STATE OF MICHIGAN

COURT OF APPEALS

RALPH BURTON PRODUCTIONS, Plaintiff-Appellant,	UNPUBLISHED December 12, 2000
v	No. 213673 Wayne Circuit Court
S & H CITADEL INCORPORATED, Defendant-Appellee.	LC No. 97-709732-CK

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting defendant's motion for summary disposition, MCR 2.116(C)(10).[1] Plaintiff also appeals an order denying its motion to amend the complaint. We reverse and remand.

Plaintiff, an independent contractor, sold incentive and motivation programs on defendant's behalf. Plaintiff became an independent contractor of defendant in March 1994 when the parties executed a sales agreement that provided for the payment of a commission to plaintiff for its sales. Paragraph H of the agreement allowed either party to terminate the contract after nine months by providing the other party with ninety days' written notice. Paragraph H contained a provision concerning the payment of commissions after the termination of the agreement:

> Commissions shall be deemed earned under this Agreement on business billed or sold, only when the underlying services have been delivered or performed; and no commission shall be deemed earned if such services have not been delivered or performed, even if payment for such non-delivered or non-performed services have been received by [defendant]. Termination of this

[1] Defendant's summary disposition motion requested dismissal on the basis of MCR 2.116(C)(7), (C)(8), and (C)(10). The trial court granted the motion based on the reasoning that defendant provided in its brief and during oral argument. Because defendant essentially argued that it was entitled to judgment as a matter of law, we construe the court's ruling as granting defendant's motion pursuant to MCR 2.116(C)(10).

> Agreement shall not affect commissions earned on business sold by [plaintiff] at the time of such termination which have not been paid by SHC.

The parties do not dispute that defendant exercised the termination option in a letter that was effective January 21, 1997.

At issue in this case is the commission that plaintiff alleged it earned from two specific programs. The first program was the Ford Division 300-500 Legends and Leaders program that plaintiff sold to Ford Motor Company before defendant notified plaintiff that it was terminating the agreement. The program was to last five years and plaintiff asserted that it would generate $2.5 million in revenue each year. The second program that plaintiff sold to Ford Motor Company was called Quality Care Quality People ("QCQP"). This program provided debit cards to employees as part of a sales incentive program.

Plaintiff first argues that the trial court erred in granting summary disposition for defendant. This Court reviews decisions regarding motions for summary disposition de novo to determine if the moving party was entitled to judgment as a matter of law. *Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994). "MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to [judgment] as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party." *Id.*

According to plaintiff, the trial court erred in granting defendant's motion because the provision of the contract dealing with payment of post-termination commissions was susceptible to more than one interpretation. Plaintiff argued before the trial that paragraph H dealt with when, not whether, the commissions would be payable. Defendant, however, urged the court to conclude that it was only obligated to pay "earned" commissions, as defined in the agreement. "If the contract language is clear and unambiguous, its meaning is a question of law. Where the contract language is unclear or susceptible to multiple meanings, interpretation becomes a question of fact." *Port Huron Educ Ass'n v Port Huron Area School Dist*, 452 Mich 309, 323; 550 NW2d 228 (1996) (citations omitted). "Hence, in the context of a summary disposition motion, a trial court may determine the meaning of the contract only when the terms are *not* ambiguous. . . . In an instance of contractual ambiguity, factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *D'Avanzo v Wise & Marsac, PC*, 223 Mich App 314, 319; 565 NW2d 915 (1997) (citations omitted) (emphasis original). Thus, if both parties set forth reasonable interpretations, a trial court errs if it grants summary disposition and adopts a party's interpretation of the disputed language. *Id.* at 319-320.

In our view, paragraph H is ambiguous. Although it defines the term "earned" for purposes of determining commissions, and states that termination of the agreement does not affect "earned" commissions, paragraph H does not unambiguously address whether termination affects commissions payable on plaintiff's sales that did not meet the definition of "earned" at the time of the termination. Defendant, in effect, asserts that the commissions not affected by termination are those that have been earned at the time of termination, so that the phrase "at the time of termination" qualifies both the words "earned" and "sold." Plaintiff basically asserts that

the phrase "at the time of termination" refers only to the word "sold," and the word "earned" simply expresses the requirement that the commissions at some point actually be earned under the previously expressed definition of that word.

Defendant urges us to conclude that *Barber v SMH (US), Inc*, 202 Mich App 366, 370-371; 509 NW2d 791 (1993), is dispositive of this issue. In our view, *Barber* is distinguishable. In *Barber*, this Court noted that "[e]ntitlement to post-termination commission depends primarily upon the parties' intentions as determined from the contract and other circumstances." *Id*. at 373. The exact language of the agreement in *Barber* stated that "in the event of termination of this agreement by either party, commission will be paid on all orders received and shipped as of the date of termination." *Id.* at 374. This Court concluded that the plaintiff was not entitled to any commission for merely procuring customers. *Id*. Rather, the plaintiff was only entitled to commission when the defendant both received and shipped the order to the customer before the termination. *Id*.

Unlike the present case, the agreement in *Barber* contained no gray area. The *Barber* contract provided that under no circumstances would the plaintiff receive commission "for orders written and not shipped," and that in the event of a termination, the defendant would only be required to pay commission on orders that it had received and shipped on the date of the termination. *Id*. at 374. In the present case, the agreement preserved plaintiff's "earned" commissions, but unlike contractual language in *Barber*, the provision at issue in this case does not state that defendant "only" had to pay the commissions that plaintiff earned prior to the termination. The agreement simply does not provide for the treatment of the sales that plaintiff made before the termination but that did not attain "earned" status until some time after termination. In light of this ambiguity, summary disposition was improper and we therefore remand so that the trier of fact may determine the parties' intent. See *D'Avanzo*, *supra* at 319-320.

The trial court did not err, however, when it concluded that the parties did not, by virtue of their electronic mail communications, amend the sales agreement to include payment of a commission to plaintiff for "breakage"[2] from the QCQP program. The party seeking to supplant contract language must establish mutuality of assent, or "a meeting of the minds," with respect to the new terms or conditions. *Port Huron*, *supra* at 329. A court must judge the existence of mutuality of assent by an objective standard. The court must consider the surrounding circumstances, including all writings, oral statements, and other conduct through which the parties manifested their intent. *Rood v General Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993); *Barber*, *supra* at 370-371.

In this case, plaintiff did not establish mutuality of assent to the purported modification. An objective view of the parties' electronic mail communications reveals that the parties merely engaged in a discussion of the topic. Plaintiff remarked in the electronic mail that "this will recap our discussion." Plaintiff also stated: "This sums it up. I will begin working on the

[2] "Breakage" consisted of any unredeemed sums on the debit cards that were left over at the conclusion of the QCQP program.

Marketing plan. . . . as soon as I hear from you." Stewart Harris, defendant's president, also responded "I look forward to reviwing [sic] w/you." These statements indicate an ongoing discussion and not an agreement. Indeed, if the parties had intended to amend the original agreement, they would have likely followed the same procedures that they used for the "First Addendum," in which they agreed to alter the percentage of plaintiff's commission. We find no error.

Plaintiff next contends that the trial court abused its discretion when it denied plaintiff's motion to amend its complaint to include a claim of "promissory fraud." We review the trial court's grant or denial of a motion to amend the pleadings for an abuse of discretion. *Weymers v Khera,* 454 Mich 639, 654; 563 NW2d 647 (1997). MCR 2.118(A)(2) states that "a party may amend a pleading only by leave of the court or by written consent of the adverse party. Leave shall be freely given when justice so requires." "Amendment is generally a matter of right rather than grace . . . ." *Traver Lakes Community Maintenance Ass'n v Douglas Co,* 224 Mich App 335, 343; 568 NW2d 847 (1997). "A motion to amend should ordinarily be granted, and should be denied only for the following particularized reasons: '[1] undue delay, [2] bad faith or dilatory motive on the part of the movant, [3] repeated failure to cure deficiencies by amendments previously allowed, [4] undue prejudice to the opposing party by virtue of allowance of the amendment, [and 5] futility . . . .'" *Weymers, supra* at 658, quoting *Ben P Fyke & Sons v Gunter Co,* 390 Mich 649, 656; 213 NW2d 134 (1973).

In this case, plaintiff asserts that the trial court abused its discretion in concluding that plaintiff's amendment would have been futile. We disagree. The promise that plaintiff relied on to support its claim related to the alleged modification of the original agreement by way of electronic mail. As we concluded earlier in this opinion, the electronic mail constituted a discussion, rather than an agreement. We are likewise of the opinion that the electronic correspondence could not be reasonably construed as a promise. Therefore, any amendment to the complaint would have been futile.

Next, plaintiff raises the issue whether MCL 600.2961; MSA 27A.2961, which concerns sales representative commissions, applied to the facts of this case. The interpretation and application of a statute is a question of law that we review de novo. *People v Webb,* 458 Mich 265, 274; 580 NW2d 884 (1998). MCL 600.2961(4); MSA 27A.2961(4) provides:

> All commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due.

The statute further provides:

> A principal who fails to comply with this section is liable to the sales representative for both of the following:
>
> (a) Actual damages caused by the failure to pay the commissions when due.

> (b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of the commissions due but not paid as required by this section or $100,000, whichever is less. [MCL 600.2961(5); MSA 29A.2961(5).]

The term "sales representative" is defined within the statute as "a person who contracts with or is employed by a principal for the solicitation of orders or sale of goods and is paid, in whole or in part, by commission. Sales representative does not include a person who places an order or sale for a product on his or her own account for resale by that sales representative." MCL 600.2961(1)(e); MSA 29A.2961(1)(e). "Principal" is defined in the statute as a person who "manufactures, produces, imports, sells, or distributes a product in this state" or "contracts with a sales representative to solicit orders for or sell a product in this state." MCL 600.2961(1)(d); MSA 29A.2961(1)(d).

On its face, the statute applies to sales of goods and products, but it does not define either term. Generally, courts should give terms not defined within the statute their ordinary meaning. *Popma v Auto Club Ins Ass'n*, 446 Mich 460, 470; 521 NW2d 831 (1994); *Entingh v Grooters*, 236 Mich App 458, 461; 600 NW2d 415 (1999). Reference to a dictionary is appropriate to ascertain the ordinary meaning of a word. *Popma*, *supra* at 470.

Random House Webster's College Dictionary (2d ed 1997) defines "goods" as "possessions," especially "movable effects or personal property" and "articles of trade; merchandise . . . ." *Id*. at 559. *Webster's* defines "product" as "a thing produced by labor." Neither of these definitions implicate the sale of services. Consequently, plaintiff did not qualify as a "sales representative," and defendant did not meet the statutory definition of the term "principal." We find no error in the trial court's conclusion that the statute did not apply to the facts of the case.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell