeit for the wrong reason.” *Gleason v Mich. Dep’t of Transportation*, 256 Mich.App 1, 3; 662 NW2d 822 (2003).

B. Dohm and Snabes

*3 Dohm’s and Snabes’ employment agreements each include a noncompete clause, which provides:

2. That upon termination of the Employee’s employment voluntary or involuntary, with or without cause, the employee agrees and promises not to engage in the title insurance business in Charlevoix County, Michigan for a period of five (5) years directly or indirectly, either individually, as a partner, as a stockholder in a corporation, as any other type of investor, or as an agent, employee, representative or consultant or through a relative.

It is undisputed that soon after resigning, Dohm and Snabes began working for CTA, thereby breaching their noncompete agreements.

But defendants argue that the noncompete clause is unenforceable pursuant to MCL 445.774a, which provides:

(1) An employer may obtain from an employee an agreement or covenant which protects an employer’s *reasonable competitive business interests* and expressly prohibits an employee from engaging

in employment or a line of business after termination of employment if the agreement or covenant is reasonable as to its duration, geographical area, and the type of employment or line of business. To the extent any such agreement or covenant is found to be unreasonable in any respect, a court may limit the agreement to render it reasonable in light of the circumstances in which it was made and specifically enforce the agreement as limited. [Emphasis added.]

The parties do not differ with respect to the meaning of the statute, rather, they differ regarding the result of applying the plain language of this statute to the noncompete clause. Because the statute requires inherently fact specific and circumstantial determinations, we must determine whether the noncompete clause protects plaintiff's "reasonable business interest" considering plaintiff's particular business.

Under the circumstances of this case, plaintiff's noncompete agreement is unenforceable because it does not protect plaintiff's "reasonable business interest." Because the agreement completely prohibits Dohm and Snabes from engaging in title insurance business (within a specified time and place), it serves to protect plaintiff from competition itself. The noncompete agreement would be enforceable if it served to protect plaintiff from an unfair competitive advantage in the title insurance business. But an unfair advantage cannot arise from the employee's use of general knowledge or skill gained in working for the employer.

This application of MCL 445.774a is in keeping with the Michigan Antitrust Reform Act (MARA), MCL 445.771 *et seq.* as a whole. As stated in *Bristol Window v. Hoogenstyn*, 250 Mich.App 478, 485 (2002),

Section 2 of the MARA, MCL 445.772, which was derived from the Uniform State Antitrust Act, sets forth the following general proposition: "A contract, combination, or conspiracy between 2 or more persons in restraint of, or to monopolize, trade or commerce in a relevant market is unlawful."

*4 MCL 445.774a, specifically addresses covenants not to compete between employers and employees. Thus, reading these two sections *pari materia*, we conclude that a noncompete agreement that protects an employer's

"reasonable competitive business interest" must not restrain or monopolize trade or commerce.

This application is also in keeping with Michigan common law. MCL 445.774a is not a derogation, but rather, a codification of the common law on noncompete agreements. As noted in *Bristol*, "Long ago, before any statutory scheme of business regulation existed in Michigan, a common-law rule of reason governed what constituted a permissible restraint of trade." *Bristol, supra* at 486, citing *Hubbard v. Miller*, 27 Mich. 15, 16-17 (1873). *Bristol* made clear that 445.774a was merely a codification of the common law "that the enforceability of noncompetition agreements depends on their reasonableness." *Id.* at 495.

In *Follmer Rudzewicz & Co v. Kosco*, 420 Mich. 394; 362 NW2d 676 (1984), our Supreme Court further explained that the reasonableness of noncompetition agreements depends upon the type of information that the employee is restricted from using. The Court held:

While an employee is entitled to the unrestricted use of general information acquired during the course of his employment or information generally known in the trade or readily ascertainable, confidential information, including information regarding customers constitutes property of the employer and may be protected by contract. [*Id.* at 402 (footnotes omitted).]

In so holding, the Court noted:

"It has been uniformly held that general knowledge, skill, or facility acquired through training or experience while working for an employer appertain exclusively to the employee. The fact that they were acquired or developed during the employment does not, but itself, give the employer a sufficient interest to support a restraining covenant, even though the on-the-job training has been extensive and costly." [*Id.* at 402, n 4, quoting Blake, *Employment Agreements Not to Compete*, 73 Harv L Rev 625, 652 (1960).]

In this case, the noncompete clause completely prohibits Dohm and Snabes from engaging in the title insurance business. It does not narrow the focus of the prohibition to prevent unfair competition. Under these circumstances,

Dohm and Snabes would not be permitted to obtain referrals from sources that had never had a relationship with plaintiff. Nor would they be permitted to offer title insurance services to clients who never had or never would have given business to plaintiff in the first place. In any event, according to the record, there are seldom repeat clients in the title insurance business. The business itself is mainly developed through referral sources, of which there are many and which are readily identified in any given community. But any referral source should be free to choose a title insurance company. Even if the noncompete agreement specifically prohibited Dohm and Snabes from soliciting business from referral sources with which plaintiff had developed relationships, the agreement between plaintiff and Dohm and Snabes could not prevent the referral sources from contacting Dohm and Snabes.

*5 Thus, aside from using plaintiff's confidential information while conducting title insurance business, there is nothing about defendants' employment in the title insurance business generally that gives them an "unfair advantage" over plaintiff. Although the parties appear to have blended plaintiff's claims, the claims that Dohm and Snabes breached their confidentiality agreements are distinct from the claims that they breached their noncompete agreements. Therefore, we address the latter below.

Plaintiff also argues that if this Court determines that the noncompete clause of the employment agreements is unenforceable, it must order defendants to return their bonuses, which they obtained pursuant to the agreements. But we have not determined that the employment agreements are unenforceable, only that the noncompete clause is unenforceable. Generally, the failure of a distinct part of a contract does not void valid, severable provisions. *Samuel D. Begola Services, Inc. v. Wild Bros.*, 210 Mich.App 636, 641; 534 NW2d 217 (1995). The primary consideration in determining whether a contractual provision is severable is the intent of the parties. *Id.* Our Supreme Court has explained as follows:

Two principal factors are considered: first, "whether the two or more promises or parts of the contract are so interdependent or interwoven that the parties must be deemed to have contracted only with a view to the performance of both, and would not have entered into one without the other"; and second, whether the consideration for the several promises can be apportioned among them without doing violence to the contract or making a new contract for the parties. 3 Williston, Contracts (3d ed),

§ 532, p 764. However, "even though the consideration for each agreement is distinct, 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." *Id.*, p 765. [*Dumas v. Auto Club Ins Assoc.*, 437 Mich. 521, 616-617, n 87; 473 NW2d 652 (1991).]

In this case, the noncompete clause in each employment contract is severable from the rest of the contract. The contracts establish the terms of the employment relationships. Despite the unenforceability of the noncompete clause, the parties still had employment relationships that were governed by the employment contracts. With respect to the bonuses, the contracts provide: "The Employer has heretofore voluntarily established a 'bonus' policy with distributions to employees based on merit and Employer profitability." Because the bonuses were based on performance, we cannot conclude that the bonuses were tied in such a significant way to the noncompete clause that the bonus provision must be rendered unenforceable as well. Therefore, it does not follow from our determination that the noncompete clause is unenforceable that Dohm and Snabes must return the bonuses they received from plaintiff during the course of their employment.

IV. Confidentiality Agreements

*6 Plaintiff also alleged that Bartlett, Dohm, and Snabes breached their agreements to keep confidential all of plaintiff's "trade secrets, confidential and/or proprietary information." Specifically, plaintiff alleged that defendants breached this agreement by "using and/or disclosing to [CTA] [plaintiff's] trade secrets, confidential and/or proprietary information." The trial court did not err in dismissing this claim because, beyond mere conjecture, plaintiff has produced no evidence whatsoever that defendants have used or disclosed this information to CTA or anyone. In *Smith v. Globe Life Insurance Co.*, 460 Mich. 446, 455 n 2; 597 NW2d 28 (1999), our Supreme Court clarified the proper standard under 2.116(C)(10):

Under 2.116(C)(10), it is no longer sufficient for plaintiffs to promise to offer factual support for their claims at trial.... [A] party faced with a motion for summary disposition brought under 2.116(C)(1) is, in responding to the motion, required

to present evidentiary proofs creating a genuine issue of material fact for trial. Otherwise, summary disposition is properly granted.

Plaintiff's argument simply assumes that because Bartlett, Dohm and Snabes had access to confidential information that they must necessarily be using or disclosing it if they are working for CTA. But the mere fact that defendants have or at one time had this information in their minds is not sufficient evidence to support plaintiff's claims.

Plaintiff argues that defendants' knowledge of plaintiff's tract system, its strengths and weaknesses, will allow CTA to gain an unfair advantage. Plaintiff cites Bartlett's deposition testimony that CTA's tract system is inferior to plaintiff's and that she has discussed improving CTA's system. But even without knowledge of plaintiff's tract system, CTA could develop an improved system. Thus, upgrades and improvements to tract systems are elements of normal competition that do not depend on the knowledge of competitors' tract systems. The mere fact that Bartlett testified that she discussed improving CTA's tract system is not sufficient evidence to support plaintiff's claim that defendants misused or disclosed plaintiff's confidential information.

Plaintiff also argues that defendants used knowledge of closing agents', title examiners', realtors', bankers', and lawyers' "habits, preferences, and personal matters, such as the identities of their spouse, family members and hobbies (i.e., whether they like to golf, fish, hunt, etc.)" to "take business from" plaintiff. Plaintiff has failed to present any evidence that defendants used or disclosed this information in working for CTA. But even if there was evidence that they did, Berlage acknowledged that referral sources (Plaintiff refers to them as "clients.") are easily identified by joining local clubs or a telephone directory. Furthermore, the habits and likes of referral sources could also be obtained by anyone, in the title insurance business or without, and is surely known by more people than plaintiff's employees or defendants. To the extent that the habits and likes of referral sources were particular to the way business was conducted, any competitor could be exposed to this information through general inquiry or through a single business transaction.

*7 Plaintiff also argues that defendants' knowledge of "employee salaries, bonuses, and benefits," plaintiff's "revenues and expenses," business plans, capital investments, and hiring policies would allow them to "evaluate the strengths and weaknesses of [CTA's] system." But, again,

there is no evidence that defendants used this information in working for CTA.

Because plaintiff failed to produce any evidence indicating that Bartlett, Dohm, and Snabes have used or disclosed plaintiff's confidential information in working for CTA, the trial court did not err in granting summary disposition of these claims.

V. Plaintiff's Other Claims

Plaintiff also argues that the trial court erred in granting summary disposition of its claims of breach of fiduciary duty, civil conspiracy, tortious interference, and violation of Uniform Trade Secrets Act, MCL 445.1901 *et seq.* because none of them depended on the noncompete clauses. But plaintiff has failed, in responding to defendants' motion, to present any evidence that defendants used or disclosed plaintiff's confidential information or intentionally interfered with plaintiff's business or contractual relationships. Therefore, the trial court properly granted summary disposition of these claims.

VI. Summary Disposition Premature

Plaintiff also argues that summary disposition was premature because discovery was incomplete on may disputed issues. We disagree.

Pursuant to MCR 2.116(G)(4), plaintiff was required to submit proofs in response to defendants' motion for summary disposition. Discovery cutoff was March 24, 2003. Defendants' motion for summary disposition was first scheduled to be heard on March 6, 2003, at which time the trial court adjourned the motion to give plaintiff the required time to respond. The hearing was rescheduled for April 25, 2003. Plaintiff filed its motion to compel discovery on April 17, 2003. Therefore, even if plaintiff's failure to support its response to summary disposition was due to defendants' objections to discovery requests, plaintiff contributed to this failure by filing its motion to compel several weeks after the discovery cutoff and one week before the rescheduled hearing date for the summary disposition motion. "An appellant cannot contribute to error by plan or design and then argue error on appeal." *Munson Med Center v. Auto Club Ins Ass'n*, 218 Mich.App 375, 388; 554 NW2d 49 (1996).

Affirmed.

Footnotes

- 1 The trial court entered an order consolidating Docket Nos. 02-153419-CK and 02-153519-CK with this case.
- 2 We refer to Corporate Title Agency-Charlevoix, LLC, Corporate Title Agency-Charlevoix, Inc., and Corporate Title & Escrow Company, Inc. collectively as "Corporate Title Agency" (CTA).

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