

STATE OF MICHIGAN
COURT OF APPEALS

B. FINDER ASSOCIATES, INC.,

Plaintiff-Appellant,

v

DUNDEE MANUFACTURING
COMPANY, INC.,

Defendant-Appellee.

UNPUBLISHED
January 10, 1997

No. 188090

Monroe Circuit Court
LC No. 94-002758

Before: Griffin, P.J., and T.G. Kavanagh* and D.B. Leiber,** JJ.

PER CURIAM.

Plaintiff appeals the circuit court's order granting summary disposition in favor of defendant in this breach of contract action. We affirm.

I

Defendant is a manufacturer of plumbing and building products sold throughout the United States. Plaintiff is a manufacturer's sales representative. The parties negotiated two sales representative agreements; the first was effective from January 1, 1987 until December 31, 1987, and the second, which is at issue here, became effective September 1, 1988, and expired on August 1, 1989. Under the second agreement, plaintiff had the exclusive right to represent defendant in Illinois and Wisconsin and to receive 5% sales commission on net orders, payable the last day of each calendar month following the calendar month in which the orders were invoiced by the company. The agreement also stated that "[a]ny individual additions or deletions to this contract will be negotiated and documented and made a part of the original contract."

* Former Supreme Court Justice, sitting on the Court of Appeals by assignment pursuant to Administrative Order 1996-10.

** Circuit judge, sitting on the Court of Appeals by assignment.

It is undisputed that defendant wrote plaintiff on August 8, 1989, after the second agreement had expired, and advised plaintiff of its decision to terminate the agreement, and also stated that it would pay plaintiff commissions for an additional thirty days.

Plaintiff filed its complaint on August 16, 1994, alleging breach of contract and breach of the covenant of good faith arising from defendant's termination of plaintiff's sales representative contract. Plaintiff alleged that defendant continued to make sales after August 8, 1989, to customers which plaintiff had secured, but failed to pay plaintiff commissions for such sales. Plaintiff alleged that defendant's termination of plaintiff's services and continuation of sales to customers supplied by plaintiff, without paying commissions, constituted a breach of the implied covenant of good faith and fair dealing. Plaintiff's complaint alleged that "the acts, occurrences and omissions complained of" occurred in Monroe County, Michigan. Plaintiff attached to its complaint copies of the two agreements.

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10), arguing that the agreement contained a termination clause by which either party could terminate the agreement with thirty days written notice, and that the agreement had expired by its own terms on August 1, 1989. Defendant argued that the covenant of good faith and fair dealing does not pertain to employment relationships, and that neither of the agreements stated that plaintiff would receive commissions for sales occurring after the agreement's expiration. Defendant argued that pursuant to the agreement, it did not owe plaintiff commissions after the contract expired on August 1, 1989. Defendant further argued that, in the event that the agreement had remained in effect until September 8, 1989, i.e., thirty days after defendant gave plaintiff written notice that it was terminating the agreement, defendant did not owe plaintiff commissions on net orders accepted after September 8, 1989. In support of its motion, defendant attached an affidavit of its chief executive officer, Lyn Davis. Davis' affidavit stated that the second sales representative agreement expired according to its terms on August 1, 1989; that defendant provided plaintiff written notice by correspondence dated August 8, 1989, that defendant terminated the agreement; that defendant had paid to plaintiff all commissions due for net orders accepted by defendant through September 8, 1989; and that defendant "is not currently indebted to plaintiff for commissions or any other sums."

Plaintiff's response to defendant's motion for summary disposition argued that the cases defendant relied on were inapplicable because they involved employees suing for wrongful discharge and plaintiff was not an employee, but an independent sales agency, and because Illinois law, not Michigan law, applied. Plaintiff argued that Illinois law specifically protects the rights of sales representatives and enforces the procuring cause rule with regard to claims for commissions after termination of a sales representative agreement. Plaintiff noted that Michigan law also recognized the procuring cause doctrine. Plaintiff did not supply any affidavits in support of its response to defendant's motion.

The circuit court dismissed plaintiff's claim for breach of the covenant of good faith and fair dealing under both MCR 2.116(C)(8) and (C)(10).¹ As to plaintiff's claim of entitlement to sales commissions under the procuring cause doctrine, the circuit court noted:

There's an argument in the motions as to whether Illinois law applies or Michigan law applies. I think arguably Michigan law recognizes that doctrine and allows an employee to recover for commissions procured while in the employment of the employer in damages for breach of an alleged employment contract. So as far as 2.116(C)(8) is concerned, the motion would be denied on that theory.

However, a motion for summary disposition under 2.116(C)(10) tests the factual support for a claim. Now the party opposing summary disposition under this rule has a burden of showing that a genuine issue of fact exists and that's beyond mere allegations in their pleadings. In this case the defendant has submitted an affidavit by Lyn Davis, the chief executive officer of the defendant corporation. The affiant provides that he personally provided the plaintiff written notice of termination of the agreement dated August 8th and that defendant has paid to the plaintiff all commissions due for net orders accepted by the defendant through September 8th of 1989, I believe was the year, and that defendant is not currently indebted to plaintiff for any other sums. The affidavit says defendant is not currently indebted to plaintiff for commissions or any other sums. Plaintiff—the Court finds that plaintiff has failed to provide affidavits or specific facts alleging that certain commissions that were procured by plaintiff were not received by plaintiff, and therefore I am granting the motion under (C)(10).

II

Plaintiff first argues that the circuit court erred in granting defendant summary disposition prior to the commencement of discovery on a disputed issue of fact. Under the circumstances presented here, we disagree.

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *St. Paul Fire & Marine Ins Co v Quintana*, 165 Mich App 719, 722; 419 NW2d 60 (1988). The circuit court must consider not only the pleadings but also any documentary evidence submitted by the parties. MCR 2.116(G)(5). The test is whether the kind of record which might be developed, giving the benefit of any reasonable doubt to the nonmoving party, would leave open an issue upon which reasonable minds could differ. *Linebaugh v Berdish*, 144 Mich App 750, 754; 376 NW2d 400 (1985). The party opposing a motion for summary disposition is required to respond with affidavits or other evidentiary materials to show the existence of a factual dispute, rather than relying on the allegations or denials in the pleadings. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991); MCR 2.116(G)(4). Ordinarily, a circuit court should not grant summary disposition pursuant to MCR 2.116(C)(10) before discovery is complete. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-483; 531 NW2d 715 (1995).

However, there must be a disputed issue before the court. If the party opposing a motion for summary judgment cannot present competent evidence of a disputed fact because his or her discovery is incomplete, the party must at least assert that such a dispute does indeed exist *and support the allegation by some independent evidence*,

even if hearsay. [*Pauley v Hall*, 124 Mich App 255, 263; 335 NW2d 197 (1983).
Emphasis added.]

At the hearing on defendant's motion, plaintiff's counsel stated that he did not dispute any of the facts in Lyn's affidavit. Further, plaintiff presented no evidence that the parties intended that commissions would be paid after expiration of the agreement or after plaintiff's receipt of thirty days' written notice that the agreement was terminated, nor do either of the sales representative agreements contain any language to that effect.

Because plaintiff failed to support with documentary evidence its claim that a disputed issue of fact existed with regard to unpaid sales commissions, the trial court properly granted defendant's motion under MCR 2.116(C)(10).

Plaintiff next argues that because it signed the sales representative contract in Illinois and the contract was to be performed there, the trial court should have applied Illinois law instead of Michigan law.

We need not reach the question which state's law applies to this agreement. As the circuit court noted, regardless of which state's law applied, plaintiff failed to show that a genuine issue of fact remained as to its entitlement to post-termination commissions.

Affirmed.

/s/ Richard Allen Griffin
/s/ Thomas G. Kavanagh
/s/ Dennis B. Leiber

¹ Plaintiff does not argue on appeal that the circuit court erred in granting summary disposition as to its breach of covenant of good faith claim. We thus deem the issue waived. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1993).