

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

**DWS INTERNATIONAL, INC. d/b/a
MARBLE DIMENSIONS WORLDWIDE,
INC.,**

Plaintiff,

Case No. 3:09-cv-458

Judge Thomas M. Rose

-v-

**MEIXIA ARTS AND HANDICRAFTS CO.,
LTD., et al.,**

Defendants.

ENTRY AND ORDER OVERRULING MDW'S MOTION FOR A TRO

This matter arises from an alleged contractual relationship between Plaintiff DWS International, Inc. d/b/a Marble Dimensions Worldwide, Inc. ("MDW") and Defendant Meixia Arts and Handicrafts Co., LTD ("Meixia"). Home Casual, LLC ("Home Casual") is also a named Defendant.

Count I of MDW's Complaint, filed on November 17, 2009, in the Court of Common Pleas of Montgomery County, Ohio, seeks a Temporary Restraining Order ("TRO") and a Preliminary Injunction ("PI") against both Defendants. (Doc. #3.) Count II is against Meixia for breach of contract. Count III is against Meixia for breach of fiduciary duty. Count IV is against Meixia for breach of the duty of good faith. Count V is against Meixia for tortious interference with business relationship. Count VI is against Home Casual for tortious interference with contracts and business relationships. Count VII is against Meixia and Home Casual for misappropriation of trade secrets. Count VIII is against Meixia and Home Casual for tortious interference with prospective economic advantage. Count IX is against Meixia and Home Casual

for civil conspiracy. Count X is against Meixia and Home Casual for unjust enrichment. Count XI is against Meixia for promissory estoppel and Count XII is against Meixia and Home Casual and seeks a constructive trust. Count XIII is against Meixia and Home Casual and seeks an accounting.

MDW's Complaint was removed to this Court by Home Casual on December 3, 2009. Meixia, the other Defendant, has represented to the Court that it does not oppose the removal. The removal was based upon this Court having diversity jurisdiction, a matter not currently opposed by any Party.

Now before the Court are two motions. One is a Motion Supporting Plaintiff's November 17, 2009 Motion for a Temporary Restraining Order As Moot filed by Home Casual. (Doc. #7.) The other is a Motion for TRO and PI filed by MDW while this matter was in state court.¹ (Doc. #10-2.)

MOTION TO FIND MOTION FOR TRO MOOT

The Court of Common Pleas of Montgomery County, Ohio, did not rule on MDW's pending Motion for a TRO before this matter was removed. Therefore, MDW's Motion for a TRO remains pending.

MOTION FOR A TRO

A TRO Hearing was conducted on December 10, 2009, during which all Parties were represented and offered oral argument. The evidence now before the Court is a Verified Complaint and an affidavit or declaration submitted by each of the Parties. The TRO is, thus,

¹The Motion for a PI is set, per agreement of the Parties, for a hearing beginning on January 19, 2010.

ripe for decision.

The purpose of injunctive relief is to preserve the existing state of things until the rights of the parties can be fairly and fully investigated. *In re Delorean Motor Co.*, 755 F.2d 1223, 1229 (6th Cir. 1985)(citing *Blount v. Societe Anonyme du Filtre Chamberland Systeme Pasteur*, 53 F. 98, 101 (6thCir. 1892)). The Court considers four factors when determining whether to grant injunctive relief. The factors considered are: the likelihood of plaintiff's success on the merits; (2) whether the injunction will save the plaintiff from irreparable injury; (3) whether the injunction would harm others; and (4) whether the public interest would be served by the injunction. *Id.* at 1228(citing *USACO Coal Co. v. Carbomin Energy, Inc.*, 689 F.2d 94 (6th Cir. 1982)). No single factor is determinative. *Id.* at 1229.

Likelihood of Success On the Merits

In its Motion for a TRO, MDW argues that Meixia has breached the Memorandum of Understanding (the "MOU"), breached fiduciary duties, breached its duty of good faith in the performance of the MOU, tortiously interfered with MDW's business relationship with Home Casual, misappropriated MDW's trade secrets and tortiously interfered with MDW's prospective economic advantage. MDW also argues in its Motion that Home Casual has tortiously interfered with contracts and business relationships with Meixia, misappropriated MDW's trade secrets and tortiously interfered with MDW's prospective economic advantage.

At the TRO Hearing, MDW argued that it had a likelihood of success on its breach of contract claim against Meixia and a likelihood of success on its tortious-interference-with-business-relationship claim against Home Casual. Only these arguments have been more fully developed and thus only these arguments will be considered.

MDW allegedly entered into two contracts with Meixia. One was the Reciprocal Non-Disclosure Agreement (the “NDA”) and the other was the MOU. The Parties to both of these contracts were MDW, Meixia and Stephen Potter (“Potter”).

Breach of the MOU by Meixia

Potter did not sign the MOU. MDW, however, argues that it can show that the MOU is a valid contract because Meixia continued to act as if it was. Yet, William Job (“Job”), the President of Meixia, declares that he previously notified David Stegman of MDW via email that the MOU was null and void because of the non-agreement and non-execution by Mr. Potter. (Declaration of William Job (“Job Decl.”) ¶ 7 Dec. 10, 2009.) Job also declares that he has previously notified David Stegman via email that, if for any other reason the MOU was thought to be valid, Meixia was immediately terminating the MOU pursuant to Paragraph 1.14. (Id. ¶ 14.)

Thus, because the MOU was not signed by all of the entities that it was among and between and because there is conflicting evidence and argument as to whether Meixia believed it was a valid contract, the Court cannot, at this time, conclude that MDW has a likelihood of success on the merits of any claim brought pursuant to the MOU.

Breach of the NDA by Meixia

The remaining claim against Meixia to be considered is breach of the NDA. The NDA was entered into by MDW, Meixia and Potter and is effective September 7, 2008. The NDA defines Confidential Information and then describes how each of the parties to the NDA is to treat any Confidential Information that it receives from one of the other parties to the NDA.

MDW argues that there are two provisions of the NDA that are at issue for purposes of

the TRO. (TRO Hr'g Tr. 6.) The first is a provision at section 3.0 in the NDA dealing with the disclosure and use of confidential information. MDW argues that the development of a table top for outdoor furniture that includes glass fiber reinforced concrete ("GFRC") is unique and a "fair amount" of information was exchanged between MDW and Meixia relating to the pricing of this product. MDW also argues that, once a product, such as the GFRC tabletop, that uses a unique component, has been used and sold, the design has been disclosed. MDW further argues that selling the GFRC product on terms not agreed to by MDW is a disclosure of confidential information. (TRO Hr'g Tr. 9.)

William Job, the President of Meixia, says that Meixia never received information from MDW that involved MDW's own technology, own products, own designs, own patents or own services regarding GFRC table tops except for very generalized information about MDW of the type understood to be generally known and non-confidential. (Job Decl. ¶ 3.) Specifically, Job declares that Meixia never received any information from MDW that he understood to be protected in any way by the NDA. (Id. ¶ 5.) There is also evidence that MDW introduced Home Casual to Meixia on June 25, 2008, that Home Casual thereafter became involved in the design and manufacture of the GFRC table tops, and that MDW was aware of these activities. (Affidavit of Don Corning ("Corning Aff.") ¶¶ 15-24 Dec. 9, 2009.)

Regarding the disclosure and use of confidential information by Meixia, the Court is unable to determine what confidential information, if any, Meixia received from MDW versus information received from Home Casual. The Court is also unable to determine when any alleged confidential information may have been provided from Meixia to Home Casual, or, if any information that Meixia may have shared with Home Casual belonged to Potter.

Confidential information shared before the NDA went into effect is most probably not protected by the NDA. In sum, the Court is unable to determine, based upon the record before it, that MDW has a likelihood of success on the merits on its claim that Meixia breached the NDA by disclosing trade secrets.

The second provision of the NDA argued by MDW to be at issue regarding a TRO is section 5.0 that deals with Meixia being prohibited from contacting MDW's customer. MDW argues that Meixia has contacted Home Casual, one of MDW's previous customers, and Meixia and Home Casual are "doing millions of dollars worth of business together now." (TRO Hr'g. Tr. 11-12.)

The NDA, in this regard, provides that no party shall directly or indirectly solicit any person who, on September 7, 2008, is a customer of the other party. MDW introduced Home Casual to Meixia in July of 2008, before the NDA became effective in September of 2008. Thus, there is a question as to whether this provision in the NDA applies to Home Casual as an MDW customer.

Meixia knew about Home Casual before the NDA was signed. There is evidence that Home Casual was an MDW customer between July and September of 2008 but there is also evidence that Home Casual was working with Meixia on GFRC tabletops during this same time period. Thus, there is no clear evidence as to whether Home Casual was a customer of MDW or of Meixia regarding GFRC products at the time the NDA was signed. In sum, the Court is unable to determine, based upon the record before it, that MDW has a likelihood of success on the merits of its claim that Meixia breached the NDA by doing business with Home Casual.

Tortious Interference With Contractual Business Relationships by Home Casual

MDW argues that Home Casual has tortiously interfered with MDW's contractual business relationship with Meixia. (TRO Hr'g. Tr. 31.) There is a primary difference between tortious interference with a contractual relationship and tortious interference with a business relationship. *Brakefire, Inc. v. Overbeck*, 878 N.E.2d 84, 103 (Clermont County, Ohio Ct. Com. Pl. 2007). Interference with a business relationship applies to intentional interference with prospective contractual relations not yet reduced to a contract while interference with a contractual relationship involves intentional interference with an existing contract. *Id.* at 103-04.

The argument presented at the TRO Hearing relates only to intentional interference with an existing contract. (TRO Hr'g. Tr. 31.) MDW argues that Home Casual knew that MDW had an "exclusive relationship" with Meixia and that MDW was working on a GFRC product with Meixia.

To be successful on a claim of intentional interference with a contract, a plaintiff must show: (1) the existence of a contract; (2) the wrongdoer's knowledge of the contract; (3) the wrongdoer's intentional procurement of the contract's breach; (4) the lack of justification and; (5) resulting damages. *Id.* at 105 (citing *Kenty v. Transamerica Premium Insurance Co.*, 650 N.E.2d 863 (Ohio 1995)).

Home Casual presents evidence that its relationship with MDW began in July of 2007. (Corning Aff. ¶ 7.) At that time, Home Casual contracted with MDW to provide stone tabletops for Home Casual's 2008 product line. (*Id.*) The stone tabletops produced by MDW were not successful. (*Id.* ¶¶ 7-9.) From December 2007 through May 2008, Home Casual worked with MDW on faux tabletops. (*Id.* ¶ 11.) This product was also unsuccessful. (*Id.* ¶ 11.)

In June of 2008, Home Casual again contacted MDW regarding faux tabletops. (*Id.* ¶ 14.)

MDW then organized a meeting between Home Casual and Meixia that took place on June 25, 2008. (Id. ¶ 14.) Potter was present at that meeting and was believed by Home Casual to be the individual that originally introduced GFRC technology to MDW. (Id. ¶¶ 15-17.) There is evidence that, from this point forward, Home Casual became more directly involved with Meixia in the development of GFRC tabletops and that MDW was aware of this activity. (Id. ¶¶ 19-21.)

According to the evidence, it is only after Home Casual had been introduced to Meixia by MDW and became involved in significant development with Meixia does MDW enter into the NDA with Meixia. Thus, it cannot be said that Home Casual intentionally procured Meixia's breach of the NDA. Further, as set forth above, MDW has not shown a likelihood of success on its breach-of-contract claim against Meixia. In sum, the Court is unable to determine, based upon the record before it, that MDW has a likelihood of success on the merits of its claim that Home Casual tortiously interfered with MDW's contractual relationship with Meixia.

Irreparable Injury

“An irreparable injury is one for the redress of which, after its occurrence, there could be no plain, adequate and complete remedy at law, and for which restitution in specie (money) would be impossible, difficult or incomplete.” *Cleveland v. Cleveland Electric Illuminating Co.*, 684 N.E.2d 343, 350 (Ohio Ct. App. 1996)(quoting *Ohio Turnpike Comm. v. Texaco, Inc.*, 297 N.E.2d 557, 561 (Cuyahoga County, Ohio Ct. Com. Pl. 1973)). Further, whether there will be irreparable harm depends upon the context of the dispute. *Id.*

In its Motion, MDW argues that it will be irreparably harmed because it will be nearly impossible for MDW to prove the damages that will arise from Defendant's violation of the MOU and disclosure of trade secrets and by being prevented from being the first to the market.

At the Hearing, MDW argued that it would be irreparably harmed because the GFRC table tops are unique products, that MDW had an exclusive distribution agreement (the MOU), and that MDW will be denied the opportunity to take this unique product to the market, particularly to customers other than Home Casual.

MDW also argues that it will be irreparably harmed by Meixia's disclosure of confidential information concerning the ingredients in and the manufacture of the GFRC products. In addition, MDW argues it will be irreparably harmed by the loss of goodwill because it will not be able to sell a product that it has already promised customers. MDW also alleges that it will be irreparably harmed by unfair competition because MDW will now be competing in a market that has been set by the two Defendants, one of which MDW allegedly had an exclusive agreement with (the MOU). The final irreparable harm identified by MDW is whether or not it would ever be able to collect money damages from a company located in China.

Some background is necessary before reaching the irreparable harm allegations. Faux stone and wood table tops have been in the marketplace for many years. (Corning Aff. ¶ 4.) After three faux initiatives by Home Casual failed, Home Casual decided to contact MDW, in addition to another firm, to develop the faux table tops. (Id. ¶¶ 12-15.) MDW was working on making faux table tops from GFRC. (Id. ¶ 16.) The initial GFRC table tops produced by January of 2009 were not of adequate quality. (Id. ¶ 28.) Home Casual then expended additional resources with Meixia to develop a better product, a development that MDW was allegedly not involved in. (Id. ¶ 29.)

A new product using GFRC was developed by Home Casual. (Id. ¶ 31.) The product is called "Weatherstone." (Id.) Home Casual began accepting orders for Weatherstone in June of

2009. (Id. ¶ 32.) Weatherstone products have now been manufactured and delivered to retailers. (Id. ¶ 36.) These products are currently on retail floors and are being sold to consumers in countries outside the USA. (Id. ¶ 37.)

The Court is unable to find an irreparable injury. First, the Court finds that MDW has not shown a likelihood of success on the merits of any of its claims that could be the basis for the irreparable harm that it has identified. Second, based upon the record, GFRC products are already in the marketplace. Third, the Court cannot find an immediacy since MDW was aware of the Weatherstone products when they were shown at a trade show in the USA in September of 2009 and MDW was present at the show. (Id. ¶ 35.)

Harm To Others

MDW argues that the issuance of an injunction will harm no one other than the Defendants. Also, any delay in bringing GFRC products to the market would have little or no injurious effect on consumers.

Home Depot and Meixia argue that they will be injured by the issuance of an injunction. They also argue that retailers who have already ordered GFRC products will be harmed.

Public Interest

MDW argues that the public interest lies in ensuring that a contracting party receives the benefit of its bargain. MDW also argues that the public interest lies in the protection of trade secrets and in the protection of business relations. Home Casual and Meixia responds that this is not a public interest case.

Conclusion

None of the factors to be considered weigh in favor of granting a TRO. MDW has not

shown a likelihood of success on the merits or irreparable harm. The Court is unable to discern any significant harm to entities other than those directly involved. Finally, although the public interest may lie in the enforcement of contracts and the protection of trade secrets, MDW has not shown a likelihood of success on the merits of these claims. Therefore, MDW's Motion for a TRO, (doc. #1-2), is **OVERRULED**.

DONE and **ORDERED** in Dayton, Ohio this Seventeenth day of December, 2009.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record