STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF GRAND TRAVERSE

PURE WATER WORKS, INC.

Plaintiff/Counter-Defendant,

v

File No. 97-16167-PR
HON. PHILIP E. RODGERS, JR.

PAUL SZAFRANSKI,

Defendant/Counter-Plaintiff.

Andrey T. Tomkiw (P47341)
Attorney for Plaintiff/Counter-Defendant

Philip J. Crowley (P24218)
Co-Counsel for Plaintiff/Counter-Defendant

Patrick E. Heintz (P31443)
Attorney for Defendant/Counter-Plaintiff

DECISION AND ORDER

This case was previously dismissed by the Court with prejudice pursuant to a stipulated order for dismissal of complaint and counter-claim. This order was entered on November 19, 1997. Pursuant to the parties' settlement agreement and general release the case returns to Court on the Plaintiff's motion to hold the Defendant in contempt, reopen the proofs, amend the complaint and add an additional party. The Plaintiff seeks further injunctive relief and monetary damages.

The Court scheduled a pre-trial proceeding in which the Plaintiff stipulated that it sought to hold the Defendant in indirect civil contempt. The Court conducted a pre-trial consistent with the Michigan Judicial Institute Contempt of Court Bench Guide, § 1.5(e). The parties stipulated that the pre-trial proceedings were adequate. An evidentiary hearing was scheduled for and completed on March 12, 1998. Both parties were represented by counsel. The Court entertained the parties' oral

arguments at the conclusion of the hearing and then took the matter under advisement. The Court will now provide its findings of fact and conclusions of law. MCR 2.517.

Plaintiff Pure Water Works, Inc. provides bottled water and water treatment systems to its customers. The principal offices of this Michigan corporation are in Grand Rapids, but it does maintain a Traverse City regional office. The Defendant Szafranski was formerly the Plaintiff's regional manager stationed in Traverse City.

Plaintiff's original complaint was that Defendant had terminated his employment relationship with Plaintiff and was using confidential and proprietary information inappropriately and to Plaintiff's detriment. Those claims were ultimately resolved and are the subject of the settlement agreement and general release upon which the case was dismissed with prejudice. With the execution of the settlement agreement and the dismissal of the case in November 1997, Defendant agreed to pay Plaintiff $1,750 and not to compete with Plaintiff for its customers through March 1, 1998. Thereafter, free competition would be allowed.

The money damages were paid, the settlement documents executed and the case dismissed. Plaintiff returns to Court with claims that Defendant breached the settlement agreement, and, in its February 25, 1998 motion for a contempt hearing, listed Elmer's Crane & Dozer and City Environmental Services as customers of Plaintiff inappropriately solicited by Defendant prior to the expiration of the non-compete agreement on March 1, 1998. The Defendant denies any improper solicitation of Plaintiff's customers and any wilful violation of the settlement agreement or this Court's Order predicated upon it.

Indirect contempt occurs outside the immediate view and presence of the Court. Such contempt may not be punished summarily, but only "after proof of the facts charged has been made by affidavit or other method and opportunity has been given to defend." MCLA 600.1711(2); MSA 27A.1711(2); MCR 3.606. A court may find a defendant who has violated a court order guilty of either civil or criminal contempt. *Ann Arbor v Danish News Co*, 139 Mich App 218, 231-232; 361 NW2d 77 (1984). While wilful intent is an essential element of criminal contempt, it is not an essential element of civil contempt. Compare *People v Matish*, 384 Mich 568, 572; 184 NW2d 915 (1971); *People v Kurtz*, 35 Mich App 643, 652; 192 NW2d 594 (1971) with *McComb v Jacksonville Paper Co*, 336 US 187, 191; 69 S Ct 497; 93 L Ed 599 (1949); *Catsman v City of Flint*, 18 Mich

App 641, 646; 171 NW2d 684 (1969). In *McComb*, Justice Douglas of the United States Supreme Court gave the following explanation for why wilful intent was not required for civil contempt:

> The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of non-compliance. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been innocently. *Id.*, p 191. (Citations omitted.)

Similarly, it is true that an individual who relies in good faith upon his attorney's advice will not be found to have wilfully violated a court order and may not be found guilty of criminal contempt. *In re Rapanos*, 143 Mich App 483, 495; 372 NW2d 598 (1985). However, acting under counsel's advice is not a defense to civil contempt charges. *McComb v Jacksonville Paper Co, supra*, p 191, and *Chapel v Hull*, 60 Mich 167, 175; 26 NW 874 (1886).

The burden of proof in a civil contempt case is by clear and unequivocal evidence. *People v Matish, supra*, p 572; *Detroit Board of Education v Detroit Federation of Teachers*, 55 Mich App 499, 506; 223 NW2d 23 (1974).

Finally, the contempt alleged here arises out of the purported breach of a settlement agreement. Settlements are governed by legal principles applicable to contracts. *Hisaw v Hayes*, 133 Mich App 639, 643; 350 NW2d 302 (1984). In order to rescind the contract, Plaintiff must demonstrate that there has been a substantial breach affecting a substantial or essential part of the settlement agreement. See, *Holzander v Brownell*, 182 Mich App 716, 721; 453 NW2d 295 (1990), and *Omnicom of Michigan v Giannetti Investment Co*, 221 Mich App 341; 561 NW2d 138 (1997). The litmus test for the determination of a substantial breach may be found in *Walker & Co v Harrison*, 347 Mich 630, 635; 81 NW2d 352 (1957). There, relying upon § 275 of the Restatement of the Law of Contracts, the Michigan Supreme Court wrote as follows:

> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:

a) the extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;

b) the extent to which the injured party may be adequately compensated in damages for lack of complete performance;

c) the extent to which the party failing to perform has already partly performed or made preparations for performance;

d) the greater or less hardship on the party failing to perform in terminating the contract;

e) the wilful, negligent or innocent behavior of the party failing to perform; and

f) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

The proofs introduced at the evidentiary hearing were limited to three business: (1) Elmer's Crane & Dozer; (2) Builders Architect; and (3) Alliance Business Products. While allegations were also been made by Plaintiff regarding City Environmental Services, Britten Banners and McLain Cycle, there was no evidence introduced of any improper behavior with respect to either City Environmental Services or McLain Cycle. Jan Nickerson of Britten Banners testified that she had contacted the Defendant's company for water services, but could not say it was the Defendant who actually made the delivery. She did not recall any discussions regarding a current supplier but would not have revealed one anyway. Ms. Nickerson testified that a few days after the water had been installed, it was removed due to an agreement between the Defendant and Plaintiff.

Alliance Builders and Builders Architect were customers of Plaintiff at the time the agreement was signed. However, each separately and independently terminated its relationship with the Plaintiff due to its perceptions of poor and unreliable service. Terry Rosinski of Alliance Business Products testified that after terminating the Plaintiff he then contacted the Defendant for water. Viola Panks of Builders Architect offered similar testimony. Her company had become dissatisfied with the Plaintiff, terminated their services and then solicited Defendant to provide them with water.

In the case of Elmer's Crane & Dozer, Joelle Prechtel and Kelly Bevier testified. Ms. Prechtel is responsible for accounts payable at Elmer's and Ms. Bevier is the corporate president's secretary.

Through their testimony, Plaintiff established that Elmer's is a single corporation without divisions but which has ten or more buildings housing its operations on a tract of approximately 80 acres of land. They are currently serviced by Plaintiff, Culligan Water Supply and Defendant, each at separate buildings on this 80-acre tract. Plaintiff has been supplying water to Elmer's at least since November 1995 through the time of trial. Plaintiff's Exhibit 1. Defendant has supplied water to Elmer's since October 25, 1997. Plaintiff's Exhibit 2.

It is evident that Defendant did not solicit Elmer's for business at any time when an injunctive order was in place. Rather, Kelly Bevier knew the Defendant and his wife and called him to provide water at a location on the Elmer's property where it had not been previously available to Elmer's employees. Both Ms. Bevier and the Defendant testified that he would not provide her with water until he first consulted with counsel to determine whether it would be consistent with the injunctive order then in place. He did rely, in good faith, on his attorney's advice that this was "new business" and he could provide the service.

The Court disagrees with the Defendant's interpretation of the settlement agreement. Elmer's is not a holding company composed of many separate corporations, but a single business which provides a wide array of services. Elmer's was a customer of the Plaintiff at all times relevant to this litigation. The Defendant should not have responded to Elmer's solicitation for water services prior to March 1, 1998.

In the case of Alliance Business Products and Builders Architect, each was a customer of the Plaintiff at the time Defendant was employed by Plaintiff. Subsequently, each terminated the Plaintiff's services based upon their perceptions of poor and unreliable service. While Plaintiff asks the Court to find a violation of the agreement and the Court's Order predicated upon it by interpreting the "spirit of the agreement," the Court declines to do so. The "spirit of the agreement" was to protect the Plaintiff from the Defendant's inappropriate use of proprietary or confidential information to gain a competitive advantage. It was undisputed that Plaintiff lost the Builders Architect and Alliance Business accounts because the customers perceived they were treated badly. Nothing in the "spirit of the agreement" suggests that Plaintiff bargained for or deserves protection from the Defendant where it loses customers due to its failure to adequately meet their needs.

Accordingly, after a full day evidentiary hearing, the only evidence of a violation of the settlement agreement and this Court's Order was the provision of $237.35 of bottled water to Elmer's Crane & Dozer. While this was a violation of the settlement agreement, it was not wilful or substantial. To the contrary, while this agreement was in place, it is uncontested that the Defendant was contacted by and refused to provide services to the Leelanau Wine Cellars and Mancelona Manufacturing and removed services from Britten Banners when he determined that each was a customer of Plaintiff. Additionally, he made no effort to seek the business of Surgical Associates of Traverse City where his sister, Dolores Hunter, is employed and where presumably he could obtain the account with minimal effort.

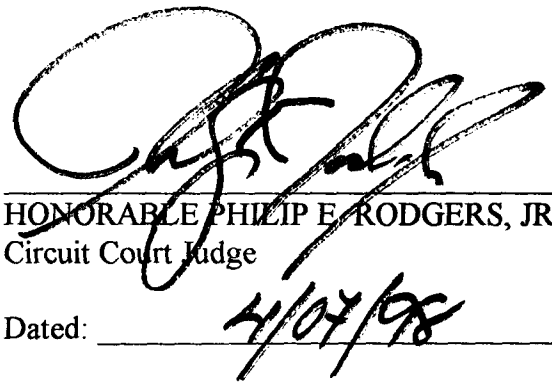
The Defendant testified sincerely and emotionally. The Court is satisfied that he understands the settlement agreement and has made every reasonable effort to comply with it, including consulting with his attorney where he was in doubt. He did not evince a demeanor to this Court consistent with an attitude of disrespect for the Court's Order or a willingness to expose his family and his infant business to the financial penalties of the certain litigation which would follow from violating the Order.

From the time the settlement agreement was executed through March 1, 1998, the only evidence presented to this Court of a clear violation of the settlement agreement was the provision of $237.35 of water to Elmer's. On the basis of this evidence, the Court will not reopen the proofs or allow the complaint to be amended to add additional parties and will not grant any further injunctive relief. It will order that the Defendant compensate the Plaintiff in the amount of $237.35. Given the extraordinary de minimus nature of the violation and the substantial overreaction to it, the Court will not award the Plaintiff any attorney's fees. Further, since the Defendant did violate the agreement and since the lack of a wilful intent is not relevant to a civil proceeding, the Court does not find any basis to assess sanctions in Defendant's favor. MCR 2.114. Defendant will be responsible for its own attorney's fees. For the contempt, however, the Defendant will also pay to this Court a fine of $250.

In summary, then, the parties' settlement agreement and general release remain in full force and effect, this case is dismissed with prejudice and the parties are free to compete with each other. The Defendant must pay damages to the Plaintiff as described herein no later than 28 days from the

date signed below and must pay his fine to the Clerk of this Court no later than 56 days from the date signed below.

IT IS SO ORDERED.



HONORABLE PHILIP E. RODGERS, JR.
Circuit Court Judge

Dated: 4/07/98