STATE OF MICHIGAN

COURT OF APPEALS

THOMAS E. VANDENHEUVEL,

Plaintiff-Appellant,

v

FITZPATRICK ELECTRIC SUPPLY COMPANY,

Defendant-Appellee.

UNPUBLISHED
May 13, 2004

No. 242333
Ottawa Circuit Court
LC No. 01-039549-CK

Before: Gage, P.J., O'Connell and Zahra, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendant summary disposition. We affirm.

On January, 28, 1993, defendant extended an offer to plaintiff to work as a salesman. In an offer letter discussing the nature and compensation of plaintiff's employment, defendant listed twenty clients plaintiff would be "slanted" toward if he accepted the offer. The list included three Prince Corporation accounts; Prince Interiors, Prince Machine, and Prince Facilities. Plaintiff accepted defendant's offer of employment and began working for defendant in early 1993. Plaintiff was never assigned the Prince Machine and Prince Facilities accounts. Plaintiff did not work these accounts and did not receive commissions on them. Plaintiff requested that he be assigned these accounts numerous times, and was refused or ignored by defendant each time. On March 22, 2001, plaintiff filed this lawsuit claiming that he is owed commissions on the Prince accounts under MCL 600.2961, the Michigan Sales Representative's Commissions Act (SRCA), breach of contract for failing to assign him the Prince accounts as promised, and promissory estoppel for inducing him to leave his former employer with a promise of the two Prince accounts.

Plaintiff first argues the trial court inappropriately granted defendant's motion for summary disposition on plaintiff's claim for unpaid commissions under the SRCA. We disagree.

This Court reviews de novo a trial court's grant of summary disposition. *General Motors Corp v Dep't of Treasury*, 466 Mich 231, 236; 644 NW2d 734 (2002). In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions and other documentary evidence filed in the action by the parties in the light most favorable to the opposing party. MCR 2.116(G)(5); *Smith v Globe Life*

Ins Co, 460 Mich 446, 454-455; 597 NW2d 28 (1999). Summary disposition is proper only when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10).

The SRCA operates in "furtherance of a remedy or mode of procedure," and is remedial in the sense that it "does not affect substantive rights." *Frank W Lynch & Co v Flex Technologies, Inc*, 463 Mich 578, 584-585; 624 NW2d 180 (2001) (citations omitted). Accordingly, common law determines when commission are due under the SRCA. See *Flynn v Flint Coatings*, 230 Mich App 633, 637; 584 NW2d 627 (1998) overruled by *Frank W Lynch & Co, supra*. The common law rule determining when commissions are due is found in *Reed v Kurdziel*, 352 Mich 287, 293-295; 89 NW2d 479 (1958), in which our Supreme Court stated:

> An examination of the law with reference to commissions allowed agents or brokers seems to indicate that it is difficult to determine a set line of decisions, particularly with reference to the right of an agent with an exclusive agency to recover commissions on sales made where he is the procuring cause. However, when they are viewed as a whole and brought into proper focus, they disclose the law applicable to the question is well settled and that the seeming confusion results from the application of that law to the particular facts of the specific cases in question. 12 ALR2d 1360, 1363, states as follows:
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> "The relationship between agent or broker and principal being a contractual one, it is immediately apparent that whether an agent or broker employed to sell personalty on commission is entitled to commissions on sales made or consummated by his principal or by another agent depends upon the intention of the parties and the interpretation of the contract of employment, and that, as in other cases involving interpretation, all the circumstances must be considered. This rule is recognized and stated in the American Law Institute, 2 Restatement, Agency, § 449, Comment a."
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> It would appear that underlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent's or broker's services without compensation and imposing upon the principal, regardless of the type of agency or contract, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales ma[y] have been consummated by the principal himself or some other agent. In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. [citations omitted.]

Plaintiff must establish that he is owed the commissions either by contract or that he was the "procuring cause" of the sale(s) to recover under the SRCA. Plaintiff relies upon the offer letter from defendant to plaintiff as a "contract" promising plaintiff the two Prince accounts. The

letter states that defendant would "slant" plaintiff toward OEM/Industrial customers, and specifically mentions the two Prince accounts. Although the letter suggests that plaintiff would service the accounts, the letter does not contain a promise to plaintiff that he would receive commissions on the accounts regardless of whether he serviced them. Thus, because plaintiff was not promised commissions on the two Prince accounts, plaintiff has not established a contract claim against defendant.

Plaintiff also asserts entitlement to the commissions from the two Prince accounts sales as the procuring cause of the sales. However, "where the agent does not participate in the negotiation of a given contract of sale with a customer, he is not the procuring cause, even though the agent may have originally introduced the customer to the principal." *Roberts Associates, Inc v Blazer Int'l Corp*, 741 F Supp 650, 653 (ED Mich, 1990); See also *Holmes Realty Co v Silcox*, 194 Mich 59, 62-63; 160 NW 465 (1916). Thus, to be a procuring cause, plaintiff must have had some participation in the sales on the two Prince accounts. Here, plaintiff does not assert that he participated in any sales related to the two Prince accounts while employed by defendant. Therefore, the trial court properly concluded that plaintiff was not entitled to commissions on the Prince accounts under common law. Accordingly, the trial court properly granted defendant summary disposition on plaintiff's claim under the SRCA.

Plaintiff next argues the trial court improperly determined the statute of limitations barred plaintiff's claims for breach of contract and promissory estoppel.

"We review a trial court's grant or denial of a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo to determine whether the moving party was entitled to judgment as a matter of law." *DeCaminada v Coopers & Lybrand, LLP*, 232 Mich App 492, 496; 591 NW2d 364 (1998). In reviewing a motion under MCR 2.116(C)(7), this Court accepts as true the plaintiffs' well-pleaded allegations and construes them in the plaintiffs' favor. *Abbott v John E Green Co*, 233 Mich App 194, 198; 592 NW2d 96 (1998). Moreover, "[w]hether a cause of action is barred by the statute of limitations is a question of law that we also review de novo." *McKiney v Clayman*, 237 Mich App 198, 201; 602 NW2d 612 (1999).

An action to recover damages for breach of contract must be brought within six years of the time the claim first accrues. MCL 600.5807(8). Promissory estoppel claims are subject to the same six year statute of limitations as breach of contract claims. *Huhtala v Travelers Ins Co*, 401 Mich 118, 125; 257 NW2d 640 (1977). This Court has generally held that a cause of action for breach of contract accrues when the breach occurs, i.e., when the promisor fails to perform under the contract. *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 246; 673 NW2d 805 (2003).

Plaintiff began his employment with defendant in February or March of 1993. Plaintiff began receiving commissions on the accounts he was servicing after one year of employment. Plaintiff's breach of contract and promissory estoppel claims accrued, at the latest, when defendant did not pay plaintiff commissions on the Prince accounts, which was one year after plaintiff began his employment with defendant. Plaintiff filed suit in March 2001. Therefore, plaintiff filed suit six years after any potential claim accrued, and the claims for breach of contract and promissory estoppel are barred.

Plaintiff however argues that his claims are not barred because they are with the doctrine of "continual wrongful acts." Plaintiff asserts that every monthly commission payment on the Prince accounts was an amount due and independent breach of contract.

> [E]very periodic payment made that is alleged to be less than the amount due … constitutes a continuing breach of contract and the limitation period runs from the due date of each payment. [*H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999) quoting *Harris v City of Allen Park*, 193 Mich App 103; 483 NW2d 434 (1992).]

First, this doctrine is inapplicable to the present case because plaintiff is not owed commissions on the two Prince accounts. Although the Prince accounts were discussed in his employment offer letter, they were never assigned to him. Also, plaintiff did not procure any sales under the two Prince accounts accounts. Therefore, plaintiff is not owed commissions, and did not suffer a continuing breach.

Second, this case involves allegations relevant to only a single breach, that being defendant's failure to assign the accounts. The continuing effects of this alleged breach are not sufficient to accrue a new cause of action. "[A] continuing wrong is established by continual tortious acts, not by continual harmful effects from an original completed act." *Jackson County Hog Producers v Consumers Power Co*, 234 Mich App 72, 81; 595 NW2d 112 (1999) quoting *Horvath v Delida*, 213 Mich App 620, 627; 540 NW2d 640 (1977). Therefore, under MCL 600.5807(8), plaintiff's breach of contract and promissory estoppel claims are barred by the statute of limitations.

Affirmed.

/s/ Hilda R. Gage
/s/ Peter D. O'Connell
/s/ Brian K. Zahra