STATE OF MICHIGAN

COURT OF APPEALS

BROOKLYN OUTDOOR, LLC,

Plaintiff/Counterdefendant-Appellant,

v

KATHERINE VANDERBUSH, DAVID PIDGEON, and STELLAR OUTDOOR, LLC,

Defendants/Counterplaintiffs-Appellees,

and

MOXIE OUTDOOR INC., SWAY OUTDOOR INC., and ALEXANDRA GREER,

Defendants-Appellees.

UNPUBLISHED
April 25, 2024

No. 363387
Wayne Circuit Court
LC No. 19-012130-CB

Before: REDFORD, P.J., and CAMERON and LETICA, JJ.

PER CURIAM.

This case involves complicated contractual relationships between plaintiff/counterdefendant, Brooklyn Outdoor, LLC ("plaintiff"), and several defendants. Plaintiff appeals the trial court's order granting summary disposition under MCR 2.116(C)(10) (no genuine issue of material fact) in favor of defendants, Katherine Vanderbush, David Pidgeon, Stellar Outdoor, LLC ("Steller"), Moxie Outdoor Inc. ("Moxie"), Sway Outdoor Inc. ("Sway"), and Alexandra Greer on plaintiff's claims of breach of contract, tortious interference with a business relationship, breach of fiduciary duty, and civil conspiracy. The order also granted summary disposition on defendants/counterplaintiffs, Vanderbush, Pidgeon, and Stellar's counterclaim for breach of contract. We affirm, in part, and reverse, in part.

I. BACKGROUND FACTS AND PROCEDURAL HISTORY

Plaintiff is a Michigan-based advertising broker engaged in the sale of outdoor advertising space. Its principal is Candice Simons. Effectively, plaintiff is a middleman between those who

seek to advertise (known as clients), and those who own spaces where advertising can take place (known as vendors). Plaintiff uses independent contractors who work as sales persons to negotiate deals between clients and vendors. It is not uncommon within the industry for such independent contractors to have multiple business relationships with different brokers and clients to maximize their business opportunities. Plaintiff's clients included M&M Outdoor ("M&M), a vendor owned by David Malay, which became plaintiff's client in 2014; and Marquee Media ("Marquee"), a vendor whose president is Jeff Joaquin, and which became plaintiff's client in 2015.

Stellar, of whom Pidgeon is the principal, entered into an Independent Contractor Agreement with plaintiff wherein Stellar agreed to solicit, manage, and maintain clients on plaintiff's behalf as an independent contractor. Duties delineated under the agreement included (1) forwarding all "requests for proposal" ("RFP") to plaintiff; (2) providing regular updates on all pending RFPs; (3) confirming availability and details of sale before accepting contracts; (4) providing plaintiff with billing contacts and invoicing instructions; (5) providing client with completion photos; and (6) soliciting payments from clients that are considered past due. In exchange, plaintiff agreed to pay Stellar a commission for the successful solicitation of a contract. With respect to termination, the agreement required 30 days' written notice by either party, and, in the event of termination, plaintiff agreed to pay Pidgeon posttermination commissions on all contracts executed before the termination date. The Independent Contractor Agreement also included a confidentiality provision that prohibited Pidgeon from using or disclosing plaintiff's proprietary information, unless the material was publicly available. Further, the parties agreed that Pidgeon could perform services for third parties during the term of his agreement and that the majority of Pidgeon's annual compensation did not come from plaintiff.

Vanderbush entered into substantially the same Independent Contractor Agreement with plaintiff. The parties agreed that Vanderbush had the right to perform outside sales services for "only one additional company," Starlite Media ("Starlite"), during the term of the Independent Contractor Agreement. But, unlike Pidgeon, Vanderbush also executed a "Confidentiality, Non-Disclosure, Non-Solicitation, and Noncompete Agreement" ("Noncompete Agreement"), under which Vanderbush agreed to "devote all of her working time and attention to faithfully and diligently performing the duties" of her hire and to not "engage in any business activity in competition with Company." The Noncompete Agreement included a nonsolicitation clause, wherein Vanderbush agreed not to solicit plaintiff's "partner[s]" or "prospective partner[s]," as well as persons who were plaintiff's contractors, within a one-year period after her termination. The Noncompete Agreement also had a noncompete clause, wherein Vanderbush agreed not to accept hire or provide advisory services to plaintiff's partners or prospective partners for a period of one year after her termination. Trifekta Media ("Trifekta"), a vendor whose CEO was Craig Ferber, became plaintiff's client in 2017. Trifekta became a client because Vanderbush had joined plaintiff.

At some point after their hire, Pidgeon and Vanderbush noticed problems with plaintiff's business environment. Several of plaintiff's vendors complained to Vanderbush and Pidgeon about Simons's unavailability, failure to provide consultation, and failure to respond to e-mails. The vendor and client complaints continued, and, on more than one occasion, vendors asked Vanderbush to represent them instead of plaintiff.

In 2018, plaintiff's employees began complaining to Pidgeon and Vanderbush regarding their job dissatisfaction. Pidgeon and Vanderbush approached Simons about these issues, but substantive changes were not made.

By the winter of 2019, plaintiff's business environment had worsened; Pidgeon and Vanderbush were extremely frustrated, employees approached them concerned about job security, and several employees asked Pidgeon and Vanderbush if they planned to leave. Plaintiff's vendors had also grown increasingly irritated. M&M felt plaintiff was not concentrating on its business, felt plaintiff was using a bad marketing strategy, and was extremely dissatisfied because it had inventory that was not selling. Trifekta was dissatisfied with its sales levels through plaintiff, was frustrated that plaintiff was promoting Trifekta's inventory as its own, which caused Trifekta to lose a client relationship, and was unhappy with the manner in which plaintiff handled content related to one of its accounts. Marquee, meanwhile, sensed that plaintiff was not taking its account seriously and was unhappy with the payment arrangement it had with plaintiff, i.e., plaintiff was collecting Marquee's money and not remitting it to Marquee.

Around this time, Pidgeon and Vanderbush engaged in a series of e-mails discussing their potential separation from plaintiff and how they would make up for lost income. Ultimately, by late spring 2019, Pidgeon and Vanderbush concluded that plaintiff was likely a failing enterprise.

Around May 28, 2019, Vanderbush resigned from plaintiff. On that same date, plaintiff and Vanderbush entered into a Commissions After Termination Payment Agreement ("Termination Agreement"), under which plaintiff agreed to pay Vanderbush any outstanding commissions she had earned before her termination. On June 7, 2019, Vanderbush established his own advertising brokering company, Sway. Around that time, plaintiff stopped paying Vanderbush's commission under the Termination Agreement, despite owing her $175,938.

Pidgeon resigned about a month after Vanderbush. As with Vanderbush, Pidgeon and plaintiff entered into a Termination Agreement. But plaintiff never paid Pidgeon any amount under his respective Termination Agreement, despite owing him $125,525.81.

Sometime after Pidgeon's resignation, Greer, one of plaintiff's lower-level employees, contacted Pidgeon and expressed her desire to work with Pidgeon and Vanderbush. Greer had signed a "Confidentiality and Restrictive Covenant Agreement" ("Restrictive Covenant Agreement") with plaintiff, which required Greer to retain all of plaintiff's confidential information in strict confidence, as well as a nonsolicitation clause prohibiting her from soliciting plaintiff's clients. Greer did not believe the noncompete clause of the Restrictive Covenant Agreement applied to her because she was a lower-level employee. Pidgeon allegedly told Greer when to resign via text message.

Plaintiff then lost several of its vendors to Pigeon and Vanderbush. On July 23, 2019, Marquee terminated its relationship with plaintiff as a result of its dissatisfaction and began working with Pidgeon and Vanderbush in mid-August 2019. The next day, Trifekta also terminated its agreement with plaintiff because of its dissatisfaction, and began doing business with Pidgeon and Vanderbush in August 2019. Greer also began working for Pidgeon and Vanderbush around this time. Later, around November 2019, M&M terminated its relationship with plaintiff for the same reason, and subsequently moved some of its business to Sway.

Plaintiff filed a complaint against Vanderbush, Pidgeon, Moxie, Stellar, Sway, and Greer. Vanderbush, Pidgeon, and Stellar counterclaimed alleging two counts of breach of contract related to plaintiff's refusal to pay Pidgeon and Vanderbush's outstanding commissions under their respective Termination Agreements.

The trial court heard competing motions for summary disposition of both the complaint and the counterclaim, which it ultimately granted in defendants' favor. The trial court entered a final judgment against plaintiff and for defendants, dismissing plaintiff's claims with prejudice, and awarding Vanderbush $175,353.33, Stellar $125,525.81, taxable costs, and interest. This appeal followed.

II. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition under MCR 2.116(C)(10). *Blackhawk Dev Corp v Village of Dexter*, 473 Mich 33, 40; 700 NW2d 364 (2005). Summary disposition under MCR 2.116(C)(10) is proper if "there is no genuine issue in respect to any material fact and . . . the moving party is entitled to judgment as a matter of law." *Bergen v Baker*, 264 Mich App 376, 381; 691 NW2d 770 (2004). In reviewing the trial court's decision, this Court "considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

> Where the burden of proof . . . on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. [*Id*.]

"If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted." *Id*. at 363. "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

Further, "the proper interpretation of a contract is also a question of law that we review de novo." *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). This Court's primary task in construing contractual language is discerning the intent of the contracting parties, which is determined by examining the contract's language. *Miller-Davis Co v Ahrens Constr, Inc*, 495 Mich 161, 174; 848 NW2d 95 (2014). This Court must give contractual terms their plain and ordinary meaning. *Reicher v SET Enterprises, Inc*, 283 Mich App 657, 664; 770 NW2d 902 (2009). If the terms are unambiguous, this Court must construe and enforce the contract as written. *Id*.

Finally, a trial court's decisions regarding discovery are reviewed for an abuse of discretion. *Jilek v Stockson*, 297 Mich App 663, 665; 825 NW2d 358 (2012). "An abuse of discretion occurs when the decision results in an outcome falling outside the range of principled outcomes." *Barnett v Hidalgo*, 478 Mich 151, 158; 732 NW2d 472 (2007). Questions related to

the interpretation of a court rule are reviewed de novo. *AFP Specialties, Inc v Vereyken*, 303 Mich App 497, 504; 844 NW2d 470 (2014).

III. BREACH OF CONTRACT—PLAINTIFF'S COMPLAINT

Plaintiff argues that the trial court erred by dismissing its breach-of-contract claims, because Pidgeon and Vanderbush breached their Independent Contractor Agreements, Vanderbush breached her Noncompete Agreement, and Greer breached her Restrictive Covenant Agreement. According to plaintiff, the trial court erred by finding plaintiff failed to establish damages because it was not required to provide a specific amount of damages. We agree, in part, and disagree, in part.

A. FOUNDATIONAL LAW

"A party asserting a breach of contract must establish by a preponderance of the evidence that (1) there was a contract (2) which the other party breached (3) thereby resulting in damages to the party claiming breach." *Miller-Davis Co*, 495 Mich at 178. "[C]ausation of damages is an essential element of any breach of contract action[.]" *Id*. The remedy for breach of contract is generally compensatory damages, meaning the "remedies are those that arise naturally from the breach or those that were in the contemplation of the parties at the time the contract was made." *Wright v Genesee Co*, 504 Mich 410, 419; 934 NW2d 805 (2019) (quotation marks and citation omitted).

B. INDEPENDENT CONTRACTOR AGREEMENT

1. SECTIONS 4(A) AND 5.7: SUBMISSION OF RFPS & PAYMENT OF MONIES

Plaintiff first argues that the trial court erred in granting summary disposition because Pidgeon and Vanderbush breached Sections 4(a) and 5.7 of their Independent Contractor Agreements. Plaintiff asserts that Pidgeon and Vanderbush breached this section of their agreement by not submitting RFPs involving Knott's Berry Farm or Rapport to plaintiff, and that Pidgeon also discussed with Ferber how to divert the commission owed to plaintiff to Pidgeon and Vanderbush.

Section 4(a) provides:

> **4. Services to be executed**. Contractor agrees to perform the following services for Company:
>
> a. forward all "request for proposals" RFPs to Company for reporting.

In addition, Section 5.7 states:

> **5.7 Client Payments.** Contractor shall not collect any monies or remittances, of any type whatsoever, in connection with any executed Contract from any Client or other representative; and in the event that Contractor shall receive or collect any such monies or remittances, Contractor shall immediately thereupon deliver such monies or remittances to Company.

Plaintiff appears to argue that Vanderbush violated these provisions through Pidgeon. Yet, plaintiff cites no law for its proposition that Pidgeon's acts can be attributed or imputed to Vanderbush. Plaintiff cites no record evidence showing that Vanderbush, herself, failed to submit RFPs to plaintiff or otherwise diverted funds owed to plaintiff to herself during her tenure as plaintiff's independent contractor. Consequently, this argument is abandoned for our review and we decline to consider it now. See *MOSES Inc v SEMCOG*, 270 Mich App 401, 417; 716 NW2d 278 (2006) ("If a party fails to adequately brief a position, or support a claim with authority, it is abandoned.").

Regarding Pidgeon's alleged breach, plaintiff first relies on e-mail messages between Pidgeon and Ferber which discussed cutting plaintiff out of the Knott's Berry Farm deal. We agree with plaintiff that the Knott's Berry Farm e-mail messages indicate that Pidgeon and Ferber agreed not to include plaintiff in the deal. But, a fair reading of the e-mail exchanges reflects that the discussion was whether the advertising would be national or local. Because Knott's Berry Farm sought advertising at the local level in southern California, Pidgeon and Ferber agreed that it did not make economic sense to include plaintiff in the deal.[1]

This exchange does not evince a breach of Section 4(a). While that provision required Pidgeon to provide the service of forwarding all RFPs to plaintiff, this contractual requirement must be read in the context of the entire Independent Contractor Agreement. In particular, under Section 8, Pidgeon and plaintiff agreed and recognized that Pidgeon, through his separate business, Stellar:

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[1] The e-mail exchange was as follows:

> *Pidgeon*. Oops. Yes, a comp structure for local/regional brands makes sense.
>
> Just a thought, but if the margins and structure for lower rates are too slim, maybe just propose cutting [plaintiff] out of local sales. They literally don't contribute to the sales efforts as Lissette and I would be the only ones who would develop and have those local contacts anyway. If it's a Davis Elen looking for a Farmer John's brand which is national, that's different than them looking for SoCal Toyota. So SoCal would not go through [plaintiff], but Farmer John's would. Still Trifekta on the contract so the agency and client wouldn't notice much of a difference, right?
>
> *Ferber*. I was thinking that and was going to propose that. The list we have with them is agency driven so this deal wouldn't be on that list so no need to include [plaintiff].
>
> I can send you a regional and local rate card and propose a comp plan and we can discuss if you are ok with that?
>
> And we can pay ur [sic] LLC on collection?

(a) . . . has the right and does fully intend to perform services for third parties during the term of this Agreement.

* * *

(g) Neither [Stellar nor Stellar's] employees or contract personnel shall be required by Company to devote full time to the performance of the services required by this Agreement.

(h) [Stellar] does not receive the majority of its annual compensation from Company.

Reading Sections 8 and 4 together, Pidgeon was required to forward all RFPs to plaintiff that were intended for plaintiff, but had no such obligation for RFPs that were intended for Pidgeon's separate business. The Knott's Berry Farm e-mail exchange simply reflects deliberations whether that account should be plaintiff's account, and Pidgeon and Ferber agreed that it should not because it was not a national account. Pidgeon acted consistent with the terms of the Independent Contractor Agreement by not forwarding the Knott's Berry Farm RFP to plaintiff, because Pidgeon had the right to perform services for third parties, did not devote all his time to serving plaintiff, and did not receive the majority of his compensation from plaintiff. In other words, the parties' agreement specifically contemplated that some RFPs would not be forwarded to plaintiff because Pidgeon did not work exclusively for plaintiff.

The same can be said for the Rapport RFP. Plaintiff again quotes a series of text message exchanges between Pidgeon and Joaquin, wherein Pidgeon states, "I can just have Rapport RFP you directly on your account. It's not about the money for me, and realize that if Brooklyn isn't involved at that commission percentage then you have more room to work with competitively." Even if Pidgeon did not ultimately forward the Rapport RFP to plaintiff, his conduct did not violate the parties' agreement. Rather, as explained, plaintiff and Pidgeon expressly agreed that Pidgeon had the right to perform services for third parties, thereby implicitly recognizing that not all RFPs that Pidgeon managed would be forwarded to plaintiff. Because nothing in the record indicates that Rapport was plaintiff's exclusive customer, such that Pidgeon was precluded from providing Rapport services, Pidgeon acted consistent with the Independent Contractor Agreement. Consequently, plaintiff has not brought forth any admissible evidence demonstrating a genuine question of fact that Pidgeon breached Section 4(a) of the Independent Contractor Agreement.

Regarding Pidgeon's alleged violation of Section 5.7, plaintiff relies on text messages between Pigeon and Ferber, after Pidgeon's contractual agreement with plaintiff had ended, allegedly describing how to divert commissions owed to plaintiff to Pidgeon and Vanderbush.[2]

[2] The text exchange between Ferber and Pidgeon is dated July 22, 2019 and provides:

Ferber: Ok. I got the termination letter today, had some language needed to add. Rachel still working on the updated [plaintiff] info. So can we assume 8-10% tiered commission and we will give you credit for 2019 business closed so far at BO and that will go toward your number for this year and get you into the upper

Yet, the excerpted text exchange does not plainly indicate that Ferber and Pidgeon had concocted a plan to take commissions owed to plaintiff. Rather, the text exchange merely reveals a discussion between Ferber and Pidgeon, after Pidgeon's departure from plaintiff, regarding how the commission structure would work between Trifekta and Sway. Ferber asked to be sent "the revised commission doc [sic]" and asked if he could assume an 8% to 10% tiered commission, with "credit for 2019 business closed so far at [plaintiff] . . . that will go toward your number this year . . . ." Nothing about this "credit" indicates that Trifekta intended to pay Pidgeon funds it owed to plaintiff, and it cannot be reasonably inferred from this exchange, even viewing it in a light most favorable to plaintiff, that Pidgeon sought to divert funds rightfully belonging to plaintiff to himself. Consequently, plaintiff has also failed to demonstrate a genuine issue of fact that Pidgeon breached Section 5.7 of the Independent Contractor Agreement.

2. SECTION 17: CONFIDENTIAL MATERIALS PROVISION

Plaintiff also argues that Pidgeon and Vanderbush breached Section 17 of their Independent Contractor Agreements, which prohibits the use or disclosure of confidential or proprietary information. According to plaintiff, Pidgeon and Vanderbush violated this provision when they downloaded plaintiff's materials for future use at Sway.

Under Section 17, Pidgeon and Vanderbush were prohibited, both during and after the term of their agreements, from disclosing or using any of plaintiff's proprietary or confidential information without plaintiff's prior permission except to perform their job duties. The agreements defined proprietary or confidential information broadly to include "written, printed, . . . or electronically recorded materials" provided by plaintiff for contractor use, "business plans, . . . customer lists, operating procedures, . . . computer programs and inventories," and "information about or belonging to [plaintiff's clients, about] whom Contractor gained knowledge as a result of Contractor's services to Company," but excluded information that was "publicly available, . . . or known to Contractor without restriction."

Plaintiff asserts that its claim that Pidgeon and Vanderbush breached this provision is established by a May 2019 text exchange, days before Vanderbush's resignation, in which Vanderbush told Pidgeon she was "finalizing all [plaintiff's] stuff and getting everything downloaded" she believed they needed. Vanderbush continued, stating that she had "copied over" a "proposal template" with M&M, Marquee, and Trifekta, and she had the "master accounts list, [the] operating expenses template," the "invoice template," and the "independent sales agreement

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> tier? Send me the revised commission doc [sic]. I sent you so I can see what ur [sic] proposing. Assume you guys did about $700k across both centers so far this year. And you did $200k Q4 last year.
>
> *Pidgeon*: Confirming you can assume the 8-10%for tiers. [Vanderbush] will follow up with an email if she hasn't already to get things buttoned-up and provide you with our representation agreement. Please let us both know when you officially notify Candice and how it goes. Thx [sic] man.

template." Additionally, plaintiff notes that Pidgeon, with Greer's help, downloaded the "agency bible," which contained plaintiff's historical customer data. Plaintiff contends these instances support its argument that Pidgeon and Vanderbush "used and disclosed" plaintiff's propriety and confidential information in contravention of Section 17.

Assuming, without deciding, that these materials are confidential or propriety within the meaning of Section 17, neither of these instances establish that Pidgeon or Vanderbush actually used or disclosed these materials. To "use" is to "put into action or service," whereas to "disclose" is to "make known or public," which implies revealing the information to a third party. *Merriam-Webster's Collegiate Dictionary* (11th ed).[3] It thus follows that Pidgeon and Vanderbush were only in violation of this section if they applied, employed, or otherwise made known to third parties plaintiff's confidential information.

Here, Vanderbush admitted to downloading certain of plaintiff's materials days before her termination. However, absent from the record is any evidence demonstrating that Pidgeon or Vanderbush actually used or disclosed these materials. Plaintiff, for example, does not proffer any evidence demonstrating that Sway's materials are substantially the same as plaintiff's materials, which would suggest that defendants used plaintiff's confidential materials. In fact, Simons admitted during her deposition that she merely believed Pidgeon and Vanderbush used this information, but did not know whether they had used this information to form any business relationships. At most, Vanderbush's text message indicates an intent to use plaintiff's materials, but, whether defendants actually used the information for their own purposes, or disclosed it, is entirely speculative. The same can be said with respect to Pidgeon's alleged download of the "agency bible." Accordingly, plaintiff has failed to provide sufficient evidence to establish that Pidgeon or Vanderbush breached Section 17.

C. VANDERBUSH'S NONCOMPETE AGREEMENT

Plaintiff next argues that Vanderbush breached various sections of her Noncompete Agreement.

1. SECTION 3(A): NONSOLICITATION CLAUSE

Plaintiff first asserts that Vanderbush violated Section 3(a) by soliciting plaintiff's clients for the benefit of Sway. According to plaintiff, the text message exchanges between Pidgeon and Malay, Joaquin, and Ferber—the owners of M&M, Marquee, and Trifekta, respectively—show that Vanderbush violated her Noncompete Agreement by recruiting plaintiff's vendors.

Section 3(a) of the Noncompete Agreement restricted Vanderbush, for a period of one year, from soliciting plaintiff's vendors. That section specifically provided:

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[3] See *McGrath v Allstate Ins Co*, 290 Mich App 434, 439; 802 NW2d 619 (2010) (citation omitted) ("Any terms not defined in the contract should be given their plain and ordinary meaning, which may be determined by consulting dictionaries[.]").

> Contractor agrees that, for a period of one (1) year following the termination of her hire with Company, without regard to reason for termination or resignation, Contractor shall not, either alone or in association with others, directly or indirectly, whether as a proprietor, partner, director, officer, agent, salesperson, consultant, contractor or otherwise: (a) directly or indirectly call on, solicit or cause or authorize to be solicited, or service or cause to be serviced any operator, entity, person, municipality, landowner, or landlord which was a Partner (meaning a person or entity for whom Company sells, brokers, solicits advertising space for which Company generates or intends to generate revenue relating to the sale of the advertising space to advertisers) or Prospective Partner (meaning a potential partner that Company is or was soliciting to become a partner) of the Company at the time of the termination of Contractor's hire with Company or within a one-year period immediately preceding Contractor's termination, unless Contractor establishes that she had no involvement with such Partner or Prospective Partner, and no knowledge of confidential information relating to such Partner or Prospective Partner during her hire with Company[.]

Damages are a necessary element of a breach-of-contract action. See *Bank of America, NA v First American Title Ins Co*, 499 Mich 74, 100; 878 NW2d 816 (2016). Plaintiff's complaint was partially premised on allegations that defendants' subsequent business relationships with the vendors caused plaintiff to lose business, thereby causing damages. But in the proceedings below, defendants presented several unrebutted affidavits showing that the termination of plaintiff's relationships with the vendors were caused by the vendors' dissatisfaction with plaintiff's business practices, not because Vanderbush solicited them. Thus, there is no evidence Vanderbush's actions in this regard caused plaintiff damages.[4]

2. SECTION 3(B): NONCOMPETE CLAUSE

Next, plaintiff contends that Vanderbush breached Section 3(b) of the Noncompete Agreement, which prohibits Vanderbush from working with plaintiff's clients within one year of her termination. Section 3(b) provides:

> Contractor agrees that, for a period of one (1) year following the termination of her hire with Company, without regard to reason for termination or resignation, Contractor shall not, either alone or in association with others, directly or indirectly, whether as a proprietor, partner, director, officer, agent, salesperson, consultant, contractor or otherwise:
>
> * * *
>
> (b) accept hire by, or agreeing to provide advisory services to, any Partner or Prospective Partner of Company or having an economic interest in any entity, that

[4] But, even if the text messages between Pidgeon and the vendors' owners could be interpreted as solicitation of their business, plaintiff fails to cite any authority indicating that Pidgeon's conduct is attributable to Vanderbush.

> engages in a business that competes with Company, unless Contractor establishes that she had no involvement with such business of Company and no knowledge of confidential information relating to such business of Company during her hire with Company[.]

At the outset, we note that defendants challenged the reasonableness of this noncompete provision, arguing before the trial court that the agreement was unreasonable, and thus unenforceable. Generally, a court "must assess the reasonableness of the noncompetition clause if a party has challenged its enforceability[,]" and the burden is on the party seeking to enforce the agreement to show that the clause is valid. *Coates v Bastian Bros, Inc*, 276 Mich App 498, 507-508; 741 NW2d 539 (2007). Here, defendants challenged the enforceability of the agreement, arguing that plaintiff had no protectable competitive business interest. Plaintiff did not respond to the argument and the trial court did not address it, which was in error.

Noncompete agreements are restraints on commerce, and, thus, are "only enforceable to the extent they are reasonable." *Total Quality, Inc v Fewless*, 332 Mich App 681, 700; 958 NW2d 294 (2020) (quotation marks and citation omitted). MCL 445.774a(1) codifies Michigan's common-law rules regarding the enforceability of noncompete agreements, and provides:

> 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.

As this Court has explained:

> [A] restrictive covenant must protect an employer's reasonable competitive business interests, but its protection in terms of duration, geographical scope, and the type of employment or line of business must be reasonable. Additionally, a restrictive covenant must be reasonable as between the parties, and it must not be specially injurious to the public.
>
> Because the prohibition on all competition is in restraint of trade, an employer's business interest justifying a restrictive covenant must be greater than merely preventing competition. To be reasonable in relation to an employer's competitive business interest, a restrictive covenant must protect against the employee's gaining some unfair advantage in competition with the employer, but not prohibit the employee from using general knowledge or skill. [*Coates*, 276 Mich App at 506-507 (alteration in original, quotation marks and citation omitted).]

Regarding an employer's "competitive business interest," it has long been recognized that "preventing the anticompetitive use of confidential information is a legitimate business interest."

Rooyakker & Sitz, PLLC v Plante & Moran, PLLC, 276 Mich App 146, 158; 742 NW2d 409 (2007) (quotation marks and citation omitted). An employee "who establishes [client] contacts and relationships as the result of the goodwill of his employer's [business] is in a position to unfairly appropriate that goodwill and thus unfairly compete with a former employer upon departure." *St Clair Med, PC v Borgiel*, 270 Mich App 260, 268; 715 NW2d 914 (2006). It follows that a reasonable competitive business interest includes an interest in retaining clients, and in client lists and contacts, to include information like cost factors and pricing. See *id*. at 268-269; see also *Certified Restoration Dry Cleaning Network, LLC v Tenke Corp*, 511 F3d 535, 547 (CA 6, 2007). Thus, a risk exists that a client could follow a salesperson like Vanderbush, despite the fact that plaintiff facilitated the relationship.

Here, defendants assert that the noncompete provision is unenforceable, not because of duration or lack of geographical constraints, but because plaintiff lacks a competitive business interest. Defendants argue that plaintiff's clients are free agents without any ongoing relationship with plaintiff. But, this argument ignores the risk inherent in plaintiff's business model, wherein salespeople, like Pidgeon and Vanderbush, develop relationships with plaintiff's clients as representatives of plaintiff. Thus, a departing independent contractor can take unfair advantage of the advertising and goodwill built by plaintiff to attract clients by competing with plaintiff to retain those clients. It is also undisputed that Vanderbush was aware that plaintiff charged its clients a 10% commission, as demonstrated by the schedule attached to Vanderbush's Termination Agreement. This was information Vanderbush could use unfairly to her advantage—for example, by offering clients a lower commission. Under these circumstances, plaintiff possessed a reasonable competitive interest in this information and the goodwill it had built with its clients. Consequently, the noncompete clause is not unreasonable for lack of a competitive business interest. We therefore conclude that, defendants have not demonstrated that the noncompete provision is unenforceable.

Turning to Section 3(b) of the Noncompete Agreement, plaintiff argues that the trial court erred when it dismissed its claim against Vanderbush. Specifically, plaintiff asserts that it is undisputed that Vanderbush violated that provision within a year of her termination from plaintiff, formed her own company, Sway, which provides services to plaintiff's former clients. We agree that these acts violate Section 3(b) of the Noncompete Agreement.

The trial court, however, dismissed this claim on the basis that plaintiff failed to demonstrate it suffered "legally significant damages" as a result of defendants' breach. In particular, the court found, with respect to damages caused by defendants' breach of their "obligations," that plaintiff's evidence was insufficient to support damages, because plaintiff had asked for $7,000,000 on the basis that it " 'had a reasonable expectation to continue its relationship with the . . . clients indefinitely.' " But, with respect to a motion for summary disposition, a party need not establish that no genuine issue of material fact exists as to the specific amount of damages. Rather, a party merely must proffer admissible evidence establishing, to a reasonable degree of certainty, the fact that damages occurred. *Hofmann v Auto Club Ins Ass'n*, 211 Mich App 55, 108; 535 NW2d 529 (1995) ("A party asserting a claim has the burden of proving its damages with reasonable certainty. . . . [However,] the certainty requirement is relaxed where the fact of damages has been established and the only question to be decided is the amount of damages.").

In this case, plaintiff lost M&M, Marquee, and Trifekta as clients, and their related revenue, when they left plaintiff and retained Sway as their broker. In support of its claim for damages, plaintiff sought lost sales revenues for M&M, Marquee, and Trifekta for "2019 onward." Plaintiff cannot be able to recover lost revenues from these clients indefinitely into the future, nor should it be able to claim lost revenues in 2019 before Vanderbush's breach of the noncompete clause, as plaintiff argued to the trial court. Thus, it is the measurement of damages in this instance that is uncertain and not the fact of damages. *Hofmann*, 211 Mich App at 108. The fact that plaintiff lost clients, arguably as a result of Vanderbush's breach of the noncompete clause is sufficient to establish the fact of damages, and the trial court erred by concluding otherwise. The trial court thus improperly granted summary disposition in favor of defendants on the basis that plaintiff's evidence of damages was insufficient. We therefore reverse the trial court's findings as to this issue.

3. SECTION 3(C): NONSOLICITATION OF EMPLOYEES CLAUSE

Plaintiff next contends that Vanderbush violated Section 3(c) by soliciting Greer to work as a contractor for Sway. Section 3(c) of Vanderbush's contract provides:

> Contractor agrees that, for a period of one (1) year following the termination of her hire with Company, without regard to reason for termination or resignation, Contractor shall not, either alone or in association with others, directly or indirectly, whether as a proprietor, partner, director, officer, agent, salesperson, consultant, contractor or otherwise:
>
> * * *
>
> (c) solicit or Contract or cause or authorize to be solicited for hire any persons who were, at anytime [sic] within one (1) year prior to the termination of Contractor's hire, Contractors of Company[.]

The undisputed evidence in this matter shows that Greer sought out employment with Sway, and Vanderbush undertook no actions to solicit Greer. Plaintiff cites no authority that Vanderbush's actions qualify as solicitation, and recent caselaw supports that merely accepting Greer's offer of hire, absent some other affirmative action, does not qualify as solicitation. See *Total Quality, Inc*, 332 Mich App at 696-697. Consequently, the trial court correctly determined that there is no genuine issue of material fact that Vanderbush did not breach Section 3(c).

4. SECTIONS 4 AND 5: CONFIDENTIALITY PROVISIONS

Plaintiff next asserts that Vanderbush violated the confidentiality provisions of the Noncompete Agreement, which are confidentiality provisions. Sections 4 and 5 of the agreement provide:

> 4. Contractor will not retain, use, misuse or disclose, directly or indirectly, any of Company's confidential information. Contractor understands and agrees that confidential information includes, without limitation, all client lists, client information and requirements, profit rates, commissions, client specifications, client contact persons, specialized business methods, techniques, computer data,

> plans and knowledge relating to the business of Company, plans for projects, advertising, marketing materials and concepts, customer information, claims processing methods, information relating to claims against clients, methods for developing and maintaining business relationships with clients and prospective clients, prospective client lists, procedural manuals, Contractor training and review programs, price lists, payroll, benefits and personnel information, cost information and any trade secrets that may have been imparted to Contractor by Company, whether such information is the property of Company or its clients, which Contractor has learned of as a result of hire with Company. Contractor recognizes that such confidential information is a unique asset of Company, developed and perfected over a considerable time and at substantial expense to Company and the disclosure of which may cause injury, loss of profits and loss of goodwill to Company. Contractor agrees to protect the confidentiality and use of all confidential information during hire and thereafter.
>
> 5. Contractor agrees to keep all confidential documents in secure locations and not to use or reveal any confidential information during the term of Contractor's hire except as necessary for the business purposes of Company. If Contractor's hire is terminated by Company for any reason, Contractor agrees that she will not use, disclose, copy, discuss, or disseminate any of Company's confidential information.

Plaintiff asserts that Vanderbush breached these provisions as evidenced by the text message exchange in which Vanderbush indicates that she downloaded some of plaintiff's materials. Unlike the Independent Contractor Agreement, which prohibited only the use or disclosure of confidential information as defined under that agreement, Section 4 prohibits *retaining* any confidential information. Vanderbush's admission provided the reasonable inference that she downloaded certain materials in preparation for her termination and that she intended to retain those materials.

A separate question is whether those materials fall within the definition of "confidential" as defined by Section 5. Vanderbush indicated that she had downloaded proposal templates for M&M, Marquee, and Trifekta, a master accounts list, an operating expenses template, an invoice template, and an independent sales agreement template. All of these documents are templates (presumably blank forms), except for the master accounts list, but plaintiff did not attach any of these documents to its summary disposition motion. In any case, "templates" are not included within the broad definition of confidential information in Section 5. Further, to conclude that the master account list or the templates are "confidential information," as defined by Section 5, would be a matter of speculation absent an understanding of what these documents contained. See *Skinner v Square D Co*, 445 Mich 153, 164; 516 NW2d 475 (1994), overruled in part on other grounds by *Smith v Globe Life Ins Co*, 460 Mich 446, 455 n 2; 597 NW2d 28 (1999) (quotation marks and citation omitted) ("[A] plaintiff's circumstantial proof must facilitate reasonable inferences . . . not mere speculation [or conjecture]. . . . [A] conjecture is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference.").

In short, plaintiff has not met its burden of bringing forth evidence from which a jury could reasonably infer that Vanderbush retained confidential information in violation of Sections 4 and 5. Further, even assuming Vanderbush retained confidential information, plaintiff has not established how Vanderbush's actions caused it to suffer damages.

5. GREER'S CONFIDENTIALITY AND RESTRICTIVE COVENANT AGREEMENT

Plaintiff next argues that the trial court erred by granting summary disposition in favor of Greer because Greer violated several provisions of the Restrictive Covenant Agreement. Plaintiff first asserts that Greer violated Section 1, a confidentiality provision, by downloading the agency bible. Section 1 required Greer to retain all confidential information or materials relating to plaintiff in "strict confidence" and prohibited her from disclosing it to another person or using it for her own gain.

While plaintiff provides a digital footprint reflecting that Greer downloaded the agency bible, allegedly a week before her resignation from plaintiff's employ, plaintiff provides no evidence whatsoever that Greer disclosed or used the information within this file in any way or otherwise disclosed it to anyone. Plaintiff cannot rely on mere allegations, it must support those allegations with specific facts. MCR 2.116(G)(4) ("[A]n adverse party may not rest upon the mere allegations or denials of his or her pleading, but must, by affidavits or as otherwise provided in this rule, set forth specific facts showing that there is a genuine issue for trial."). Consequently, plaintiff has not demonstrated that Greer violated the confidentiality provision of the Restrictive Covenant Agreement or otherwise demonstrated a genuine issue of material fact pertaining to this argument.

Plaintiff likewise argues that Greer breached Section 2(a), the nonsolicitation provision, of the Restrictive Covenant Agreement. Section 2(a) prohibited Greer, for two years after her termination, from soliciting plaintiff's clients or diverting company business. On appeal, plaintiff asserts, in a conclusory manner, that Greer breached this provision by engaging in efforts with Pidgeon and Vanderbush to divert plaintiff's business to Sway, without citation to any evidence in the record. In fact, viewing the record as a whole, nothing supports that Greer acted to divert plaintiff's business to Sway, either alone or in concert with Pidgeon and Vanderbush. Plaintiff has completely failed to substantiate this claim.

Next, plaintiff argues that Greer violated the noncompete clause in Section 2(b). Below, the parties submitted different versions of Section 2(b), with plaintiff's version omitting the bolded language:

> **[Section 2(b) is for Executive Employees Only - remove if not applicable to employee]**
>
> b. Noncompete. For a period of twelve (12) months immediately following the Employee's voluntary or involuntary termination, for any reason, the Employee will not compete against Company or associate with any of Company's competitors as an employee, owner, partner, stockholder, investor, agent, or consultant. These restrictions are limited to any market area in which I worked or had responsibility during my employment with Company.

According to Greer, she was not an executive employee, and, therefore, the noncompete clause did not apply to her. But, because plaintiff attached a different version of this contract to its summary disposition brief, which, as noted, did not contain the same bolded language indicating that the noncompete only applied to executive employees, a question of fact exists whether the noncompete provision applies to Greer, and resolution of this question turns on a credibility determination whether plaintiff or Greer modified the contract.

This factual question is immaterial, however, because plaintiff has not demonstrated how Greer's alleged decision to work for Sway in violation of the noncompete clause caused plaintiff any damages. Unlike Vanderbush, Greer was a lower-level employee, specifically, Greer was an operations associate responsible for updating internal databases and putting together proposals for clients. And, unlike with Vanderbush, there is nothing in the record to suggest that Greer formed relationships with plaintiff's clients and they followed her to Sway when she terminated her employment with plaintiff, to plaintiff's detriment. Because plaintiff has not established that any damages arose from Greer's alleged breach, the trial court properly granted summary disposition in favor of Greer.

IV. BREACH OF CONTRACT—COUNTERCLAIM

Plaintiff next argues that Pidgeon, Vanderbush, and Stellar could not maintain a claim for breach of the Termination Agreements because Pidgeon and Vanderbush committed the first substantial breach. Plaintiff explains that, because Pidgeon and Vanderbush breached Sections 4(a), 5.7, and 17 of their Independent Contractor Agreements, and those breaches were substantial, plaintiff's subsequent breach of the Termination Agreements is excused. We disagree.

"The rule in Michigan is that one who first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). "[This] rule only applies when the initial breach is substantial." *Haydaw v Farm Bureau Ins*, 332 Mich App 719, 729-730; 957 NW2d 858 (2020) (quotation marks and citation omitted, alteration in original). The rationale underpinning this rule is that the first breach was so substantial that it "effected such a change in essential operative elements of the contract that further performance by the other party is thereby rendered ineffective or impossible, such as the causing of a complete failure of consideration or the prevention of further performance by the other party." *McCarty v Mercury Metalcraft Co*, 372 Mich 567, 574; 127 NW2d 340 (1964) (citation omitted).

But, the first-to-breach rule has no applicability here, because no evidence supports that either Pidgeon or Vanderbush breached the various provisions of their Independent Contractor Agreements. Accordingly, the first-to-breach rule does not prohibit defendants' claim for breach of the Termination Agreements.

Plaintiff next argues that defendants' counterclaim for breach of the Termination Agreements should have been dismissed by the trial court because those agreements were procured by fraud in the inducement. According to plaintiff, Pidgeon and Vanderbush concealed their plans to divert RFPs from plaintiff and take plaintiff's clients, plaintiff relied on their assertions and the numbers they provided to enter into the Termination Agreements, and plaintiff thereby suffered

damages. In short, plaintiff posits that it would not have entered into the Termination Agreements had it known defendants would take its clients.

"[F]raud in the inducement is an affirmative defense that may be used to avoid the enforcement of [a contract]." *Southeast Mich Surgical Hosp, LLC v Allstate Ins Co*, 316 Mich App 657, 663; 892 NW2d 434 (2016). An affirmative defense must be raised in a party's responsive pleading and a defense not raised in a responsive pleading is waived. *Campbell v St John Hosp*, 434 Mich 608, 615; 455 NW2d 695 (1990); MCR 2.111(F). Plaintiff did not raise fraud in the inducement as an affirmative defense in its answer to defendant's counterclaim. Consequently, this defense was waived, and we decline to address it on appeal.

V. TORTIOUS INTERFERENCE

Plaintiff also challenges the trial court's grant of summary disposition in favor of defendants on its tortious-interference-with-a-business-expectancy claim. Plaintiff argues that the same acts of Pidgeon and Vanderbush that supported plaintiff's claim for breach of contract also support a claim of tortious interference. We disagree.

> The elements of tortious interference with a business relationship are the existence of a valid business relationship or expectancy, knowledge of the relationship or expectancy on the part of the defendant, an intentional interference by the defendant inducing or causing a breach or termination of the relationship or expectancy, and resultant damage to the plaintiff. [*Dalley v Dykema Gossett, PLLC*, 287 Mich App 296, 323; 788 NW2d 679 (2010) (citation omitted).]

To establish the existence of a valid business expectancy, a plaintiff must show that the expectancy was "a reasonable likelihood or possibility and not merely wishful thinking." *Cedroni Ass'n, Inc v Tomblinson, Harburn Assoc, Architects & Planners, Inc*, 492 Mich 40, 47; 821 NW2d 1 (2012) (quotation marks and citation omitted). This business relationship or expectancy with another must be one that is both specific and realistic. *Joba Constr Co v Burns & Roe Inc*, 121 Mich App 615, 634; 329 NW2d 760 (1982).

Plaintiff has demonstrated it had a business relationship with third parties M&M, Marquee, and Trifekta. While these entities were free agents and could end their relationship with plaintiff at any time, it is undisputed that these entities had ongoing relationships with plaintiff that, in the case of M&M and Marquee, predated Pidgeon and Vanderbush's employment with plaintiff. Plaintiff, therefore, possessed more than a prospective, speculative wish of doing business with these clients in the future; rather, plaintiff demonstrated that it had a years' long, revenue-generating business relationship with them. That these clients could leave at any time does not negate their business relationship with plaintiff.

Plaintiff, however, cannot demonstrate the third element of tortious interference—an intentional interference by defendants causing a termination of the relationship. "[T]o satisfy the third element, the plaintiff must establish that the defendant acted both intentionally and either improperly or without justification." *Puetz v Spectrum Health Hosps*, 324 Mich App 51, 78; 919 NW2d 439 (2018) (quotation marks and citation omitted). There are two different ways of establishing that a defendant acted improperly or without justification: a plaintiff must show either

"the intentional doing of a per se wrongful act or the doing of a lawful act with malice and unjustified in law for the purpose of invading the . . . business relationship of another." *CMI Int'l, Inc v Intermet Int'l Corp*, 251 Mich App 125, 131; 649 NW2d 808 (2002) (quotation marks and citation omitted).

No evidence supports a determination that Pidgeon or Vanderbush engaged in per se wrongful acts. Instead, plaintiff alleges that Pidgeon and Vanderbush engaged in acts with malice, and unjustified in the law, which were intended to invade plaintiff's business relationships with M&M, Marquee, and Trifekta. Plaintiff relies on two text message exchanges between Pidgeon and Ferber, and Pidgeon and Joaquin, respectively, as evidence that Pidgeon and Vanderbush planned to usurp these vendors. Yet, plaintiff fails to adequately explain how these "communications" demonstrate a malicious intent to interfere with plaintiff's business relationships beyond asserting that Pidgeon advised some of these vendors on the timing of their resignations from plaintiff. Providing guidance to plaintiff's clients on when to resign, however, is not synonymous with a malicious purpose to interfere with plaintiff's business relationships. Furthermore, an intent to interfere with plaintiff's business relationships cannot be inferred from Pidgeon's guidance in the messages, given that the vendors' wishes to end their relationships with plaintiff necessarily predated any communications with Pidgeon on the subject of how to end those relationships. In other words, Pidgeon giving advice as to the date of resignation does not reasonably evince that Pidgeon had any role in the clients' decision to end their relationships with plaintiff.

Plaintiff also points to the fact that the clients knew Pidgeon and Vanderbush sought to form a competing business. However, the clients' knowledge of this fact is insufficient to create a reasonable inference that Pidgeon and Vanderbush maliciously and intentionally interfered with plaintiff's business relationships. Even assuming Pidgeon and Vanderbush told these clients that they were forming a separate business, that communication falls short of evincing any intent to usurp plaintiff's clients. To conclude otherwise would be conjectural. See *Skinner*, 445 Mich at 164.[5]

VI. FIDUCIARY DUTY

Plaintiff next argues that the trial court erred by dismissing its claim that Pidgeon and Vanderbush breached their fiduciary duties to plaintiff. Plaintiff contends that Pidgeon and Vanderbush were plaintiff's agents because their agreements gave them express authority to act on plaintiff's behalf, and, further, that Pidgeon and Vanderbush breached their fiduciary duties when they used information they gained from their relationship with plaintiff for their own personal gain. We disagree.

[5] Defendants argue that plaintiff cannot maintain an action in tort for the nonperformance of a contract unless a separate duty distinct from the contractual obligation is established. Defendants, however, cite no legal authority that a separate and distinct duty does not underlie a claim for tortious interference with a business relationship. Therefore, this argument is abandoned, and we decline to address it. *MOSES Inc*, 270 Mich App at 417.

"[A] fiduciary relationship arises from the reposing of faith, confidence, and trust and the reliance of one upon the judgment and advice of another." *Vicencio v Ramirez*, 211 Mich App 501, 508; 536 NW2d 280 (1995). "When a fiduciary relationship exists, the fiduciary has a duty to act for the benefit of the principal regarding matters within the scope of the relationship." *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 43; 698 NW2d 900 (2005). Typically, a fiduciary relationship arises in one of four scenarios:

> (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act for or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client or a stockbroker and a customer. [*In re Estate of Karmey*, 468 Mich 68, 74 n 2; 658 NW2d 796 (2003), quoting *Black's Law Dictionary* (7th ed).]

Additionally, "[a]n agency is a fiduciary relationship." *In re Monier Khalil Living Trust*, 328 Mich App 151, 169; 936 NW2d 694 (2019). However, a fiduciary relationship cannot exist where the interests of the parties are adverse because those interests preclude the parties from reasonably reposing full faith and confidence in one another. See, e.g., *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 260-261; 571 NW2d 716 (1997).

Plaintiff first argues that Pidgeon and Vanderbush were plaintiff's agents, and, thus, owed plaintiff a fiduciary duty of good faith and loyalty. According to plaintiff, the Independent Contractor Agreements gave Pidgeon and Vanderbush authority to act on plaintiff's behalf, specifically directing them to "solicit, manage, and maintain business from clients agreed upon by both parties via e[-]mail or in writing on behalf of [plaintiff.]" With respect to agency relationships, this Court has explained:

> An agency relationship may arise when there is a manifestation by the principal that the agent may act on his account. 1 Restatement Agency, 2d, § 15, p 82. The test of whether an agency has been created is whether the principal has a right to control the actions of the agent. [*Meretta v Peach*, 195 Mich App 695, 697-698; 491 NW2d 278 (1992).]

In this case, there is no question of fact that plaintiff did not retain the right to control the actions of either Pidgeon or Vanderbush in the execution of their duties. Neither Pidgeon nor Vanderbush had the authority to bind plaintiff to contracts, and, even in the provision cited by plaintiff, plaintiff retained the right to approve business from clients sourced by either Pidgeon or Vanderbush. Moreover, plaintiff did not control the manner in which Pidgeon and Vanderbush performed their duties, because the Independent Contractor Agreements allowed them the freedom to work however they wanted. Consequently, there is no fiduciary duty arising from an agency-principal relationship between plaintiff and Pidgeon or Vanderbush.

Plaintiff alternatively argues that, even if Pidgeon and Vanderbush were not agents but independent contractors, they nonetheless had a fiduciary relationship with plaintiff because plaintiff confided special trust and confidence in them by making them privy to business

information not known to the general public. Plaintiff cites no Michigan law determining independent contractors who are brokers—like Pidgeon and Vanderbush—have a fiduciary relationship with their brokerage (plaintiff). But, no Michigan court has categorically determined whether an independent contractor can be a fiduciary.[6]

The facts and circumstances of this case do not leave any question whether a fiduciary relationship existed. With respect to Pidgeon, there is no basis for inferring an obligation to act in plaintiff's best interests. The parties agreed that Pidgeon could provide services on behalf of others and recognized that Pidgeon did not receive the bulk of his compensation from plaintiff. Similarly, the parties agreed that Vanderbush could provide services for Starlite. Under these circumstances, a fiduciary relationship could not arise, because the parties had adverse interests, meaning plaintiff could not reasonably repose confidence and full trust in Pidgeon and Vanderbush. See, e.g., *Beaty*, 456 Mich at 260-261. Moreover, that plaintiff trusted Pidgeon and Vanderbush with its internal business processes and information is insufficient. Merely reposing confidence in another may not, in and of itself, create a fiduciary relationship. We reject plaintiff's argument that involvement with plaintiff's business is sufficient to create a fiduciary relationship. To do so would turn every independent contractor who learns of internal company policies and information into a fiduciary—a holding that would be an unsupportable sea change in Michigan law. Viewing the record as a whole, plaintiff has not set forth any evidence demonstrating a fiduciary relationship existed between plaintiff, Pidgeon, and Vanderbush.

VII. CIVIL CONSPIRACY

Plaintiff argues that the trial court erred in dismissing its civil conspiracy claim. We disagree.

"A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Swain v Morse*, 332 Mich App 510, 530; 957 NW2d 396 (2020). "[A] claim for civil conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort." *Advocacy Org for Patients & Providers v Auto Club Ins Ass'n*, 257 Mich App 365, 384; 670 NW2d 569 (2003).

Plaintiff has not established a separate actionable tort. Instead, plaintiff argues that Michigan law has recognized that civil conspiracy can be based on nontort claims, and, specifically, can be alleged on the basis of breach of contract if the statute of frauds is satisfied. Plaintiff cites *Northern Plumbing & Heating v Henderson Bros, Inc*, 83 Mich App 84; 268 NW2d

[6] Plaintiff relies on a nonbinding federal district court case indicating that, under Michigan law, a fiduciary relationship may exist between parties to an independent contractor agreement if the facts and circumstances of the relationship evince a fiduciary relationship. See *McGregor v Hunting Specialized Coating, Inc*, unpublished opinion of the United States District Court for the Eastern District of Michigan, issued June 3, 2005 (Case No. 04-73547).

296 (1978), in support of this argument. But, regardless of its lack of authority,[7] we note *Northern Plumbing* did not conclude that a civil conspiracy could be based on an underlying breach of contract. Rather, *Northern Plumbing* involved a claim of "conspiracy to breach a contract[,]" tortious interference with a contract, and tortious interference with a business expectancy. *Id*. at 91-92. While it is somewhat unclear whether the claim for "conspiracy to breach a contract" raised in *Northern Plumbing* is the same as a claim for civil conspiracy as it is now understood, it is plain that underlying torts existed in *Northern Plumbing* that could not be dismissed on summary disposition. *Id*. at 93-94. In short, *Northern Plumbing*, then, does not stand for the proposition that a civil conspiracy may be alleged in the absence of an underlying tort. Because no underlying tort exists in this matter, summary disposition was properly granted in favor of defendants with respect to plaintiff's claim of civil conspiracy.

VIII. AFFIDAVITS

Plaintiff lastly argues that the trial court erred by relying on the affidavits of Ferber, Malay, and Joaquin, given that their deposition testimonies allegedly conflicted with their affidavits. At the very least, according to plaintiff, these depositions create a genuine issue of material fact for trial. We disagree.

In making the argument that the trial court erred in relying on these affidavits, plaintiff fails to address that it did not take these depositions in response to defendants' motion for summary disposition, despite its obligation to do so to demonstrate a genuine issue of material fact. See MCR 2.116(G)(4). Instead, defendants took these witnesses' depositions after the completion of discovery for the purpose of preserving the testimony for trial consistent with MCR 2.301(B)(3). MCR 2.301(B) provides:

> (B) Completion of Discovery.
>
> (1) In circuit and probate court, the time for completion of discovery shall be set by an order entered under MCR 2.401(B).
>
> (2) In an action in which discovery is available only on leave of the court or by stipulation, the order or stipulation shall set a time for completion of discovery. A time set by stipulation may not delay the scheduling of the action for trial.
>
> (3) *After the time for completion of discovery, a deposition of a witness taken solely for the purpose of preservation of testimony may be taken at any time before commencement of trial without leave of court.*
>
> (4) Unless ordered otherwise, a date for the completion of discovery means the serving party shall initiate the discovery by a time that provides for a response

[7] Decisions issued by this Court before November 1, 1990 are not binding on this Court. *Meier v Public Sch Employees' Retirement Sys*, 343 Mich App 571, 579 n 3; 997 NW2d 719 (2022); MCR 7.215(J)(1).

> or appearance, per these rules, before the completion date. As may be reasonable under the circumstances, or by leave of court, motions with regard to discovery may be brought after the date for completion of discovery. [Emphasis added.]

Subsection (B)(3) allows the taking of a witness's deposition "solely for the purpose of preservation of testimony" after the completion of discovery without seeking leave of the trial court. Under the maxim of *expressio unius est exclusio alterius*, the expression of one thing in a court rule implies the exclusion of other, similar things. *United States Fidelity & Guaranty Co v Amerisure Ins Co*, 195 Mich App 1, 5-6; 489 NW2d 115 (1992). The express reference to depositions solely for the purpose of preservation of testimony in MCR 2.301(B)(3) necessarily implies that such a deposition cannot be used for any other purpose. Additionally, when Subparagraphs (B)(3) and (B)(4) are read together, a party wishing to take a deposition after the completion of discovery for a purpose other than "preservation of testimony" may do so only by leave of court.

Here, plaintiff did not take the depositions of Ferber, Malay, or Joaquin to support its response to defendants' summary disposition motion and never sought leave of the court after completion of discovery to do so. Instead, plaintiff waited until it filed its second motion for reconsideration, by which time defendants had taken these witnesses' depositions for the limited purpose of preservation, to reference these depositions for the first time. Because MCR 2.301(B) indicates such depositions can only be used for preservation of testimony purposes, plaintiff was precluded from relying on them in its second motion for reconsideration. We agree that the trial court properly exercised its discretion to disregard the deposition testimony of these witnesses.

IX. CONCLUSION

Affirmed, in part, and reversed, in part. Remanded for the specific issue of plaintiff's breach-of-contract claim against Vanderbush. On remand, the trial court should consider whether plaintiff has met its burden of showing that the noncompete clause is enforceable, and, if so, to what extent under the circumstances. We do not retain jurisdiction.

/s/ James Robert Redford
/s/ Thomas C. Cameron
/s/ Anica Letica