

STATE OF MICHIGAN
COURT OF APPEALS

UNISYS CORPORATION,

Plaintiff-Cross-Defendant-Appellee,

v

JAMES R. GNEWKOWSKI,

Defendant-Cross-Plaintiff-Appellant.

UNPUBLISHED

August 8, 1997

No. 194834

Oakland Circuit Court

LC No. 95-496004-CZ

UNISYS CORPORATION,

Plaintiff-Cross-Defendant-Appellant,

v

JAMES R. GNEWKOWSKI,

Defendant-Cross-Plaintiff-Appellee.

No. 195084

Oakland Circuit Court

LC No. 95-496004-CZ

Before: Taylor, P.J., and Griffin, and Saad, JJ.

PER CURIAM.

In Docket Number 195084, plaintiff's suit to recover an alleged debt, and Docket Number 194834, defendant's counterclaim for plaintiff's alleged retention of sales commissions, each party appeals as of right the circuit court's order granting summary disposition pursuant to MCR 2.116(C)(7). We affirm.

In December 1993, defendant, a former commission sales representative for plaintiff, wrote plaintiff requesting \$17,529.70 in outstanding commissions. However, plaintiff claimed to owe defendant only \$9,628.42 and sent him a check for that amount. Plaintiff then sent defendant another \$9,628.42 check. After defendant cashed both checks, plaintiff notified defendant that he had been

overpaid and requested that he return \$5,229.35.¹ Defendant refused, but sent plaintiff \$997.95 to settle what he considered to be the overpaid amount.

Plaintiff refused to cash defendant's check and filed suit to recoup \$9,628.42 in allegedly overpaid sales commissions. Defendant counterclaimed, alleging damages resulting from plaintiff's failure to pay his commissions within forty-five days of his termination. Each party moved for summary disposition under MCR 2.116(C)(7), contending that the other party's claim should be dismissed for failure to exhaust the grievance procedure outlined in the parties' sales commission contract. The trial court agreed, and granted summary disposition on each claim.

On appeal, each party claims that the trial court dismissed their claim erroneously. Plaintiff argues that the dispute resolution procedure does not apply to its claims for wrongful retention of overpaid funds. Defendant argues that the procedure cannot apply to his counterclaim because MCL 600.2961(8); MSA 27A.2961(8), invalidates measures purporting to waive such claims. We disagree with each contention.

Parties may not seek judicial relief where they fail to exhaust the grievance procedure required by their contract. *Wallace v Recorder's Court*, 207 Mich App 443, 447; 525 NW2d 481 (1994); *Dahlman v Oakland Univ*, 172 Mich App 502, 505; 432 NW2d 304 (1988). The law favors contractual provisions directing alternative measures of dispute resolution, *Brucker v McKinlay Transport, Inc*, 454 Mich 8, 17; 557 NW2d 536 (1997); *Whispering Pines AFC, Home, Inc v Dep't of Treasury*, 212 Mich App 545, 550; 538 NW2d 452 (1995), and we broadly apply contractual provisions establishing such mechanisms. Cf. *Kaleva-Norman-Dickson School Dist No 6 v Kaleva-Norman-Dickson School Teachers' Ass'n*, 393 Mich 583, 592-593; 227 NW2d 500 (1975), quoting *United Steelworkers of America v Warrior & Gulf Navigation Co*, 363 US 574; 80 S Ct 1347; 4 L Ed 2d 1409 (1960); *Grand Rapids v Grand Rapids Lodge No 97, Fraternal Order of Police*, 96 Mich App 226, 229; 292 NW2d 529 (1980). "MCR 2.116(C)(7) is the proper subrule for deciding whether to grant a motion for summary disposition for failure to exhaust grievance and arbitration procedures." *Mollett v Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992); see, generally, *Stamps v City of Taylor*, 218 Mich App 626, 630; 554 NW2d 603 (1996); *Shawl v Dhital*, 209 Mich App 321, 323; 529 NW2d 661 (1995).

In the present case, section I(C) of the parties' sales compensation plan provides:

All disputes concerning the application of this Plan shall be governed by section V of the Plan, as defined therein. Both the Company and the Sales Representative agree, as evidenced by the Receipt and Acceptance Acknowledgement [sic] Form, to exhaust the procedures contained in this Plan before commencing any action to recover sales commissions. Failure to comply with Section V shall constitute a complete defense to any such action to recover sales commissions.

Section V(J) of the agreed upon plan provides:

The procedures outlined below are designed to provide for a prompt and thorough review of all disputes concerning the crediting, debiting, payment or chargeback of all items of incentive compensation included in this Plan. The Sales Representative and the Company agree that they will utilize these procedures first in an effort to resolve any dispute covered by this Plan before resorting to any other tribunal, court, or administrative agency. The Sales Representative and the Company agree that this procedure is mandatory and a prerequisite to any other remedy that may be available concerning the recovery of incentive compensation provided for by this Plan. After exhaustion of the procedures outlined herein, any further relief may be pursued at the option of either party.

In our view, these provisions unambiguously require each party to exhaust the established grievance procedure before pursuing their claims in circuit court. Therefore, we hold that the trial court correctly dismissed each party's claim pursuant to MCR 2.116(C)(7).

The clear bilateral language plaintiff used in drafting this contract contradicts plaintiff's contention that the dispute resolution procedure applies only to employees' claims. Indeed, the contractual language provides that "*Both*" sales representatives "*and the Company* agree that *they* will utilize" the dispute resolution procedure "*before* resorting to any other tribunal, court, or administrative agency." (Emphasis added.) Moreover, no matter how creatively plaintiff attempts to define its claim, this dispute involves the percentage of the allegedly overpaid funds defendant had earned. Thus, plaintiff's claim clearly falls within the contractual language directing "all disputes concerning the crediting, debiting, payment or chargeback of all items of incentive compensation included in this Plan" to the dispute resolution process. To the extent the contractual language is ambiguous on either issue, ambiguities are construed against the drafter, which is plaintiff in this case. See *Sroka v Catsman Transit-Mix Concrete, Inc.*, 350 Mich 672; 86 NW2d 801 (1957); *DeMello v McNamara*, 178 Mich App 618; 444 NW2d 149 (1989).

Furthermore, the dispute resolution procedure establishes only a precondition for filing a suit, not a waiver of prospective claims under MCL 600.2691; MSA 27A.2961. Therefore, the agreed upon grievance procedure does not result in the waiver of defendant's right to sue plaintiff for late commission payments. Nor is the agreed upon dispute resolution procedure futile. In *Dahlman, supra* at 506, this Court "decline[d] to rule that all grievance committees comprised of employees are inherently defective." See *Goolsby v Detroit*, 419 Mich 651, 655, n 1; 358 NW2d 856 (1984); *Patterson v Allegan Co Sheriff*, 199 Mich App 638, 640; 502 NW2d 368 (1993); cf. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994). Therefore, without proof that plaintiff's employees are unable or unwilling to fairly and honestly evaluate defendant's claim, we reject defendant's unsupported contention speculating that the grievance procedure lacks consequence. Indeed, the procedure provides an elaborate three level approach by which an employee can dispute, document, and gain review of the commission accounting department's calculations.² In fact, employees can contest the accounting departments calculations to the human resources director, a regional supervisor who appears to have full authority to reverse the local accounting department's determinations.

Affirmed.

/s/ Richard Allen Griffin

/s/ Henry William Saad

¹ According to plaintiff's calculations, this was the after tax amount it overpaid defendant.

² Under the contract, employees disputing determinations by plaintiff's accounting department may submit letters to the branch/district manager "explaining the basis for contesting the accounting department's determination." If the branch/district manager affirms the accounting department's determination, "the Sales Representative or Branch/District Manager must submit a memorandum specifically outlining the basis of the dispute, including pertinent documentation, to Regional Human Resources requesting review." Finally, if either the sales representative or the branch/district manager disagrees with the regional human resources determination, either party may file a written request for a full review by the regional human resources director. It appears that the regional human resources director, who does not appear to be a member of the accounting department, has authority to reverse the accounting department's determination.