

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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MARK ROZENBERG,

Plaintiff-Appellant,

v

RETRIEVAL METHODS, INC., a Michigan  
corporation, f/k/a RETRIEVAL METHODS OF  
MICHIGAN, INC., and RETRIEVAL  
METHODS, INC., a Pennsylvania corporation,,

Defendants-Appellees.

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UNPUBLISHED

October 11, 2002

No. 225586

Oakland Circuit Court

LC No. 98-007819-CK

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MARK ROZENBERG,

Plaintiff-Appellant/Cross-Appellee,

v

RETRIEVAL METHODS, INC., f/k/a  
RETRIEVAL METHODS OF MICHIGAN, INC.,  
and STANLEY RAY,

Defendants-Appellees/Cross-  
Appellants,

and

RETRIEVAL METHODS OF PENNSYLVANIA  
INC., EDWARD GIEBEL and JOHN KRAVETZ,

Defendants-Appellees.

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No. 227335

Oakland Circuit Court

LC No. 99-013786-CK

Before: White, P.J., and Neff and Jansen, JJ.

PER CURIAM.

These consolidated appeals involve plaintiff's claims regarding post-termination commissions. In docket no. 225586, plaintiff appeals as of right the dismissal of defendant Retrieval Methods, Inc. (RMI-Mich), and challenges various rulings leading to the \$9,588.67 judgment in his favor against defendant Retrieval Methods of Pennsylvania, Inc. (RMI-Penn). In docket No. 227335, involving a subsequent action, plaintiff appeals as of right the dismissal of various claims, and defendants RMI-Mich and Ray cross-appeal the order denying frivolous action sanctions.

In docket no. 225586 (RMI-1), we reverse the dismissal of RMI-Mich. Regarding RMI-Penn, we affirm the judgment of \$9,588.67 as representing contract damages up to a date certain<sup>1</sup> but remand for further proceedings whether contract damages extend beyond November 10, 1997. We reverse the dismissal of plaintiff's claims under the Sales Representative Commissions Act (SRCA), MCL 600.2961, and unjust enrichment, the latter claim limited, however, to the period after the contract damages cut-off date.

In docket no. 227335 (RMI-2), we reverse the dismissal of plaintiff's claims against Ray, Giebel and Kravetz.<sup>2</sup> As to RMI-Penn, we reverse the dismissal of the fraud claim. The cross-appeal is rendered moot by our dispositions.

## I

Plaintiff argues that dismissal of RMI-Mich under MCR 2.116(C)(8) was error. This Court reviews the circuit court's grant of summary disposition de novo. *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 253; 571 NW2d 716 (1997). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). All factual allegations are accepted as true, as are reasonable inferences or conclusions that can be drawn therefrom, and are construed in the light most favorable to the nonmoving party. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). A grant of summary disposition for failure to state a claim should be with prejudice. *ABB Paint Finishing v National Union Fire Ins*, 223 Mich App 559, 563; 567 NW2d 456 (1997).

Plaintiff's complaint stated claims for breach of contract, violation of the SRCA, and unjust enrichment. It is clear that the court looked beyond the pleadings, and that it inappropriately made factual findings, most notably, that plaintiff's contract was with RMI-Penn alone. Dismissal under MCR 2.116(C)(8) was error.

Defendants in effect also argue that even if dismissal was error, it was harmless because at no time did plaintiff present evidence sufficient to raise a genuine issue of fact regarding whether RMI-Mich could be held liable for plaintiff's post-termination commissions. We

<sup>1</sup> The first circuit judge initially determined that plaintiff's contract damages should end on September 7, 1997. However, on plaintiff's motion for reconsideration, the first judge noted that plaintiff had presented evidence that might entitle him to commissions through November 10, 1997. No order reflecting that ruling was ever entered, however. The second circuit judge later entered judgment in plaintiff's favor for contract damages, but it is not clear from the record whether the September or November date was used.

<sup>2</sup> Plaintiff alleged breach of contract, unjust enrichment, violation of the SRCA and fraud against the individual defendants.

disagree. Plaintiff testified at deposition that when he approached Stanley Ray regarding the Kmart opportunity, Ray told plaintiff to talk to “his partner,” Ed Geibel. Plaintiff submitted an affidavit below stating that when plaintiff and Geibel signed the commission agreement, Geibel informed plaintiff that the company was a partnership between him and Ray. Plaintiff’s affidavit stated that at no time had either Geibel or Ray informed him of their separate companies, and that they had acted at all times as though they were owners or partners of one company, called “Retrieval Methods.” Further, the written contract itself did not designate the contracting party as RMI-Penn or as a corporate entity. See n 3, *infra*. Additionally, plaintiff presented Ray’s deposition testimony that RMI-Mich continued to profit from Kmart’s business, and documents evincing payments made from Kmart to RMI, without a change in the payee, from 1995 extending into June 1999. Moreover, discovery was either outstanding or not over in both cases when they were dismissed.

Thus there were questions of fact regarding whether Geibel signed as agent for a partnership or joint venture between Geibel and Ray, or their respective corporations, or as alleged by defendant, only RMI-Penn. Because there were questions of fact regarding the contracting parties, and there was evidence that Kmart was continuing to pay revenues into June 1999, to the same entity it had paid since the inception of the contract, the court erred in dismissing RMI-Mich and in limiting contract damages regarding RMI-Penn.

## II

Given our disposition that the dismissal of RMI-Mich in the first case was error, we need not address plaintiff’s argument that RMI-Mich was improperly dismissed in RMI-2 on res judicata grounds except to note that it appears plaintiff is correct.

## III

Plaintiff argues that as to RMI-Penn the circuit court improperly dismissed plaintiff’s unjust enrichment claim for the period after contract damages cut off, and improperly dismissed plaintiff’s claim under the SRCA on grounds not argued by RMI-Penn. We agree.

A claim of unjust enrichment has as elements “1) the receipt of a benefit by the defendant from the plaintiff and 2) an inequity resulting to the plaintiff because of the retention of the benefit by the defendant.” *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). “In such instances, the law operates to imply a contract in order to prevent unjust enrichment.” *Id.*, citations omitted. “However, a contract cannot be implied in law while an express contract covering the same subject matter is in force between the parties.” *H J Tucker & Assoc v Allied Chucker Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999).

The circuit court dismissed the unjust enrichment claim against RMI-Penn on the basis that a valid written contract covering the same subject matter existed between the parties. However, the written contract between the parties does not directly address the circumstances presented.<sup>3</sup> After discovery was finally provided to plaintiff, plaintiff presented evidence to raise

<sup>3</sup> The agreement states in its entirety:

Agreement of Understanding

(continued...)

a genuine issue of fact that RMI-Penn continued to receive revenues from Kmart into 1999. We thus reverse the dismissal of plaintiff's unjust enrichment claim against RMI-Penn, limited to the period after contract damages are determined on remand to cut-off.

Regarding the SRCA<sup>4</sup> violation claim, the first circuit judge determined "as a matter of law" that plaintiff did not qualify as a "sales representative" under the act, and that plaintiff did

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This document outlines the sales representation relationship between Mark Rozenberg and Retrieval Methods. In compensation for his efforts to secure business at Kmart, Retrieval Methods agrees to pay to Mark Rozenberg commissions of 10% of gross revenue or 30% of gross profits, whichever amount is greater.

This amount to be paid within 45 days of the invoice date, providing for any invoice amounts outstanding. Only the outstanding portion may be deducted for purpose of calculating commissions, that amount to be paid when Kmart pays the outstanding balance.

In no case shall Mark Rozenberg be responsible for any unpaid invoice amounts, or loss or damages to Retrieval Methods.

<sup>4</sup> The SRCA, MCL 600.2961, provides in pertinent part:

(1) (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the amount of orders or sales or as a percentage of the dollar amount of profits.

\* \* \*

(d) "Principal" means a person that does either of the following:

(i) Manufactures, produces, imports, sells or distributes a product in this state.

(ii) Contracts with a sales representative to solicit orders for or sell a product in this state.

(e) "Sales representative" means 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.

(2) The terms of the contract between the principal and sales representative shall determine when a commission becomes due.

(continued...)

not sell goods as required under the act, but rather, sold “services.” Because defendant made no such arguments below, these were improper determinations. See *Boje v Wayne Co General Hospital*, 157 Mich App 700, 709; 403 NW2d 203 (1987) (reversing dismissal of defendant where that defendant had not brought motion for summary disposition and plaintiff had thus been prevented from making proper presentation to court on the issue.) The second circuit judge revisited the SRCA issue, agreed with plaintiff that the contract involved “goods” rather than services, but concluded that plaintiff was not a “sales representative” under the statute and that dismissal of plaintiff’s SRCA claim was thus not “clearly erroneous.”

Under the circumstances that plaintiff represented RMI in obtaining and servicing the Kmart business,<sup>5</sup> and that the written contract refers to “the sales representation relationship”<sup>6</sup> between plaintiff and Retrieval Methods, the court erred in dismissing the SRCA claim.

#### IV

Plaintiff argues that in RMI-2 the circuit court erred in dismissing the fraud, successor liability and tortious interference with contractual relations claims on res judicata grounds because they had not been litigated in RMI-1, and that these claims were not barred by collateral estoppel because plaintiff did not have a full and fair opportunity to litigate the issues in RMI-1.

Regarding the claims against Stanley Ray, plaintiff argues that no issue “determined” in RMI-1 had anything whatever to do with Ray, that plaintiff’s RMI-2 claims against Ray involve Ray’s own acts, and were not, with the exception of the piercing the corporate veil claim, derivative. Plaintiff further argues that the fraud and tortious interference claims against Ray had nothing to do with the fact that Ray owned RMI-Mich or the elements of a breach of contract suit

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(...continued)

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(4) 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.

(5) 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 commissions due but not paid as required by this section or \$100,000.00, whichever is less.

<sup>5</sup> Defendant seeks to characterize plaintiff as something akin to a business broker, but has not established that plaintiff operated in that capacity.

<sup>6</sup> See n 3, *supra*.

against the corporation. Plaintiff argues regarding Ray, Giebel and Kravetz that no claim or issue was ever adjudicated in RMI-1 because they were never in that case.

Regarding RMI-Penn, the circuit court in RMI-2 properly dismissed the three counts previously brought in RMI-1, however, the fraud theory was improperly dismissed.<sup>7</sup> It was not litigated and thus was not barred by res judicata. Nor was it barred by collateral estoppel because it is wholly distinct from the issues involved in RMI-1 and there was no litigation of these issues.

We agree with plaintiff that the fraud, successor liability and tortious interference claims against RMI-Mich had not been litigated in RMI-1, and under the circumstance that defendants obstructed discovery could not have been litigated, and were thus improperly dismissed. The claims against the individual defendants had also not been litigated and were thus improperly dismissed.<sup>8</sup>

V

Under the circumstances presented here, we find no abuse of discretion in the circuit court's setting aside the defaults entered against Giebel and Kravetz. See *Kowalski v Fiutowski*, 247 Mich App 156, 158-159; 635 NW2d 502 (2001).

In light of our dispositions, we need not address the cross-appeal. Affirmed in part and reversed in part.

/s/ Helene N. White

/s/ Janet T. Neff

/s/ Kathleen Jansen

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<sup>7</sup> Plaintiff's second suit did not allege tortious interference against RMI-Penn, thus plaintiff's challenge that that claim was improperly dismissed is without merit.

<sup>8</sup> Immediately after the circuit court dismissed RMI-Mich in RMI-1 under MCR 2.116(C)(8), plaintiff had moved to amend his complaint in RMI-1 to add Giebel and Kravetz, but the court denied the motion.