

STATE OF MICHIGAN
COURT OF APPEALS

FRED RUPPERT,

Plaintiff-Appellee,

v

MOLD MASTERS COMPANY,

Defendant-Appellee.

UNPUBLISHED

May 25, 2004

No. 244726

Oakland Circuit Court

LC No. 2001-036638-CK

Before: Schuette, P.J., and Bandstra and Cooper, JJ.

PER CURIAM.

Plaintiff Fred Ruppert appeals as of right the trial court's order granting defendant Mold Masters' motion for summary disposition as to all of plaintiff's claims pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

I. Facts

In 1999, plaintiff, an independent manufacturer's sales representative, entered into an oral contract with defendant, an automotive plastic component parts manufacturer, to assist in increasing defendant's injection molding and flocking business. The parties agreed on a five-percent commission rate. Plaintiff procured a large amount of business for defendant in a short amount of time from three major tier suppliers for General Motors when another manufacturer closed operations. In April of 2001, however, defendant terminated its relationship with plaintiff. Defendant had recently suffered a financial loss when one of the suppliers plaintiff procured went into bankruptcy. Another supplier had requested that plaintiff cease further contact, because, plaintiff asserts, it was restructuring. Plaintiff alleged that these reasons were mere pretext and that his services were terminated to avoid paying his rising commissions.

Although the parties did not discuss post-termination commissions upon entering into the contract, plaintiff argued that it is an industry custom to pay commissions for the life of a part or program. Beyond this understanding, plaintiff asserted that Hugo Leonardi, Jr., defendant's vice president of operations, repeatedly assured plaintiff that he would continue to receive commissions for the life of the part. However, upon plaintiff's termination, defendant issued him a check in full satisfaction of all commissions owed. Rather than cash the check, plaintiff filed suit to reserve his right to post-termination commissions.

II. Legal Analysis

This Court reviews a trial court's determination regarding a motion for summary disposition de novo.¹ A motion under MCR 2.116(C)(10) tests the factual support of a plaintiff's claim.² "In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), we consider the affidavits, pleadings, depositions, admissions, or any other documentary evidence submitted in the light most favorable to the nonmoving party to decide whether a genuine issue of material fact exists."³ Summary disposition is appropriate only if there are no genuine issues of material fact, and the moving party is entitled to judgment as a matter of law."⁴

A. Express Contract

Plaintiff argues that there is a genuine issue of material fact regarding the existence of an express contract between the parties covering post-termination commissions, and therefore, the trial court erroneously granted defendant's motion for summary disposition. We disagree.

To form an express oral contract, the "expressed words of the parties and their visible acts" must manifest mutual assent.⁵ Plaintiff admits that the effects of termination, including post-termination commissions, were not discussed at the time of contract formation. Accordingly, the parties never expressly agreed to such a term, and the trial court properly granted defendant's motion for summary disposition.⁶

B. Implied Contract

Plaintiff also contends that an implied-in-fact or implied-in-law contract exists as the circumstances indicate that the parties agreed to life-of-part commissions. In dismissing this claim, the trial court found that "the parties' oral agreement did speak to the issue of post-termination commissions,"⁷ and that plaintiff could not prove an implied term where the parties'

¹ *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001).

² *Auto-Owners Ins Co v Allied Adjusters & Appraisers, Inc*, 238 Mich App 394, 397; 605 NW2d 685 (1999).

³ *Singer v American States Ins*, 245 Mich App 370, 374; 631 NW2d 34 (2001).

⁴ *MacDonald v PKT, Inc*, 464 Mich 322, 332; 628 NW2d 33 (2001).

⁵ *Rood v Gen Dynamics Corp*, 444 Mich 107, 119; 507 NW2d 591 (1993).

⁶ In dismissing plaintiff's express contract claim, the trial court found that

Plaintiff's own testimony does not support [an express contract]. Plaintiff specifically testified that he was never promised life of part or life of program commissions. Plaintiff acknowledged it was his understanding he would be paid a commission for as long as the parts were shipped and as long as he was a Mold Masters' representative. [Opinion and Order, October 8, 2002, p 3.]

⁷ [Opinion and Order, October 8, 2002, p 4.]

express contract covered the same subject matter.⁸ However, the trial court's rulings are obviously inconsistent. The court found that the agreement was silent with regard to post-termination commissions to support its dismissal of the express contract claim, while finding that the agreement spoke to, and denied, the right to such commissions in dismissing the implied contract claim.

Furthermore, the record does reveal a genuine factual dispute regarding the existence of an implied contract to pay life-of-part commissions. Although plaintiff answered affirmatively in his deposition when asked whether he understood that his commissions were limited to the life of the part and his term as a representative for defendant, plaintiff stated in his affidavit that he understood this to mean that he was to receive post-termination commissions for the life of the part or program. Plaintiff also stated at his deposition that Mr. Leonardi told him on three occasions that he would receive commissions as long as the parts shipped, which he understood to be a life-of-part agreement. Plaintiff's understanding is supported by the fact that such commissions are standard in the industry.⁹ As there is a genuine issue of material fact regarding whether the parties had an implied-in-fact contract to pay post-termination commissions for the life of the part, summary disposition was improper.

As the parties had no express agreement regarding post-termination commissions, and plaintiff may pursue his claim that such an agreement was implied, plaintiff may also pursue his claims of quantum meruit and unjust enrichment on remand.¹⁰

C. Procuring Cause Doctrine

Plaintiff also contends that he is entitled to post-termination commissions under the procuring cause doctrine. The Michigan Supreme Court described the procuring cause doctrine in *Reed v Kurdziel*.¹¹

[T]he 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

⁸ [Opinion and Order, October 8, 2002, p 3, citing *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993).]

⁹ A sales representative usually takes a long period of time, without pay, to develop business for a client. The representative is rewarded by receiving commissions for the entire period of time that a particular part is being sold to a particular customer. See, e.g., *Terry Barr Sales Agency v All-Lock Co*, 96 F3d 174, 177 n 1 (CA 6, 1996); *Kingsley Assocs, Inc v Moll PlastiCrafters, Inc*, 65 F3d 498, 502 n 5 (CA 6, 1996).

¹⁰ *H J Tucker & Assocs, Inc v Allied Chucker & Eng'g Co*, 234 Mich App 550, 573; 595 NW2d 176 (1999).

¹¹ *Reed v Kurdziel*, 352 Mich 287; 89 NW2d 479 (1958).

nevertheless be permitted to recover the commission if the agent was the procuring cause.^[12]

Defendant argues that plaintiff is not entitled to post-termination commissions under the procuring cause doctrine because he was hired to *service* existing accounts rather than to *procure* new business. However, plaintiff presented evidence that he was paid no salary or commissions until he brought in new business. Thus, plaintiff has at least presented an issue of fact whether he is entitled to any post-termination commissions as a procuring agent.

However, we must reject plaintiff's contention that he is entitled to commissions for sales that defendant now makes directly to General Motors. Plaintiff procured the business for the parts in question with a previous major tier supplier. Defendant still manufactures the same parts plaintiff originally procured. Since the time of plaintiff's termination, defendant has dealt with a replacement supplier, and then, directly with General Motors. While plaintiff may have set this chain of events in motion, plaintiff is too far removed to be considered the cause, or procuring agent, in defendant's relationship with General Motors. Plaintiff never met with or negotiated with General Motors, or the preceding supplier.¹³ As plaintiff was not the procuring cause of defendant's business relationship with General Motors, the trial court properly granted defendant's motion for summary disposition on this ground.

D. Michigan Sales Representative Commission Act

Finally, plaintiff asserts that the trial court erred in finding that the Sales Representative Commission Act (SRCA)¹⁴ does not apply to sales made to Collins & Aikman because plaintiff received a set piece price for each sale rather than a percentage commission. We agree.

Whether the SRCA applies to given circumstances is a matter of statutory interpretation that we review de novo.¹⁵ The SRCA provides that a principal who fails to pay a sales agent's commissions when they come due is liable to the agent for actual damages and treble damages up to \$100,000 plus court costs and attorney fees if the failure was intentional.¹⁶ The statute defines "commission" as "compensation accruing to a sales representative for payment by a

¹² *Id.* at 294-295 (internal citations omitted).

¹³ See *Roberts Assocs, Inc v Blazer Internat'l Corp*, 741 F Supp 650, 653 (1990) ("[W]here 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."); *Holmes Realty Co v Silcox*, 194 Mich 59, 62-62; 160 NW 465 (1916) (agent who introduced the parties, but failed to secure an agreement, was not entitled to commissions).

¹⁴ MCL 600.2961.

¹⁵ *Mahnick v Bell Co*, 256 Mich App 154, 161; 662 NW2d 830 (2003).

¹⁶ MCL 600.2961(5)-(6).

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.”¹⁷

The definition of “commission” encompasses percentages based on the dollar amount of profits as well as the dollar amount of sales. Plaintiff testified that for sales to Collins & Aikman, the parties first calculated the price to charge the customer and then plaintiff adjusted his original base five-percent commission rate to account for shipping charges. Plaintiff presented evidence that his commission from these sales was not a pure piece-price payment, but a percentage commission based on defendant’s actual *profit* (cost less freight charges) from the sale of each part to Collins & Aikman. The fact that the amount varied from part to part or that it deviated from plaintiff’s usual five-percent commission rate does not negate the fact that the amount is a percentage of profits. Accordingly, the amounts paid to plaintiff on sales to Collins & Aikman were “commissions” within the definition of the SRCA. Defendant was, therefore, not entitled to summary disposition on this basis.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette
/s/ Richard A. Bandstra
/s/ Jessica R. Cooper

¹⁷ MCL 600.2961(1)(a).