STATE OF MICHIGAN

COURT OF APPEALS

JAMES PETROFF,

Plaintiff-Appellant,

v

GRAND BLANC TRACTOR SALES, INC. and DAVID STEINER,

Defendants-Appellees.

UNPUBLISHED
November 10, 2009

No. 288303
Genesee Circuit Court
LC No. 08-089103-CK

Before: Stephens, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order granting defendants' motion for summary disposition. We reverse and remand for further proceedings consistent with this opinion. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This is a breach of contract suit. Plaintiff and defendant Grand Blanc Tractor Sales (GBTS) entered into an "exclusive agency agreement" on December 9, 1996. Plaintiff was to serve as GBTS's agent and translator in Bulgaria during negotiations with a Bulgarian company, HydroEngineering ("Hydro"), which was supposed to make backhoes for GBTS. The agreement included the following terms:

> 1. Company grants Agent the exclusive right to contract, for the benefit of Company, as its agent, with HydroEnengineering, for the fabrication of a tractor attached backhoe, under terms and conditions agreed upon by Company and HydroEngineering.
>
> 2. In consideration for the exclusive agency granted herein, Company agrees to pay to Agent thirty dollars ($30.) per each backhoe in the first container, fourty [sic] ($40.) per each backhoe in the second container, fifty ($50) per each backhoe in the third container and thereafter, delivered from HydroEngineering to Company or to a third party in the USA, Canada and Mexico. Payment of said commission shall be due and owing by Company to Agent within sixty (60) days of unit receipt at the destinations in the USA, Canada or Mexico.

> 3. After commencement of the initial delivery of product[,] Company agrees to provide a written account to Agent, on a quorterly [sic] basis, of all deliveries in USA, Canada, Mexico.
>
> 4. Agent agrees not to disclose any information about pricing and customer lists and not to enter into any agreements with a third party that involve Company.
>
> 5. Company agrees not to negotiate or do business with HydroEngineering without Agent.
>
> 6. Company and Agent agree to maintain complete loyalty to each other.
>
> 7. This agreement shall endure as long as Company imports backhoes built by HydroEngineering.

The agreement also stated:

> Agent has the ability to speak, write and translate the Bulgarian language and is able to assist Company in it's [sic] negotiating a contract with HydroEngineering, and subsequently assisting Company during the performance of any contract with HydroEngineering, Company and Agent desire to enter into an agreement that expressly enumerates the relationship between Company and Agent.

However, the only duties expressly imposed on plaintiff by the agreement are those identified in paragraphs 4, 6, and 7. Defendant Steiner signed the agreement as GBTS's president.

Plaintiff flew to Bulgaria at GBTS's expense to negotiate with Hydro and monitor the progress in building a prototype backhoe. Approximately six months later, Hydro shipped its prototype to GBTS; it was not satisfactory. According to plaintiff, Steiner instructed him to work with the Bulgarian engineers to fix the problems. However, Hydro was having its own problems with bankruptcy, and on April 7, 1997, privatization of the company was ordered. In June 1998, the company was ordered to liquidate eighty percent of its capital.

In early August 1998, plaintiff and Steiner met for the last time. Both parties agree that Steiner told plaintiff there would be no immediate deal with Hydro. The parties do not dispute that plaintiff did not do any more work for GBTS.

In March 1999, Hydro contacted GBTS, desiring to renew the companies' relationship. Steiner traveled to Bulgaria with a different translator and worked out a deal with Hydro. Plaintiff did not learn of this until he saw an advertisement for the backhoes in September 2007. He filed suit in July 2008, identifying eight counts in his amended complaint: (1) breach of contract, (2) fraudulent misrepresentation, (3) innocent misrepresentation, (4) exemplary damages, (5) unjust enrichment, (6) breach of non competition covenant, (7) promissory estoppel, and (8) complaint for an accounting.

Defendants moved for summary disposition primarily based on expiration of the six-year statute of limitations that applies to causes of action arising out of contracts. MCL 600.5807(8). Plaintiff responded that this contract was analogous to a commission or installment contract, and

that defendants repeatedly breached the contract with every shipment they received. GBTS's success would not have occurred but for plaintiff's work.

The trial court agreed with defendants. The court distinguished the "commission contract" case cited by plaintiff, *HJ Tucker v Allied Chucker*, 234 Mich App 550; 595 NW2d 176 (1999), because in *HJ Tucker*, the agent was to be paid for any work he performed within six years of filing the lawsuit. Plaintiff, in this case, did not perform any work for GBTS in the past six years, nor did the contract require him to perform work in order to be paid. The court thus concluded that even if this was a commission contract, any work plaintiff did was well before the six-year period.

The trial court then analyzed each of plaintiff's counts. The court noted that plaintiff alleged that defendants breached the contract when they ordered backhoes from Hydro in 1999 without notifying plaintiff. This occurred before the six-years-back time limit. The court quoted *Michigan Millers Mut Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367, 372 n 1; 494 NW2d 1 (1992): "A breach of contract claim accrues on the date of the breach, not on the date the breach is discovered." Because plaintiff did not perform any work for defendants in the past six years, he was not owed anything under the contract and so defendants were not in breach.

For Counts II and III, fraudulent and innocent misrepresentation, the court noted that plaintiff alleged these arose out of conversations held in 1998 or earlier. Under *Boyle v General Motors*, 468 Mich 226; 661 NW2d 557 (2003), there is no tolling for fraud based on lack of discovery. Thus, these counts were also time-barred. Count IV, for exemplary damages, was dismissed because the underlying claims were dismissed. Count V, unjust enrichment, was dismissed because the subject matter was covered by the contract, in accord with *Barber v SMH (US), Inc*, 202 Mich App 366, 375; 509 NW2d 791 (1993). Count VI, for breach of non compete covenant, was the same as the breach of contract claim, and time-barred for the same reasons as Count I. The court found Count VII, promissory estoppel, was the same breach of contract claim. Finally, because the other claims had all been dismissed, there was nothing to support Count VIII, for accounting.

In this Court, plaintiff argues that the "threshold issue" is whether the agreement is a commission contract. He points to the use of the word "commission" in the agreement, and cites *HJ Tucker* for the rule that each failure to pay a commission constitutes a new breach and the entire suit is not barred just because the initial breach occurred more than six years earlier. Plaintiff asserts that this is a commission contract because he was to be paid periodically, whenever shipments were made, and the rate of pay was proportional to the size of the shipment. He also argues that his promissory estoppel claim should be allowed. He was promised commissions in return for his work in Bulgaria. He performed that work in reliance on the promise that he would be paid for it. However, defendants never paid him. Plaintiff makes no argument that his other claims were wrongly dismissed.

Defendants first argue that plaintiff's allegation in his first complaint that the agreement was terminated in 1998 controls the outcome. There is no discovery rule for actions based on contracts, and because plaintiff's claim is at its core a claim for breach of contract, the statute of limitations bars his suit. For the same reason, plaintiff's promissory estoppel claim fails. Defendants also argue that this is not a commission contract. "Commission" is defined in the sales representative compensation act, at MCL 600.2961(1)(a), as "compensation accruing to a

sales representative or 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* [defendants' emphasis]." The agreement here provides for a fixed amount, not a percentage as required by the statute. Moreover, the trial court correctly found that plaintiff could not recover commissions for work he did not perform; since no orders were shipped as a result of his efforts but only from later efforts made without him, he is not entitled to commissions from those shipments. Tolling could only occur if there were fraudulent concealment, but plaintiff did not plead that, nor do the facts support it. Finally, defendants argue that plaintiff's claims against Steiner personally are barred because he was not a party to the contract. GBTS is a corporation, and so Steiner cannot be held personally liable where he signed the contract not as an individual but as a representative of the company.

We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Although we must view substantively admissible evidence submitted at the time of the motion in the light most favorable to the party opposing the motion, the non-moving party must come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case. *Maiden v Rozwood*, 461 Mich 109, 120-121; 597 NW2d 817 (1999); *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). Issues of contract interpretation are questions of law, also reviewed de novo. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006).

Plaintiff is correct that this case turns on whether the agreement was a commission contract. If it was not, there is no question that his claim fails for being untimely. There is no discovery rule for contracts claims, and under MCL 600.5827, "Except as otherwise expressly provided, the period of limitations runs from the time the claim accrues. . . . [T]he claim accrues at the time the wrong upon which the claim is based was done regardless of the time when damage results." For contracts, the period is six years. MCL 600.5807(8). Plaintiff's equitable claims would be subject to the same period. MCL 600.5815 ("The prescribed period of limitations shall apply equally to all actions whether equitable or legal relief is sought").

However, the trial court erred in concluding that this is not a commission contract. The court quoted a dictionary definition of "commission": "a fee paid to an agent or employee for transacting a piece of business or performing a service."[1] The court went on to state, "Accordingly, if this is a commission contract, it necessarily follows that Plaintiff is required to perform at least some business or service on Defendants' behalf." The court failed to recognize that plaintiff *did* perform some service for defendants; he traveled to Bulgaria to negotiate with Hydro, and he refrained from working for another company, just as was contemplated by the agreement. The trial court erred in interpreting the contract as requiring additional work from plaintiff for each shipment. This is clearly not within its terms. Instead, under the dictionary definition used by the trial court, plaintiff's compensation, which was paid to him as GBTS's

[1] Defendants' reliance on the statutory definition of "commission" is misplaced. Plaintiff is not a sales representative, and so MCL 600.2961 does not apply to him or this contract.

agent for performing a service, was a "commission." The trial court's interpretation incorrectly considered the time of plaintiff's performance when it should have looked at the time payment was due from defendants.

This does not mean, however, that plaintiff is necessarily owed any commissions. First, he cannot seek compensation for commissions that should have been paid more than six years ago. As plaintiff notes, *HJ Tucker* indicates that each failure to pay begins a new period of limitations. Moreover, as defendants point out, no shipments were made in immediate response to plaintiff's work; some further dealing had to be done. This does not preclude plaintiff's claim, though, because he performed as required by the contract, and there was no contractual requirement that his efforts be successful. The appropriate common law that applies in this case is clearly set forth in the seminal case, *Reed v Kurdziel*, 352 Mich 287, 294; 89 NW2d 479 (1958), which identifies "the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent's or broker's services without compensation." The *Reed* Court explained:

> 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 to 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. [*Id*. at 294-295 (citations omitted).]

This doctrine applies in non-sales situations as well. See, e.g., *Muir v Kalamazoo Corset Co*, 155 Mich 624; 119 NW 1079 (1919) (commission paid for service provided to close a department); *Powers & Co v American Soc of Tool Engineers*, 345 Mich 392; 75 NW2d 824 (1956) (commission paid for advertising solicited but not published until after the contract was terminated); *Meeuwsen v Clough & Warren Co*, 207 Mich 697; 175 NW 408 (1919) (commission paid for "talking machine" [phonograph] cabinets ordered but not shipped due to necessary dyes not being available from Germany because of the war); *Friedenwald v Welch*, 174 Mich 399, 401; 140 NW 564 (1913) (quoting 19 Cyc p 249: "'If a broker has brought the parties together and as a result they conclude a contract, he is not deprived of his right to a commission by the fact that the contract so concluded differs in terms from the one which he was authorized to negotiate'").

What remains is the question of whether plaintiff was the "procuring cause" of the shipments. Plaintiff argues that the parties never would have made an agreement had he not brought them together. However, since defendants already knew about Hydro before plaintiff went overseas, they might be able to prove that plaintiff contributed little to the effort, and that the second translator did all the real work. It is also possible that proofs might show that both parties considered the agreement terminated without breach when Hydro appeared incapable of producing a suitable backhoe. See Restatement Agency 3d, § 3.09: "An agent's actual authority terminates . . . upon the occurrence of circumstances on the basis of which the agent should reasonably conclude that the principal no longer would assent to the agent's taking action on the principal's behalf." Because these issues have not yet been presented to the trial court, a remand is necessary.

Finally, the trial court did not err in dismissing plaintiff's equitable and tort claims. Plaintiff presented no facts supporting fraud; at the time defendants told him they would not be ordering from Hydro, it was true. The equitable claims all arise from alleged contract breaches occurring more than six years ago, and so are time-barred. MCL 600.5815. However, Count VIII, for accounting, should not be dismissed.

We reverse and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Cynthia Diane Stephens
/s/ Mark J. Cavanagh
/s/ Donald S. Owens