

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

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LARRY STERLING and THE STERLING  
ASSOCIATION, INC.,

UNPUBLISHED  
December 20, 2007

Plaintiffs/Counter-Defendants-  
Appellants,

v

No. 268176  
Wayne Circuit Court  
LC No. 03-334848-CZ

BURNSIDE INDUSTRIES, L.L.C.,

Defendant/Counter-Plaintiff-  
Appellee,

and

BRIAN BURNSIDE, d/b/a L & K SALES,

Defendant/Counter-Plaintiff.

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Before: White, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Plaintiffs filed this action to recover commissions allegedly owed under a sales agreement with defendants. Following a jury trial, plaintiffs were awarded a judgment of \$132,652.39 against defendant Burnside Industries, L.L.C., for commissions owed before the agreement was cancelled or terminated. On appeal, plaintiffs challenge the trial court's earlier grant of partial summary disposition to defendants, dismissing claims for commissions arising after the agreement was cancelled or terminated on the basis that the agreement unambiguously provides that no such commissions are payable. We conclude that the agreement is ambiguous and reverse.

Plaintiff Larry Sterling worked as an independent manufacturers sales representative for defendant Burnside Industries, L.L.C.,<sup>1</sup> pursuant to a written contract executed in October 2000.<sup>2</sup> The agreement provided:

6. **TERM**

The term of this Agreement shall be Three Years (3) years [sic] commencing on October 23, 2000 through October, 2003, however, said contract shall automatically renew from year to year unless canceled in writing by either party hereto at least sixty days prior to expiration of any yearly term hereunder.

\* \* \*

12. **TERMINATION**

**BURNSIDE** reserves the right to terminate this Agreement for good cause by providing Agent with 90 days written notice of termination.

Agent shall be entitled upon termination to full commissions on all purchase orders accepted by **BURNSIDE** prior to the actual termination date as provided for above.

After termination date Agent shall continue to be entitled to full commissions on sales of all products pursuant to purchase orders accepted by **BURNSIDE** prior to the termination date even though such products may be delivered after said date and even though said purchase order may automatically renew under a new purchase order number. This right to commissions shall be for the period of one year (1) year [sic] at 100% commission and at the rate of 50% for the second. [<sup>3</sup>

On or about May 12, 2003, plaintiff informed defendant in writing of his intention to terminate the sales agreement. Shortly thereafter, defendant acknowledged in writing that the agreement would be cancelled, effective October 2003, in accordance with § 6. Plaintiffs thereafter filed this action alleging entitlement to both pre-termination and post-termination sales commissions under the agreement. The trial court determined that the agreement unambiguously provided that plaintiff was entitled to post-termination commissions only if defendant terminated

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<sup>1</sup> For purposes of this opinion, the singular “plaintiff” is used to refer to plaintiff Larry Sterling, and the singular “defendant” is used to refer to defendant Burnside Industries, L.L.C.

<sup>2</sup> The instant agreement was between defendant Burnside Industries and plaintiff, and states that it was entered into on an unspecified date in April, 2001. A prior written agreement, dated November 23, 1998, was between plaintiff and Burnside Manufacturing. The agreements are virtually identical, except for the commission rate in the second year after termination.

<sup>3</sup> The prior agreement provided for post-termination commissions for two years, without a decrease in rate from 100% to 50% in the second year.

the agreement under § 12. Because it was undisputed that defendant did not terminate the agreement for good cause under § 12, but rather, the agreement was cancelled in accordance with § 6, the trial court granted defendant's motion for summary disposition with respect to post-termination commissions. On appeal, plaintiffs argue that the trial court erroneously construed the parties' contract as unambiguously precluding post-termination commissions except where the agreement is terminated by defendant for cause. We agree.

This Court reviews a trial court's decision on summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Defendant moved for summary disposition under MCR 2.116(C)(8) and (10). Although the trial court did not identify the subrule under which it granted defendant's motion, it is apparent that the court considered evidence beyond the pleadings. We therefore review the motion under MCR 2.116(C)(10).

A motion under MCR 2.116(C)(10) tests the factual support for a claim. The court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

A court's obligation when interpreting a contract is to determine the intent of the parties. *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 375; 666 NW2d 251 (2003). The agreement must be read as a whole. *Pickering v Pickering*, 268 Mich App 1, 13; 706 NW2d 835 (2005). If apparent to the reader, contractual language is construed according to its plain and ordinary meaning, while technical or constrained constructions are to be avoided. *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003); *Dillon v DeNooyer Chevrolet Geo*, 217 Mich App 163, 166; 550 NW2d 846 (1996). On the other hand, a trial court may grant summary disposition of a breach of contract claim only if the terms of the contract are not subject to two or more reasonable interpretations. *BPS Clinical Laboratories v Blue Cross & Blue Shield of Michigan (On Remand)*, 217 Mich App 687, 700; 552 NW2d 919 (1996).

While the agreement uses varying terms, "termination," "expiration" and "canceled," it does not make a clear distinction between termination and cancellation in the context of commissions. Nor does the use of separate terms establish that the parties intended to give the meanings to these terms ascribed by the trial court. Paragraph 6 sets forth the term of the agreement. That this paragraph uses the word "canceled" to describe the act and consequence of sending notice to the other party of a desire that the contract not continue beyond the yearly renewal, and the word "expiration" to describe the end of a yearly renewal term, does not establish that the words "termination date" in ¶ 12 do not refer to the date at which the contract ends, whether by expiration due to cancellation by one of the parties, or by termination by defendant for good cause or bankruptcy.<sup>4</sup>

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<sup>4</sup> The agreement also provides:

13. **BANKRUPTCY**

(continued...)

Contrary to the trial court's conclusion, the agreement does not state that post-termination commissions will only be paid if the agreement is terminated by defendant for good cause. This was an inference drawn by the trial court; and, although this is a reasonable reading of an ambiguous contract, it is not compelled, and is somewhat strained. As plaintiff points out, the trial court read the contract as providing plaintiff with a right to post-termination commissions in the event the contract is terminated for good cause by defendant, but as providing no right to such commissions in the event the contract is terminated without cause, at the expiration of a yearly renewal period. Under this construction, plaintiff could have secured his commissions simply by suspending performance under the contract without canceling as provided for in ¶ 6. Defendant would have then presumably terminated the contract for cause, and plaintiff would have had a right to commissions under ¶ 12. While this Court will not rewrite an unambiguous contract for the parties in order to provide them with a better or more sensible one, nor will it construe an ambiguous contract as necessitating an incongruent result.

We conclude the trial court erred in granting defendant summary disposition, and reverse and remand for further proceedings.<sup>5</sup> We do not retain jurisdiction.

/s/ Helene N. White

/s/ Karen M. Fort Hood

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(...continued)

In the event Agent shall declare bankruptcy, receivership or insolvency, or shall go out-of-business **BURNSIDE** shall have the right to terminate this Agreement effective immediately upon written Notice of Termination.

<sup>5</sup> Defendant's cross appeal was dismissed for failure to timely file a brief on cross appeal. Plaintiffs may tax their costs for the additional transcripts that defendant required plaintiffs to file for the cross appeal.