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NOT FOR PUBLICATION

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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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Julia Ann Talley,

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No. CV-08-2165-PHX-FJM

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Plaintiff,

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ORDER

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vs.

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Pembroke Occupational Health, Inc.,

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Defendant.

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The court has before it defendant’s motion for partial summary judgment (doc. 41), plaintiff’s response (doc. 45), and defendant’s reply (doc. 49). We also have before us plaintiff’s motion for summary judgment (doc. 43), defendant’s response (doc. 47), and plaintiff’s reply (doc. 50).

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I

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Plaintiff Julia Talley worked as a salesperson for Pembroke Occupational Health, Inc., a company providing pre-employment drug screening for client companies. On July 11, 2003, she entered into a written employment contract with Pembroke that described the terms and conditions of her employment and compensation. PSOE, exhibit 1 (“employment contract”). The agreement stated that “Commissions of 5% of revenue will be paid for 24 months beginning with the first month that the client is billed. Beginning month 25, 1% of revenue will be paid until your termination of employment with Pembroke.” Id. The

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1 contract further provided that “Commissions will be paid on all fees to the clients sold by you
2 except the cost of collection fees.” Id.

3 In October 2004, plaintiff secured a contract with the Department of Interior (“DOI”).
4 PSOF ¶ 11. Due to the nature of the contract, the commission structure was modified for this
5 client, id., however, the modified agreement was not reduced to writing. Talley contends that
6 she was entitled to receive 2% for all revenues, including “collection fees,” collected from
7 the DOI for the first 3 years of the contract, and 1% thereafter until termination of her
8 employment. Id. ¶¶ 11, 13; Talley Deposition at 167-68. Pembroke paid Talley 2%
9 commissions on the DOI contract for almost a year from December 2004 through October
10 2005. PSOF ¶ 14; DCSOF ¶ 14. In December 2005, Pembroke stopped paying Talley DOI
11 commissions, claiming that the contract was not profitable. Diveley Deposition at 49. She
12 was then told in May 2006 that she was not receiving DOI commissions because DOI was
13 in arrears in its payments. However, even after Pembroke received the past due DOI
14 payments, it neither informed Talley of the payments, nor paid her commissions on the
15 revenue. PSOF ¶ 28. Pembroke eventually renegotiated the terms of the agreement with
16 DOI in order to make the pricing structure profitable. Cametas Deposition at 16.

17 Talley did not receive any commission payments on the DOI account after December
18 2005, although DOI remained a Pembroke client. Pembroke stopped paying Talley
19 commissions on all of her accounts as of January 2008, although she remained employed
20 with Pembroke until January 2010. PSOF ¶ 43.

21 Talley filed this action against Pembroke for breach of the employment contract on
22 October 22, 2008.

23 II

24 Pembroke seeks partial summary judgment on Talley’s claim for commissions on
25 the DOI account, asserting that it is barred by the statute of limitations. It argues that because
26 Talley knew that the DOI commission payments stopped in December 2005, she had until
27 December 2006 to file this claim. It therefore contends that her October 2008 claim is time-
28 barred.

1 A claim for breach of employment contract must be filed within one year after the
2 cause of action accrues. A.R.S. § 12-541(3). Generally, a cause of action accrues and the
3 statute of limitations begins to run when one party is able to sue another. Gust, Rosenfeld
4 & Henderson v. Prudential Ins. Co., 182 Ariz. 586, 588, 898 P.2d 964, 966 (1995).
5 However, under the “discovery rule,” when the injury or the act causing the injury has been
6 difficult for the plaintiff to detect, the statute of limitations does not begin to run until the
7 plaintiff knows or with reasonable diligence should know of the facts underlying the alleged
8 breach. Id. 591, 898 P.2d at 969. The discovery rule is premised on the notion that “it is
9 unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for
10 believing that a claim exists.” Id. at 589, 898 P.2d at 967.

11 Although Talley was aware that Pembroke had stopped paying DOI commissions in
12 December 2005, she repeatedly inquired into the status of those payments while Pembroke
13 provided varying excuses for the delay. Pembroke’s president, Stefan Cametas, told Talley
14 in December 2005 that she would no longer receive DOI commission payments. DSOF ¶ 7.
15 In May 2006, Pembroke’s CFO told Talley that her commission payments were delayed
16 because DOI’s payments were past due. PCSOE ¶ 15. Over the course of many months,
17 Talley was told that the DOI commissions were not paid because DOI was in arrears, id., that
18 the CFO is “swamped” and is trying to hire additional help, id. ¶¶ 18-19, that the CFO was
19 not able to calculate her commissions in time for a fourth quarter commissions check, id. ¶
20 31, that a “revenue posting delayed [her] paycheck,” id., that the “systems were broken” so
21 there was a problem with closing the books, id. ¶ 33, and ultimately the CFO explained that
22 he believed Talley had received an “overpayment,” yet no overpayment calculation was
23 produced, id. ¶¶ 38-39. As late as October 9, 2008, Pembroke’s owner, Jon Cametas
24 continued to assure Talley that he was working on the commission calculation. Id. ¶ 70.

25 Because of Pembroke’s ongoing assurances and excuses, Talley did not have a
26 reasonable basis for believing that she had a claim until well into 2008. We conclude that
27 Talley’s claim for DOI commissions is timely. Pembroke’s motion for partial summary
28 judgment is denied (doc. 41).

1 III

2 Talley also moves for summary judgment arguing that no material fact exists
3 regarding Pembroke’s breach of her employment agreement and that she is therefore
4 entitled to judgment as a matter of law. She contends that she was entitled to commission
5 payments under her employment contract but that Pembroke failed to pay DOI commissions
6 since December 2005 and non-DOI commissions since January 2008. PSOF ¶ 43. She
7 claims that she is entitled to past due commissions in the amount of \$133,858.00. Id. ¶ 41.
8 She also claims that she is entitled to treble damages under A.R.S. § 23-355, which subjects
9 an employer to treble damages if it fails to pay earned wages.

10 Pembroke counters that material issues of fact preclude summary judgment. It first
11 attempts to create a factual dispute regarding the terms of the commission agreement on the
12 DOI account. Talley contends that she was entitled to 2% of all revenue received from the
13 DOI for the first 36 months of the contract, then 1% of all revenue thereafter until the date
14 of termination of her employment. In opposition, Pembroke argues only that Russell Basch,
15 the Pembroke representative who negotiated the DOI commission arrangement, “cannot
16 remember the details of the agreement he reached with Plaintiff.” Pembroke Response at
17 5. This is insufficient to create an issue of fact regarding the terms of the agreement. See
18 Fed. R. Civ. P. 56(e)(2). Pembroke acknowledges that it paid Talley 2% commissions on
19 the DOI contract for almost a year during 2004 to 2005. DCSOF ¶ 14. This, as well as
20 Talley’s sworn testimony, is uncontroverted evidence of at least some of the terms of the
21 agreement.

22 Pembroke also argues that an issue of fact exists as to how long Talley was entitled
23 to receive commissions on the DOI account. While the employment contract provides that
24 Talley is generally entitled to receive commissions on her clients’ revenue “until [her]
25 termination of employment with Pembroke,” PSOF, exhibit 1, Pembroke now contends
26 that its DOI commission obligation ended when Stefan Cametas informed Talley in
27 December 2005 that she would no longer receive commissions because the account was
28 unprofitable. This presents a legal question, not a factual dispute. The issue is whether

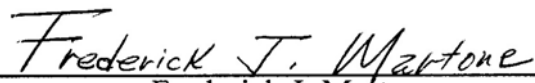
1 Pembroke had the legal authority to cancel the commissions agreement if the underlying
2 contract was unprofitable. Pembroke presents no support for this position and thus it will
3 not serve to defeat summary judgment on this issue. We conclude that Pembroke had an
4 obligation to pay Talley commissions on the DOI account and that it breached its obligation
5 by failing to pay Talley any DOI commissions after December 2005. The amount of the
6 damages on this claim remains open.

7 Other issues of material fact exist that preclude summary judgment. For example, the
8 question of whether Talley was entitled to receive commissions on all DOI revenue, or
9 whether “collection fees” were to be deducted is unresolved. An issue also exists as to
10 whether Pembroke’s CFO applied the incorrect commission percentage entitling it to a set-
11 off against Talley’s damages claim. An issue also exists as to whether Pembroke can show
12 that a reasonable good faith dispute supported its decision to withhold Talley’s wages as far
13 back as December 2005. See A.R.S. § 23-352(3). Because these and other factual issues
14 remain, we deny Talley’s motion for summary judgment.

15 **IT IS ORDERED DENYING** Pembroke’s motion for partial summary judgment
16 (doc. 41).

17 **IT IS FURTHER ORDERED GRANTING IN PART AND DENYING IN PART**
18 Talley’s motion for summary judgment (doc. 43). The motion is granted as to liability on
19 Talley’s breach of contract claim regarding the DOI account. The motion is otherwise
20 denied.

21 DATED this 21st day of April, 2010.

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 Frederick J. Martone
27 United States District Judge
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