IN THE COURT OF COMMON PLEAS FOR THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY

TEKTREE, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No.: CPU4-12-002911
	)	
BORLA PERFORMANCE INDUSTRIES, INC., and RONGYU XIA, individually	)	
	)	
	)	
Defendants.	)	
	)	

Submitted: August 2, 2013
Decided: September 16, 2013

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ORDER ON DEFENDANT BORLA PERFORMANCE INDUSTRIES, INC.'S MOTIONS FOR SUMMARY JUDGMENT

On August 2, 2013, this Court held a hearing on two motions for summary judgment filed by Defendant Borla Performance Industries, Inc. ("Borla"). In its first motion for summary judgment, Borla seeks summary judgment on the claim brought by Plaintiff TekTree, LLC ("TekTree"), alleging that a contractual agreement existed between the

parties, and that Borla breached a non-solicitation provision of the agreement when Borla's former employee, Rongyu Xia ("Xia"), sought and secured employment with TekTree's client, Lincoln Financial Group ("Lincoln Financial"). In its second motion, Borla seeks summary judgment on its counterclaim against TekTree, in which Borla claims TekTree owes payment for a backlog of invoices in the amount of $15,750.00.

At the close of the hearing, the Court reserved decision. This is the Court's final decision and order.

FACTUAL AND PROCEDURAL POSTURE

On November 3, 2011, TekTree and Borla entered a Professional Services Agreement ("Agreement"), whereby Borla's employees were to provide services to TekTree's clients as requested in subsequent Purchase Orders. That same day, TekTree and Borla executed a Purchase Order for Borla's employee, Xia, to provide services to TekTree's client, Lincoln Financial. Xia worked with Lincoln Financial under this arrangement until April 30, 2012, when she resigned from her employment with Borla. Upon accepting Xia's resignation, Borla's Vice President of Human Resources, Debbie Juszak, advised Xia that for one year she was not permitted to provide any direct or indirect services to any clients introduced by TekTree , and that doing so could result in legal action against both Xia and Borla.

After her resignation from Borla, Xia began working for Lincoln Financial. On May 3, 2012, TekTree wrote to Borla, informing Borla that Xia's employment with Lincoln Financial constituted a breach of the Agreement, and demanding $20,000 in liquidated damages. TekTree sent a similar letter to Xia, demand that she pay liquidated damages of

$20,000.00 for breach of contract and tortious interference. On May 10, Borla responded to TekTree's demand letter, stating that Borla had met all of its contractual obligations.

This action commenced on July 24, 2012. TekTree filed the Complaint against Borla and Xia, alleging: that Borla breached the Agreement with TekTree; that Xia was in violation of the agreement and breached the Demand Note/Training Contract she signed with TekTree, and; that Xia had engaged in tortious interference with contractual obligations by intentionally convincing Lincoln Financial to end its agreement with TekTree. TekTree seeks judgment in the amount of $20,000.00 from Borla and $20,000.00 from Xia, for a total of $40,000.00 in damages.

On August 31, 2012, Borla filed an answer denying liability for Xia's actions. Borla also filed a counterclaim, seeking compensation in the amount of $15,750.00 from TekTree for unpaid invoices for services rendered by Xia.

After the discovery period ended, Borla filed two motions for summary judgment. In its first motion, Borla seeks summary judgment on TekTree's breach of contract claim against Borla. In its second motion, Borla seeks summary judgment on its breach of contract counterclaim against TekTree for unpaid invoices in the amount of $15,750.00.

STANDARD OF REVIEW

When considering a motion for summary judgment, the court must examine the record to determine whether any genuine issues of material fact are in dispute.[1] The burden is on the moving party to show that no genuine issues of material fact exist.[2] After the

[1] *Appling v. Victory Chapel, Inc.*, 1990 WL 18298, at *1 (Del. Super. Dec. 11, 1989).
[2] *Moore v. Sizemore,* 405 A.2d 679, 680 (Del.1979).

moving party meets its burden, the burden then shifts to the nonmoving party to demonstrate that there are issues of material fact that must be resolved at trial.[3] Summary judgment will only be granted when the court, after examining the record in the light most favorable to the nonmoving party, finds that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[4] However, "summary judgment is not a substitute for the trial of disputed fact issues . . . the court cannot try issues of fact on a Rule 56 motion, but is only empowered to determine whether there are issues to be tried."[5] Thus, if the record suggests that an issue of material fact exists, or if "a more thorough inquiry into the facts is desirable to clarify the application of the law to the circumstances," then summary judgment will not be granted.[6]

DISCUSSION

I. Borla's Motion for Summary Judgment on TekTree's Breach of Contract Claim

In its first motion for summary judgment, Borla contends that TekTree can show no factual or legal basis to support its breach of contract claim. Borla concedes that the agreement existed between Borla and TekTree, whereby Borla was precluded from providing services to any client it met through TekTree, for a period of one year, commencing on the

[3] *Moore v. Sizemore,* 405 A.2d at 681.

[4] *Burkehart v. Davies*, 602 A.2d 56, 59 (Del. 1991).

[5] *GMG Capital Investments, LLC v. Athenian Venture Partners I, L.P.*, 36 A.3d 776, 782 (Del. 2012) (citing 10A Chalres Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2712 (3d ed. 1998) (discussing federal counterpart to Del. Super. Ct. Civ. R. 56)).

[6] *Phillips-Postle v. BJ Productions, Inc.*, 2006 WL 1720073 at *1 (Del. Super. April 26, 2006).

termination of the Agreement (the "Non-Solicitation Provision").[7] However, Borla argues, there are no facts or law to suggest that Borla maintains liability for the actions of its employee once that employment relationship is terminated. According to Borla, the plain language of the contract says nothing about precluding Borla's former employees from working for clients they encounter through TekTree. Thus, Borla contends, there is no issue of material fact and it is entitled to judgment as a matter of law.

It is TekTree's position that the Agreement, including the Non-Solicitation Provision, does in fact extend to Borla's employees, and it imposes liability on Borla if the Non-Solicitation Provision is breached. TekTree places emphasis on the language of the Non-Solicitation Provision, which provides that Borla "agrees not to directly or indirectly" work with TekTree's clients. TekTree argues that the language of the Non-Solicitation Provision clearly imposes liability on Borla for its employee's breach of the Agreement. Additionally, TekTree argues, the deposition of Alexander Borla ("Mr. Borla"), the CEO of Borla and the party that signed the Agreement, establishes that Borla agreed not to directly or indirectly provide services to clients of TekTree, including Lincoln Financial. TekTree asserts that in his deposition, Mr. Borla was asked if Borla would be in breach of the Agreement due to the

[7] Specifically, ¶ 6 of the Agreement, the Non-Solicitation Provision, reads: During the initial term of the agreement and any renewals thereof, and for one year after the expiration . . . vendor . . . agrees that it will not provide (or advice other of the opportunity to provide) directly/indirectly any service to any client which vendor has been introduced or about which vendor has received information through TekTree or through any client for which vendor has performed services thru TekTree . . . . Further, where TekTree is subcontracting work from another contractor, client also includes the end client, and any intermediary entities in between.

VENDOR agree not to directly or indirectly offer employment to, or to independently contact with, or to refer to an outside agency or business, any consultants/employees of TekTree for a period of a or b as mentioned below, which ever is later (a) one (1) year from the date of introduction (b) or (1) year from the last day of services provided by the introduced consultants on projects resulting from such introduction

actions of its employee, to which Mr. Borla responded "yes." Accordingly, TekTree concludes, genuine issues of material fact exist as to whether Borla is liable for Xia's independent breach of the Agreement.

a. Genuine issues of material fact exist regarding Borla's liability for the action of its former employee, Xia.

It is well-settled that Delaware employs the objective theory of contracts.[8] Under the objective theory of contracts, "a contract's construction should be that which would be understood by an objective, reasonable third party."[9] The Court will "read a contract as a whole and . . . will give each provision and term effect, so as not to render any part of the contract mere surplusage."[10] However, where a contract is clear and unambiguous, the plain meaning of the terms and provisions therein will be applied.[11]

The plain language of the Agreement confirms that an obligation was imposed on Borla to ensure that its employees did not violate the terms of the Agreement. Provision 23(h) of the Agreement states:

> The Contractor agrees that all of its personnel working on company, client and vendor projects covered by this Agreement or any Work Order or [*sic*] to be bound by this Agreement or any Work Order issued pursuant to this Agreement and agrees to take all necessary assurances to ensure that its personnel does not violate any of the terms or conditions of this agreement.

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[8] *Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1159 (2010) (quoting *NBS Universal v. Paxon Commc'ns*, 2005 WL 1038997, at *5 (Del. Ch. Apr. 29, 2005)).

[9] *Id.*

[10] *Id.* (quoting *Kuhn Construction, Inc. v. Diamond State Port Corp.*, 2010 WL 779992, at *2 (Del. Mar. 8, 2010)).

[11] *Id.* at 1159-160 (citation omitted).

Thus, under the Agreement, Borla has a contractual obligation to take "all necessary assurances" to make certain that its employee, Xia, did not violate the terms of the Agreement, including the Non-Solicitation Provision. Borla's argument is based on the proposition that the Agreement does not impose liability on Borla for Xia's actions after her employment with Borla terminated. Borla's argument presupposes that it fulfilled its contractual obligations prior to Xia's termination. Borla's argument is inapposite to the present motion for summary judgment, since Borla has not established that it fulfilled its contractual obligation *prior to* Xia's resignation (emphasis added). In sum, the present record does not reflect that Borla took adequate steps to ensure that its employees did not violate the Agreement. An issue of material fact exists as to whether Borla breached the Agreement by failing to assure that Xia did not violate the Non-Solicitation Provision. A more thorough inquiry into the facts is needed to clarify the application of the law in this case. Accordingly, Borla's first motion for summary judgment must fail.

II. Borla's Motion for Summary Judgment on its breach of contract counterclaim.

In its second motion for summary judgment, Borla argues that no issues of material fact exist, and it is entitled to judgment as a matter of law on its breach of contract counterclaim. According to Borla, Xia's services on the Lincoln Financial project were secured via a Purchase Order, which provided that Borla would submit invoices for Xia's services rendered to TekTree, and TekTree would submit payment to Borla within 15 days thereafter. Borla claims that it submitted invoices in accordance with the Purchase Order from December 1, 2011, through the date of Xia's resignation on April 30, 2012. Borla claims

that TekTree breached the Agreement by failing to make payment on all of the invoices submitted, leaving a balance of $15,750.00 outstanding.

It is TekTree's position that Borla is not entitled to payment for any outstanding invoices since Borla's "improper actions" resulted in their breach of the Agreement. TekTree contends Xia's employment with Lincoln Financial constituted a material breach of the Agreement, thereby relieving TekTree of its contractual obligation to pay the invoices.

a. Borla is entitled to judgment as to liability on its counterclaim.

It is undisputed that some of the invoices submitted to TekTree remain unpaid. TekTree argues that payment has not been rendered because Borla materially breached the Agreement when Xia secured employment with Lincoln Financial. Borla argues that the outstanding invoices pertain to the period that Xia was still employed by Borla, before she resigned and began working for Lincoln Financial, and thus performance was rendered and payment was due prior to the alleged breach.

The issue of whether a breach is material is usually a question of fact.[12] However, the facts surrounding Borla's counterclaim are undisputed; thus, the Court can decide from the record whether Borla materially breached the Agreement, thus relieving TekTree of its obligation to pay.[13]

It is well established that Delaware law "firmly supports the principle that 'a party [to a contract] is excused from performance ... if the other party is in material breach' of his

[12] *Saienni v. G & C Capital Group, Inc.*, 1997 WL 363919, at *3 (Del. Super. May 1, 1991).

[13] *See Id.*

contractual obligations."[14] On the other hand, a party's slight breach "will not necessarily terminate the obligations of the injured party to perform under the contract. Non-performance by the injured party under such circumstances will operate as a breach of contract."[15]

It is clear from the record that the alleged breach by Borla and Xia was not material. Delaware courts have defined materiality as follows:

> It has been said that a "material breach" is a failure to do something that is so fundamental to a contract that the failure to perform that obligation defeats the essential purpose of the contract or makes it impossible for the other party to perform under the contract. In other words, for a breach of contract to be material, it must "go to the root" or "essence" of the agreement between the parties, or be "one which touches the fundamental purpose of the contract and defeats the object of the parties in entering into the contract." A breach is "material" if a party fails to perform a substantial part of the contract . . . .[16]

> Not all breaches will authorize the other party to abandon or refuse further performance. To justify termination, 'it is necessary that the failure of performance on the part of the other go to the substance of the contract.' [M]odern courts, and the Restatement (Second) of Contracts, recognize that something more than mere default is ordinarily necessary.... Thus, although a material breach excuses performance of a contract, a nonmaterial-or *de minimis*-breach will not allow the non-breaching party to avoid its obligations under the contract.[17]

It is clear from the record that the alleged breach–Xia's employment with Lincoln Financial–was not a material breach of the Agreement. There is nothing in the record to

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[14] *Brasby v. Morris*, 2007 WL 949485, at *4 (quoting *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003)).

[15] *Eastern Elec. And Heating, Inc. v. Pike Creek Professional Center*, 1987 WL 9610, at *4 (Del. Super. April 7, 1987).

[16] *Shore Investments, Inc. v. Bhole, Inc.*, 2011 WL 5967253, at *5-6 (Del. Super. Nov. 28, 2011) (quoting 23 Williston on Contracts § 63:3 (4th ed.)).

[17] *Id.* (quoting *DeMarie v. Neff*, 2005 WL 89403, at*4 (Del. Ch. Jan. 12, 2005)).

suggest that the purpose or "essence" of the Agreement was to prevent Borla and its employees from independently working with TekTree's clients; rather, the purpose of the Agreement was to provide services to TekTree's client. The Non-Solicitation Provision is tangential to the Agreement's fundamental purpose of providing services to TekTree's clients. TekTree does not dispute that those services were rendered by Xia. Furthermore, the alleged breach did not occur until after performance was rendered by Xia, and benefits were received by TekTree. TekTree cannot now avoid performance under the guise of material breach.

The record demonstrates that, between December 1, 2011 and May 4, 2012, Borla submitted invoices to TekTree for services rendered by Xia, totaling $33,030.00, and TekTree submitted three payments to Borla, totaling $17,280.00. Thus, a balance of $15,750.00 remains due and owing to Borla. Borla has satisfied its burden of proving that there are no genuine issues of material fact, and it is entitled to judgment as a matter of law on its counterclaim in the amount of $15,750.00 and TekTree has made no showing that issues of fact exist. Thus, Borla is entitled to summary judgment on its counterclaim.

CONCLUSION

For the foregoing reasons, it is **HEREBY ORDERED**:

1. Defendant Borla Performance Industries, Inc.'s first motion for summary judgment on Plaintiff TekTree, LLC's breach of contract claim is **DENIED**.

2. Defendant Borla Performance Industries, Inc.'s second motion for summary judgment on its breach of contract counterclaim against Plaintiff TekTree, LLC is **GRANTED**.

3. Judgment is entered in favor of Defendant Borla Performance Industries, Inc., and against Plaintiff TekTree, LLC in the amount of **$15,750.00** plus post-judgment interest at the legal rate.

4. This Judicial Officer will retain jurisdiction over this matter.

IT IS SO ORDERED this 16th day of September, 2013.

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Alex Smalls, Chief Judge.