

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

IAN CHAPMAN,

Plaintiff,

v.

ATLAS RESIN PROPPANTS, LLC,

Defendant.

OPINION AND ORDER

11-cv-857-slc

Plaintiff Ian Chapman filed this civil action for damages against his former employer, defendant Atlas Resin Proppants, LLC, alleging that it failed to pay him a bonus it had promised him. Atlas has counterclaimed, alleging that Chapman breached the terms of a Confidentiality, Company Property and Non-Competition Agreement (Count I) and a Patent and Proprietary Information Utilization Agreement (Count II). Now before the court is Chapman's motion for judgment on the pleadings on Atlas's counterclaims regarding breach of contract, dkt. 18, on the ground that neither agreement is enforceable under Wisconsin law. Also before the court is Atlas's motion for leave to present matters outside the pleadings, dkt. 22. Jurisdiction is present under the federal diversity statute, 28 U.S.C. § 1332.

I am granting Chapman's motion. First, Atlas indicates that it no longer intends to pursue a claim for damages with respect to Count II, the claim alleging a breach of the proprietary information agreement. *See* Defendant's Response, dkt. 19, at 1. Second, Atlas cannot succeed on Count I because the confidentiality and non-compete agreement upon which it rests was rendered null by the proprietary information agreement, the plain terms of which indicate that it superseded the former agreement. I am denying Atlas's request to present evidence concerning matters outside the pleadings because as a legal matter, such extrinsic evidence of the parties' intent is not proper where, as here, the contract terms are not ambiguous.

ALLEGATIONS OF THE COUNTERCLAIM

Defendant Atlas Resin Proppants, LLC is a Delaware limited liability company with its principal place of business in Taylor, Wisconsin. (According to the complaint, Atlas is owned entirely by one member, Badger Mining Corporation, which is a Wisconsin corporation with a principal place of business in New Berlin, Wisconsin.) Atlas is in the business of formulating, manufacturing and supplying precured and curable resin coated sand proppants.

Plaintiff Ian Chapman is a resident of Arizona and former employee of Atlas. Chapman now works for one of Atlas's competitors, a company called Imerys.

On or about January 27, 2009, as a condition of his employment with Atlas, Chapman signed a Confidentiality, Company Property and Non-Compete Agreement (the "Confidentiality Agreement"). *See* Exhibit A to Answer, dkt. 8. After identifying Chapman as the "Associate," the "Purpose of the Agreement" states (in relevant part) that:

Atlas is in the business of developing, manufacturing, and selling resin-coated proppants. It serves customers in and competes with proppant suppliers located throughout the United States, Canada, and Mexico.

Associate desires to join Atlas to manage Atlas. Upon joining Atlas, Associate will learn about and receive access to Atlas' Confidential Information, as defined below. Atlas expects Associate to become familiar with this information and to utilize it in executing his duties.

Associate acknowledges that Associate's job duties will include managing the activities of Atlas throughout all markets in which it competes, namely throughout the entire United States, Canada or Mexico.

Associate acknowledges that the Confidential Information of Atlas is of economic value to Atlas and would be of value to any competitor of Atlas that competes against Atlas anywhere in the United States, Canada or Mexico.

* * *

Clause No. 1 of the Agreement's is a Confidentiality Provision, in which Chapman agreed that, during the term of his employment and for a period of 18 months after his voluntary termination, he would not use or disclose any "Confidential Information" belonging to Atlas for his own benefit, for the financial benefit of another, or if doing so would harm Atlas. The Agreement defines the term "Confidential Information" as:

[A]ll information and materials which have economic value to Atlas or contain sensitive information about Atlas' customers, suppliers or employees and includes, without limitation, the terms and conditions of Atlas' agreements with its suppliers and customers; Atlas' customers needs, preferences, and pricing; Atlas' supply sources; Atlas' processes and techniques for coating resin; Atlas' business plans, including sales plans, strategic plans, and marketing plans; Atlas' pricing and cost information; Atlas' training methods and programs; research and development conducted by or for Atlas or otherwise in Atlas' possession or control; any material marked "confidential;" and any other information or material of which Associate is advised constitutes or contains confidential or sensitive information. Confidential Information includes any such information developed or created by Associate if the information was developed or created by Associate while executing Associate's duties for Company or if the information was developed or created by Associate based upon Confidential Information that Associate received by virtue of Associate's association with Atlas . . .

Clause No. 2 of the Agreement is a non-compete provision, which provides:

Associate agrees that during Associate's employment with Atlas, Associate will devote Associate's time and efforts exclusively to Atlas. In addition, Associate agrees that if Associate resigns or otherwise initiates Associate's employment separation from Atlas, for a period of eighteen months following Associate's separation, Associate will not become employed by or provide consulting services or advice to any entity that competes with Atlas anywhere in the United States, Canada or Mexico in the business of resin-coating, proppant-manufacturing, or proppant-supplying if the position, advice sought, or consulting engagement would involve Associate providing services similar to those Associate provided to Atlas.

Associate further agrees that if Associate resigns or otherwise initiates Associate's employment separation from Atlas, for a period of eighteen months following Associate's separation from Atlas, Associate will not become employed by or provide consulting services or advice to any entity that competes with Atlas in the United States, Canada, or Mexico in any other capacity in which Atlas' Confidential Information would be useful to Associate in providing the services or advice to the competitor.

About five weeks later, on March 4, 2009, Chapman executed an Employee Patent and Proprietary Information Agreement. *See* Exhibit B to Answer, dkt. 9. In this document, Chapman agreed to keep confidential Atlas's "Proprietary Information." This term is defined in the agreement as:

information, whether or not in tangible form, which is the property of the Company and which is not known in the trade or generally by the public, and . . . information which is identified as confidential by the Company or which I have reason to believe is being maintained in confidence whether embodied in memoranda, manuals, letters, drawings or other documents, computer disks, tapes or other information storage devices or any other media . . . [and] includes all results, intermediate and final, of the Company's research activities in which I may participate or of which I may obtain knowledge during my employment, together with business, manufacturing and research methods, including product designs and specifications; manufacturing procedures and tolerances; research tools; test procedures; prices and pricing formulae; cost information; customers' special materials and product specifications and requirements; information concerning suppliers; sales records; sales reports; customer lists; customer contact reports; and customer records.

Pursuant to this agreement, Chapman was required "to treat Proprietary Information as confidential both during [his] employment and thereafter . . .". *Id.*, ¶12.

Of particular importance to the instant motion is paragraph 12 of the Proprietary Agreement. *Id.*, , which provides that:

This agreement supersedes and is hereby substituted for all existing agreements which I have entered into with the Company relating generally to the same subject matter. This agreement shall be binding on an inure to the benefit of the parties . . .

With respect to competition, the Proprietary Agreement provides only that Chapman would not engage in business in competition with Atlas while he was employed by the company; it did not contain a non-compete provision like that set out in the Confidentiality Agreement. *Id.*, ¶17.

Atlas alleges that Chapman breached the Confidentiality Agreement by disclosing Atlas's confidential information to Imerys's employees or by using that information to lure Atlas's customers to Imerys. *See* Answer and Counterclaims, dkt. 5, at 11-12, ¶¶ 11 & 12.

OPINION

I. Standard of Review

Chapman, in his role as counter-defendant, has moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12©, which permits a party to move for judgment after the complaint and answer have been filed by the parties. *Buchanan–Moore v. County of Milwaukee*, 570 F.3d 824, 827 (7th Cir. 2009). A motion for judgment on the pleadings pursuant to Rule 12© is subject to the same standard as a Rule 12(b) motion to dismiss. *United States v. Wood*, 925 F.2d 1580, 1581 (7th Cir. 1991). The court must accept the facts alleged in the complaint in the light most favorable to the plaintiff, *McCann v. Neilsen*, 466 F.3d 619, 622 (7th Cir. 2006), and may grant the motion “[o]nly when it appears beyond a doubt that

the plaintiff cannot prove any facts to support a claim for relief and the moving party demonstrates that there are no material issues of fact to be resolved.” *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007).

The court may consider materials beyond the pleadings on a Rule 12© motion when they are documents to which the complaint has referred, are authentic, and are central to a plaintiff's claim. *Hecker v. Deere & Co.*, 556 F.3d 575, 582 (7th Cir. 2009). The court also may take judicial notice of matters of public record. *Id.* Beyond this, if matters outside the pleadings are presented to and not excluded by the court, then the motion must be converted as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d).

II. The Proprietary Information Agreement Supersedes the Confidentiality Agreement

The parties appear to agree that Wisconsin law applies to their dispute. Wisconsin applies familiar rules of contract interpretation, with the goal being to ascertain the intent of the parties. *Town Bank v. City Real Estate Dev., LLC*, 2010 WI 134, ¶ 33, 330 Wis. 2d 340, 793 N.W. 2d 476. “[T]he best indication of the parties’ intent is the language of the contract itself[.]” *Id.* (citation omitted). In reviewing this language, the court must strive “to give meaning to every word, ‘avoiding constructions which render portions of a contract meaningless, inexplicable or mere surplusage.’” *Maryland Arms Ltd. P'ship v. Connell*, 2010 WI 64, ¶ 45, 326 Wis.2d 300, 786 N.W.2d 15 (citation omitted). *Id.* If the parties’ intent can be determined with reasonable certainty from the face of the contract itself, then there is no need to resort to extrinsic evidence. *Patti v. Western Machine Co.*, 72 Wis.2d 348, 351–52, 241 N.W.2d 158 (1976). “Extrinsic evidence is excluded because it cannot serve to prove what the agreement

was, this being determined as a matter of law to be the writing itself.” *Kohlenberg v. American Plumbing Supply Co.*, 82 Wis.2d 384, 395, 263 N.W.2d 496, 501 (1978) (quoting 4 S. Williston, *The Law of Contracts* § 631 at 959-60 (3d ed. 1961)).

If, however, the language of the contract is ambiguous, then the court is not restricted to the face of the instrument in ascertaining intent, but may consider extrinsic evidence. *Patti*, 72 Wis.2d 348, 351–52, 241 N.W.2d 158. Words or phrases in a contract are ambiguous when they are reasonably susceptible to more than one meaning. *Id.*

Chapman contends that Atlas’s claim that he breached the non-compete clause of the Confidentiality Agreement must be dismissed because that agreement was superseded by the Proprietary Agreement, which lacks a similar clause. As support, Chapman points to paragraph 12 of the Proprietary Agreement, which states in broad but plain terms that the Agreement “supersedes and is hereby substituted for all existing agreements” which Chapman entered into with Atlas “relating generally to the same subject matter.” Chapman argues that, because both the Proprietary Agreement and the previously-executed Confidentiality Agreement “relate generally” to the matter of protecting Atlas’s confidential information, the terms of the Confidentiality Agreement are null and void, having been supplanted by the terms of the Proprietary Agreement.

In response to this argument, Atlas does not deny that both agreements seek to protect Atlas’s confidential information, and Atlas does not point to any contradictory language in either agreement to show that the “subject matter” of the agreements differ. Neither does Atlas suggest a different interpretation of the phrase “relating generally to the same subject matter.” Instead, Atlas points to matters outside the pleadings, namely, the circumstances surrounding its

negotiations with Chapman concerning the terms of the two agreements before they were signed, and to Chapman's deposition testimony concerning his understanding of the agreements. Def.'s Br. in Opp., dkt. 19, at 8-9. According to Atlas, Chapman's testimony is "highly probative" because it shows that, in signing the Proprietary Agreement, he did not understand it to replace the Confidentiality Agreement. Mot. for Leave to Present Matters Outside of Pleadings, dkt. 22, at 2.

Missing from Atlas's argument, however, is any reason why it is necessary to look to this extrinsic evidence to ascertain the parties' intent. As just discussed, "[o]nly when the contract is ambiguous, meaning it is susceptible to more than one reasonable interpretation, may the court look beyond the face of the contract and consider extrinsic evidence to resolve the parties' intent." *Town Bank*, 2010 WI 134, ¶ 33, 330 Wis. 2d 340, 793 N.W.2d 476. Here, there is nothing ambiguous about Paragraph 12 of the Proprietary Agreement: it says that it "supersedes and is hereby substituted for all existing agreements" which plaintiff entered into with Atlas "relating generally to the same subject matter." Atlas does not disagree that this language, if enforced, captures the previously-executed Confidentiality Agreement. In the absence of any claim by Atlas that the integration clause is reasonably susceptible to more than one meaning, it is not proper to look outside the four corners of the document. *Lewitton v. ITA Software, Inc.*, 585 F.3d 377, 381 (7th Cir. 2009) ("[E]xtrinsic evidence cannot be used to create ambiguity where none otherwise exists"). Accordingly, Atlas's motion to present matters outside of the pleadings must be denied.

Atlas points out that the Proprietary Agreement "does not even have a non-compete clause in it," and therefore its integration clause cannot be read as extinguishing the non-compete clause in the Confidentiality Agreement. This argument is a nonstarter. The

Proprietary Agreement's integration clause speaks in terms of agreements, not particular clauses or terms. It is undisputed and indisputable that both agreements "relate generally" to the matter of protecting Atlas's confidential information; therefore, under the terms of the integration clause, the Proprietary Agreement supersedes the terms of the Confidentiality Agreement in total.

Finally, I infer from Atlas's arguments that the integration clause was included in the Proprietary Agreement either by mutual mistake or by unilateral mistake. However, Atlas has not developed any argument to this effect, so I need not consider it. *See United States v. Tockes*, 530 F.3d 628, 633 (7th Cir. 2008) ("Unsupported and undeveloped arguments . . . are considered waived."). Further, as Chapman points out, there are a number of steps Atlas could have taken to avoid this result: Atlas could have had Chapman sign the Proprietary Agreement first, it could have made a carve-out in the Proprietary Agreement for the Confidentiality Agreement, or it could have included a non-compete clause in the Proprietary Agreement. The mere fact that Atlas included a term in the Proprietary Agreement that it now believes should have been left out is not a basis to read the term out of the contract. *Accord Star Direct, Inc. v. Dal Pra*, 2009 WI 76, ¶ 55-56, 319 Wis. 2d 274, 767 N.W. 2d 898 (refusing to ignore term in restrictive covenant based on party's assertion that "phrase is possibly the result of an overzealous lawyer and should have been left out").

In sum, even after granting all reasonable inferences to Atlas, it is proper to enter judgment in favor of Chapman because Atlas cannot prove any facts to support its counterclaim for breach of the Confidentiality Agreement. By its plain terms, the Proprietary Agreement's integration clause superseded and extinguished the earlier-signed Confidentiality Agreement.

ORDER

IT IS ORDERED THAT:

1. Defendant's motion for leave to present matters outside the pleadings, dkt. 22, is DENIED.
2. Plaintiff's motion for judgment on the pleadings on Counts I and II of defendant's Counterclaims, dkt. 18, is GRANTED.

Entered this 22nd day of October, 2012.

BY THE COURT:

/s/

STEPHEN L. CROCKER
Magistrate Judge