

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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|--------------------------------|---|--------------|
| CHRISTOPHER B. DAGUE, | : | |
| | : | |
| Plaintiff, | : | CIVIL ACTION |
| | : | |
| vs. | : | NO. 07-5539 |
| | : | |
| ROBERT HUDDLER and | : | |
| MOBILITY REHAB PRODUCTS, INC., | : | |
| | : | |
| Defendants. | : | |

HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE

MEMORANDUM

Before the Court is the Motion to Dismiss the Counterclaim of Plaintiff, Christopher B. Dague ("Dague") for Violating 15 Pa. C.S.A. § 8587(a), alleging breach of an alleged Confidentiality Agreement between Dague and Mobility Rehab Products, LLC ("MRP"). For the reasons that follow, the Motion will be denied without prejudice.

I. BACKGROUND AND PROCEDURAL HISTORY.

Dague filed his three count Complaint on December 31, 2007, alleging Tortious Interference with Contractual Relationship (Count I), Defamation (Count II), and Fraud or Deceit (Count III). Dague is a resident of Pennsylvania. Compl., p. 1. Defendant, Robert Huddler ("Huddler"), is an individual with offices in care of MRP in Maryland. Id. MRP is a limited liability corporation with offices at 3150 Baltimore Blvd., Finksburg, Maryland, and does business in Pennsylvania.

Id.

Dague worked for MRP from March 12, 2007 through September 28, 2007, when he voluntarily terminated his employment. Dague contends that he never, at any time during or after his employment with MRP, signed a policy and procedures manual, confidentiality agreement or covenant not to compete agreement with MRP. Id. at 2.

On October 1, 2007, three days after leaving MRP, Dague commenced employment as the Director of Business Development with Mobility Unlimited, Inc. ("Mobility Unlimited"). Id. On October 23, 2007, Huddler sent a letter and documents to Mobility Unlimited, alleging that Dague was in direct violation of MRB's confidentiality policy and stating, among other things, that marketing by Mobility Unlimited to MRB's clients should immediately cease or legal action would be taken against Mobility Unlimited. Id. at 2, 3. Mobility Unlimited received Huddler's letter on October 24, 2007, which included six additional pages as attachments; four pages listed 115 of MRB's business referral sources, and two pages were excerpted from MRB's policy and procedures manual referencing non-compete information. Id. at 3.

Less than one week after Mobility Unlimited received Huddler's letter, Dague's employment with Mobility Unlimited was terminated on October 30, 2007. Id. at 3. He filed his

Complaint in the instant action on December 31, 2007. The Answer to the Complaint with Affirmative Defenses and Counterclaim was filed by Huddler and MRP on January 23, 2008. The three-paragraph counterclaim which is the subject of the instant Motion to Dismiss states the following:

1. Plaintiff, Christopher B. Dague, at or about the time he left the employ of Defendant company and thereafter, was soliciting customers previously serviced by Defendant Mobility Rehab Products, LLC, indicating to customers and other referral sources that he was with "Mobility Rehab", not informing them he had changed employers to Mobility Unlimited, Inc.
2. Such conduct on part of Plaintiff was a breach of his Confidentiality Agreement with Defendant Mobility Rehab Products, LLC.
3. As a direct and proximate result of the Plaintiff's breach and misconduct as aforesaid, Defendant Mobility Rehab Products, LLC has sustained damages in an amount to be determined.

WHEREFORE, Defendant, Mobility Rehab Products, LLC demands judgment against Plaintiff in an amount in excess of the arbitration jurisdictional limits together with interest, costs of suit, and delay damages allowed by law.

Dkt. No. 3, pp. 7-8. Dague filed a "Reply to the Counterclaim" on February 1, 2008, but in the Reply, did not raise any jurisdictional issue. Dkt. No. 5.

On March 10, 2008, the parties consented to try this case before the undersigned pursuant to 28 U.S.C. § 636©. On March 25, 2008, a telephone conference was held pursuant to

Federal Rule of Civil Procedure 16 setting the deadline for completion of discovery for July 14, 2008. That deadline was twice extended and the current deadline is November 7, 2008. New counsel for Huddler entered his appearance on July 18, 2008, and new counsel for MRB entered his appearance on July 22, 2008. Counterclaim counsel for both Defendants remains in this case solely to prosecute the counterclaim.

On August 22, 2008, Dague filed a Motion captioned "Motion to Dismiss the Counterclaim for Violating 15 Pa. C.S.A. § 8587(a)." On September 4, 2008, Dague filed exhibits in support of the Motion. On September 8, 2008, Huddler and MRB filed their Response to the Motion. Dague filed a Supplemental Response to the Motion on September 24, 2008. On September 25, 2008, MRB filed a Supplemental Brief in Opposition to Plaintiff's Motion to Dismiss Counterclaim, and on September 29, 2008, Dague filed a Brief in Response to Defendant's Supplemental Brief.

II. STANDARD.

Federal Rule of Civil Procedure 12© provides that "[a]fter the pleadings are closed - but early enough not to delay trial - a party may move for judgment on the pleadings." Fed. R. Civ. P. 12©. Plaintiff presents matters outside the pleadings for this Court's consideration in deciding the instant Motion, therefore the Motion must be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d).

Judgment will not be granted unless the movant clearly establishes there are no material issues of fact, and he is entitled to judgment as a matter of law. Sikirica v. Nationwide Ins. Co., 416 F.3d 214, 220 (3d Cir. 2005)(citing Soc'y Hill Civic Ass'n v. Harris, 632 F.2d 1045, 1054 (3d Cir.1980)); Hayes v. Cmty. Gen. Osteopathic Hosp., 940 F.2d 54, 56 (3d Cir. 1991); see also 5A Charles A. Wright et al., Federal Practice and Procedure § 1368, at 519 (2d ed. 1990). This Court must review the facts presented in the pleadings and the inferences to be drawn therefrom in the light most favorable to the nonmoving party. Id. (citing Id.)

III. DISCUSSION.

Dague is domiciled in Pennsylvania. Huddler is domiciled in Maryland, and MRP is a limited liability corporation with offices at 3150 Baltimore Blvd., Finksburg, Maryland. Dague has averred that the amount in controversy is in excess of \$175,000. Thus, this Court has diversity jurisdiction over this case, and Pennsylvania law is applicable.

Dague moves to dismiss the counterclaim on the basis that MRP is a Maryland limited liability company which has not registered with the Commonwealth of Pennsylvania as a registered foreign limited liability company, "thereby running afoul of 15

Pa. C.S.A. § 8587(a)."¹ Pls. Mot. Dismiss, p. 1. Dague distinguishes MRP, which is a Maryland limited liability company with an address at 3150 Baltimore Blvd., Finksburg, MD 21048, from Mobility Rehab Products, LLC, for which a certificate of organization was filed on January 22, 2008 with the Commonwealth of Pennsylvania Department of State, and which has an initial registered office at 2222 Sullivan Trail, Easton, PA 18040 in Northampton County, PA. Dague contends that MRP, a Maryland corporation, is different from the Pennsylvania corporation bearing the same name and principal. Dague claims that the Counterclaim should be barred because MRP, a Maryland entity, never registered in Pennsylvania as a limited liability company and therefore, pursuant to 15 Pa. C.S.A. § 8587(a), MRP may not

¹15 Pa. C.S.A. § 8587(a) provides:

Maintenance of actions or proceedings

prohibited.-- A nonqualified foreign limited partnership doing business in this Commonwealth may not maintain any action or proceeding in any court of this Commonwealth until it has registered under this subchapter; nor, except as provided in subsection (b), shall any action or proceeding be maintained in any court of this Commonwealth on any right, claim or demand arising out of the doing of business by the foreign limited partnership in this Commonwealth by any successor, assignee or acquiror of all or substantially all of the assets of the foreign limited partnership that is a foreign corporation for profit or not-for-profit or a foreign limited partnership until such foreign corporation or foreign limited partnership has been authorized to do business in this Commonwealth.

15 Pa. C.S.A. § 8587.

maintain any action or proceeding in any court of the Commonwealth of Pennsylvania until it has registered with the Pennsylvania Department of State.

MRP,² in its Answer to the Motion to Dismiss, affirms that Mobility Rehab Products, LLC is a registered Pennsylvania corporation with its registered office at 2222 Sullivan Trail, Easton, PA 18040 in Northampton County, PA. MRP also states that the registered office in Pennsylvania is the same address of JMR Holdings, LLC, which was registered in Pennsylvania as a Pennsylvania business entity on August 6, 2001, and "which owns substantially all the assets of Mobility Rehab Products, LLC." Ans. to Mot. Dismiss, p. 1.

The statute cited by Plaintiff Dague governs nonqualified foreign limited partnerships, but confusingly, Plaintiff, later in the Brief in Support of the Motion, also cites "section 4141(a) of the Pennsylvania Business Corporation Law" which governs nonqualified business corporations. MRP is a limited liability corporation, or LLC. Pursuant to 15 Pa. C.S.A. § 8102(a), LLC is interchangeable with other forms of corporation. According to 15 Pa. C.S.A. section 4141, there is a penalty for corporations doing business in Pennsylvania without a certificate of authority. Subsection (a) of this state statute provides:

²MRP is also the Counterclaim Plaintiff.

a) **Right to bring actions or proceedings suspended.**-- A nonqualified foreign business corporation doing business in this Commonwealth within the meaning of Subchapter B (relating to qualification) shall not be permitted to maintain any action or proceeding in any court of this Commonwealth until the corporation has obtained a certificate of authority. Nor, except as provided in subsection (b), shall any action or proceeding be maintained in any court of this Commonwealth by any successor or assignee of the corporation on any right, claim or demand arising out of the doing of business by the corporation in this Commonwealth until a certificate of authority has been obtained by the corporation or by a corporation that has acquired all or substantially all of its assets.

15 Pa. C.S.A. § 4141(a). Because MRB is a limited liability corporation, or LLC, this provision guides this Court's analysis, and not 15 Pa. C.S.A. § 8587(a), as Dague argues.

Counsel for MRB, in his Brief filed on September 25, 2008, has concisely and correctly set forth the issue which this Court must resolve in order to determine the instant Motion, i.e., the legal identity of MRP. In reviewing the evidence presented by Dague to support his Motion, MRP correctly argues that Dague in submitting personal affidavits in support of his Motion, has not complied with Federal Rule 56(e)(1), which requires that a supporting affidavit must be made on personal knowledge, showing that the affiant is competent to testify on the matters stated. Dague has, however, also submitted portions of Huddler's deposition taken on September 12, 2008. Pertinent

portions of Huddler's deposition are:

Q: When you first started in 1999, what states were you doing business?

A: Maryland.

Q: Did you understand as a limited liability corporation formed under Maryland law that if you were going to [do] business in other states, you had to register in other states as a foreign limited liability company? . . .

A: No.

Q: You didn't know that?

A: At that time, no.

. . . .

Q: I'll show you what has been identified as Huddler 4. Do you recognize that document?

A: That is a registration for the Pennsylvania Department of State.

Q: Who filed that paperwork?

A: I did.

Q: Did you have the professional assistance of counsel when you did it?

A: No.

Q: When did you do it?

A: January 22, 2008.

Q: And what prompted you to do it?

A: We needed to register in the State of Pennsylvania.

Q: Look at the registration. How did you register Mobility Rehab Products, LLC, as a foreign limited liability company or a new domestic limited liability company?

A: I went to the Department of State and told them of our company and the situation needed and they gave me the necessary forms to file the business entity of Mobility Rehab Products in the State of Pennsylvania.

Q: So you started as a new limited liability company in Pennsylvania; is that correct?

A: That's the forms they gave me, yes.

Q: And you never registered as a foreign limited liability company doing business out of Maryland, correct?

. . . .

A: To my knowledge and understanding at the time that I went to apply for this license, they asked me if we had a location in Pennsylvania and I said yes, issued the address of Sullivan Trail, which they spelled incorrectly, and that's the forms that they gave me to fill out and that's what I did.

Q: Did you tell them that you were already organized under the laws of Maryland as a limited liability corporation?

A: I don't recall if I said that.

Q: Did you affirmatively hide from the State of Pennsylvania that you were a Maryland limited liability company?

A: No, sir.

Q: Did you understand that you were obligated from the first day you did business in Pennsylvania to register as a foreign limited liability company? Did you understand that?

. . . .

THE WITNESS: No.

Q: Do you agree or disagree that this registration was created on January 22nd, 2008?

A: Yes.

Q: Did you understand -- is it a fair and accurate statement that what prompted this registration was the lawsuit that Chris Dague filed against Mobility Rehab Products, LLC?

A: Yes.

Q: Did you understand that if you told the Pennsylvania authorities that you were doing business without registration and you gave them the date you started doing business that would have subjected you to back taxes, interest and penalty? Did you understand that?

A: No.

Q: Was the purpose of filing this as a domestic limited liability corporation to avoid paying back taxes to Pennsylvania, interest and penalties?

A: No.

Q: You did comply with New Jersey law and you did comply with South Carolina and registered as a foreign limited liability corporation; correct? . . .

THE WITNESS: As a company we registered, yes. . . .

Q: To this day you have not alerted the Pennsylvania authorities to the fact that you were a Maryland company -- limited liability company doing business in Pennsylvania; correct?

A: Correct.

Q: When did you start doing business in Pennsylvania?

A: 2004. . . .

Q: When the limited liability company was started, you were the sole owner; correct?

A: Yes.

Q: Did that change?

A: Yes.

Q: When did that change?

A: 2006.

Q: What happened in 2006?

A: In 2006 Mobility Rehab was purchased -- 90 percent of the shares of Mobility Rehab was purchased by JMR Holdings -- I don't know what the acronym after that is -- LLC or Inc. Or what, I'm not sure.

Q: Who owned the ten percent?

A: Myself, Robert Huddler.

Q: Just you, not you with your wife?

A: Yes.

Q: And the resident agent in Huddler 1, Eileen Burke, that's your wife?

A: Yes.

Q: That's your home address?

A: Yes, sir.

Q: Did this new entity created on January 22nd, 2008, as a domestic limited liability company in Pennsylvania have anything to do with Chris Dague?

Q: Do you agree with me that Chris Dague was not employed by Mobility Rehab Products, LLC, a Maryland -- Pennsylvania domestic limited liability company? . . .

THE WITNESS: I'd confirm that Christopher Dague was not employed with Mobility Rehab Products, yes.

Q: A domestic liability company in Pennsylvania?

A: At that time he was not employed at Mobility Rehab Products in the State of Pennsylvania.

Q: Ever? He was never employed by Mobility Rehab Products, LLC, a domestic limited liability company in Pennsylvania?

A: No.

Q: You agree that Mobility Rehab Products, a domestic limited liability company in Pennsylvania is not a party to the lawsuit in which you are involved in at this point in time?

THE WITNESS: No, I cannot answer that question.

Q: Do you understand that Mobility Rehab Products, LLC, a Maryland limited liability company is a separate and distinct entity from Mobility Rehab Products, LLC, a Pennsylvania limited liability company? Do you understand that they are two separate entities?

A: No, sir, I don't.

Pl.'s Supp. Resp., Ex. A, pp. 9-10, 13-15, 18-23.

Plaintiff contends that the counterclaim must be dismissed because MRP, the counterclaim plaintiff, is disabled from enforcing its claim since it failed to register as a foreign limited liability company. Plaintiff is correct that the fact that the counterclaim has been brought in federal court will not affect the applicability of the Pennsylvania statutes.

In Empire Excavating Co. v. Maret Dev. Corp., 370 F. Supp. 824 (W.D. Pa. 1974), the District Court for the Western District of Pennsylvania examined whether subsequent compliance with the corporate registration statute after suit was filed would permit a foreign corporation to enforce its contractual rights arising prior to its domestication. The court reviewed the Pennsylvania Business Corporation Law and determined that the Pennsylvania statute did not provide that no suit should be commenced by an unqualified foreign corporation. Id. at 827. Following Empire Excavating, the late Judge Raymond Broderick of

this District Court examined the effect of failure to comply with 15 P.S. § 2014(A), which was the predecessor statute to 15 Pa.

C.S.A. § 4141(a), Judge Broderick stated:

The failure of a foreign corporation to comply with § 2014, however, does not deprive the Pennsylvania courts of subject matter jurisdiction. Section 2014 is a procedural statute defining a foreign corporation's capacity to maintain a suit. Plaintiff need not establish in its complaint that it has capacity to sue; instead, the lack of capacity to sue is a matter to be raised by defendant in its answer to the complaint, or in a preliminary objection asserting the defense of lack of capacity to sue, as provided by Pa. R. Civ. P. 1017. Coleco Industries v. Lectro-Media, Inc., 3 Pa. D.&C.3d 255 (1977); Home Security Corp. v. James Talcott, Inc., 62 Pa. D.&C.2d 457 (1973). Further, it is not necessary that plaintiff comply with § 2014 before filing suit; compliance during the pendency of the litigation is sufficient. Empire Excavating Co. v. Maret Development Corp., 370 F. Supp. 824 (W.D. Pa. 1974); International Inventors, Inc., East v. Berger, 242 Pa. Super. 265, 363 A.2d 1262 (1976).

Typh, Inc. v. Typhoon Fence of Pa., Inc., 461 F. Supp. 994, 996-997 (D.C. Pa. 1978). In Moore v. N. Homes of Pa., Inc., 80 F.R.D. 278 (W.D. Va. 1978), a plaintiff had also filed a motion to dismiss a counterclaim of a defendant corporation because the corporation had never obtained a certificate of authority from the Virginia State Corporation Commission, had no registered agent in Virginia, and was therefore barred from maintaining any action in any court in Virginia by virtue of the applicable Virginia statute which was similarly worded to the applicable statute in this case. The Moore court held that the statutory prohibition of noncomplying corporations maintaining lawsuits in

Virginia was not waivable, but was an absolute bar to the noncomplying corporations' use of courts to press its claim until compliance, and the corporation was permitted thirty days to effect compliance with the statute in light of Virginia courts' interpretation of such statutory prohibition.

Based upon the submitted paperwork and Huddler's deposition testimony, it appears that the Defendant MRP, a Maryland corporation, has not complied with the registration statutes in Pennsylvania to date. Dague points to Leswat Lighting Sys., Inc. v. Lehigh Valley Rest. Group, Inc., 663 A.2d 783 (Pa. Super. 1995), in arguing that lack of a certificate of authority to do business in the Pennsylvania prohibits MRP's counterclaim. In Leswat, however, the corporation argued that it was not required to secure a certificate of authority because it was not doing business in Pennsylvania. Id. at 785. Here, MRP does not make the same arguments, and Huddler attempted in January, 2008, to comply with the Pennsylvania statutes. See Huddler Dep., pp. 13-14. Accordingly, Huddler is permitted thirty days to effect correct compliance with the Pennsylvania corporate registration statute and the Motion to Dismiss will be denied without prejudice, for Dague to reassert his claims at the conclusion of thirty days if MRP does not secure the appropriate certificate of authority to do business.

An appropriate Order follows.

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| MOBILITY REHAB PRODUCTS, INC., | : | |
| | : | |
| Defendants. | : | |

ORDER

AND NOW, this 2nd day of October, 2008, upon consideration of Plaintiff's Motion to Dismiss the Counterclaim (Dkt. No. 31), it is hereby ORDERED that the Motion to Dismiss is DENIED without prejudice.

BY THE COURT:

/s/ Henry S. Perkin
HENRY S. PERKIN
UNITED STATES MAGISTRATE JUDGE