# STATE OF MICHIGAN

# COURT OF APPEALS

DAVID BRUCE WEISS,

Plaintiff-Appellant,

v

RACO ASSOCIATES and INGRID CONNELL,

Defendants-Appellees.

UNPUBLISHED
September 23, 2010

No. 291466
Oakland Circuit Court
LC No. 2008-093842-CZ

Before: WILDER, P.J., and CAVANAGH and M. J. KELLY, JJ.

PER CURIAM.

In this dispute over a real estate commission, plaintiff David Bruce Weiss appeals as of right the trial court's order dismissing his claims against defendants RACO Associates and Ingrid Connell. On appeal, we must determine whether the trial court properly dismissed Weiss' contract claim as untimely and properly dismissed Weiss' claims premised on piercing the corporate veil and improper distribution for failing to state claims upon which relief could be granted. Because we conclude that the trial court did not err when it dismissed these claims, we affirm.

## I. BASIC FACTS AND PROCEDURAL HISTORY

In August 2001, RACO entered into an agreement with Weiss that gave Weiss "the exclusive right to sell, lease or exchange" a specific commercial property that RACO owned. The agreement provided that the exclusive right lasted for a "listing period" that commenced August 1, 2001 and ended on September 30, 2001. The agreement stated that the sale price was to be $1.1 million and provided that Weiss would receive a commission on the sale of the property under certain specified conditions. However, all the conditions had to occur "during the life" or "term" of the contract or within 180 days of the "termination," "term," or "listing period" of the contract. Ingrid Connell signed the exclusive right to sell agreement on behalf of RACO.

The commercial property at issue did not sell from August 1, 2001 to September 30, 2001. However, Weiss presented evidence that he did contact a potential buyer, Riyadh Jiddou, in August 2001 and continued to meet with Jiddou about the property through July 2002. Jiddou entered into an agreement—called an offer to purchase—regarding the property in August 2001, but RACO terminated the offer after Jiddou failed to obtain financing within the time provided in the offer.

On March 31, 2002, which was 182 days after September 30, 2001, Xhafer Elezi placed a $50,000 deposit in escrow towards the purchase of the property. In April 2002, Elezi entered into an agreement to purchase the property from RACO for $1,050,000. Elezi's purchase of the property from RACO closed in September 2002. According to a letter signed by Elezi, he was not shown the property at any point during 2001 and the only brokers that showed him the property in 2002 were Herman Williams of Crown Realty Group, LLC and David Kramer of Kramer-Triad Management Co. At the closing, RACO paid commissions to Williams and Kramer, but did not pay any commission to Weiss.

On August 15, 2008, Weiss sued RACO and Connell for failing to pay him a commission on the sale of the commercial property that was the subject of the listing agreement. In his complaint, Weiss alleged that he showed Elezi the property at issue during the time within which the exclusive right to sell agreement was "effective" and that Elezi actually purchased the property within 180 days of the termination of that agreement. According to Weiss, under the terms of paragraph 4 of the exclusive right to sell agreement, RACO was required to pay Weiss a 6% commission on the sale of the property and RACO breached the agreement when it failed to pay him the required commission. In a count titled "piercing the corporate veil," Weiss alleged that Connell had a duty to ensure that RACO had "unencumbered capital reasonably adequate for [its] prospective liabilities" and that she failed to adequately preserve such capital by distributing all the proceeds from the sale of the commercial property. Further, because RACO was really just Connell's "instrumentality," Weiss alleged that Connell could be held personally liable for the commission that he was owed. Finally, Weiss alleged that Connell wrongfully made a "preferential transfer" from RACO to herself that made RACO insolvent and was contrary to Michigan law. For that reason, Weiss concluded, he is entitled to "trace and recapture those distributions."

In January 2009, RACO and Connell moved for summary disposition under MCR 2.116(C)(7), (C)(8), and (C)(10). In their brief in support of their motion, RACO and Connell argued and presented evidence that the listing agreement between RACO and Weiss clearly expired on September 30, 2001 and that the only events that could trigger its obligation to pay a commission had to occur within that time or within 180 days after the end of that period. As such, if Weiss ever became entitled to a commission, he would have had to have earned it by—at the latest—March 29, 2002. Therefore, any breach of the agreement had to have occurred on or before March 29, 2002 and, because Weiss did not sue until more than 6 years after that date, his contract claim was untimely and should be dismissed under MCR 2.116(C)(7). RACO and Connell also presented evidence that there was no factual dispute that none of the events that could trigger an obligation to pay a commission actually occurred during the listing period or 180 days thereafter. For that reason, they argued that Weiss' contract claim fails as a matter of law and should be dismissed under MCR 2.116(C)(10). Finally, RACO and Connell argued that, because Weiss' remaining claims—to the extent that they are cognizable at all—depend on the validity of his contract claim and that claim must be dismissed as a matter of law, the remaining claims must also be dismissed under MCR 2.116(C)(8).

The trial court held a hearing on RACO and Connell's motion on March 25, 2009, and entered an opinion and order dismissing Weiss' claims on March 26, 2009. The trial court explained that, because any commission would have had to have been earned by, at the latest, March 29, 2002, Weiss had to file his claim for breach of contract by March 29, 2008, which he

did not do. For that reason, the trial court dismissed Weiss' contract claim as untimely. Given its resolution of the contract claim, the trial court dismissed Weiss' remaining claims for failing to set forth any legal basis for relief.

Weiss now appeals.

## II. CONTRACT CLAIM

### A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc v Gates Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper interpretation of a contract. *Clark v DaimlerChrysler Corp*, 268 Mich App 138, 141; 706 NW2d 471 (2005).

### B. MCR 2.116(C)(7)

A party is entitled to summary disposition under MCR 2.116(C)(7) if the opposing party's claim or claims are barred under the applicable statute of limitations. The parties may support or oppose a motion for summary disposition under MCR 2.116(C)(7) with affidavits, depositions, admissions, or other documentary evidence. *Odom v Wayne Co*, 482 Mich 459, 466; 760 NW2d 217 (2008); MCR 2.116(G). In reviewing motions under MCR 2.116(C)(7), this Court will accept the plaintiff's well-pleaded factual allegations as true unless contradicted by the parties' supporting affidavits, depositions, admissions, or other documentary evidence. *Odom*, 482 Mich at 466. This Court will construe the parties' submission in the light most favorable to the non-moving party. *Alcona Co v Wolverine Environmental Production, Inc*, 233 Mich App 238, 246; 590 NW2d 586 (1998). However, if no material facts are in dispute and reasonable minds could not differ on the legal effect of those facts, whether the statute of limitations bars the plaintiff's claim is a matter of law for the Court. *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997).

### C. ANALYSIS

In Michigan, all claims premised on a breach of contract must be filed within six years of when the claim accrues. See MCL 600.5807(8) (setting the period of limitations for "all other actions to recover damages or sums due for breach of contract" at six years); MCL 600.5827 (stating that the applicable period of limitation runs from the time the claim accrues and that the claim accrues at the time of the wrong regardless of the time when the damage results). A claim for breach of contract accrues at the time of the actual breach and not at the time the breach is discovered. *Michigan Millers Mut Ins Co v West Detroit Building Co, Inc*, 196 Mich App 367, 372 n1; 494 NW2d 1 (1992).

In the present case, Weiss claims that RACO breached the exclusive sell agreement by failing to pay him the commission that he earned under the agreement. Accordingly, the breach necessarily occurred—if it occurred at all—when Weiss earned the commission and RACO failed to pay it. On appeal, Weiss argues that he only became entitled to a commission as of the September 2002 closing of the sale of the property to Elezi. For that reason, he continues, his

August 2008 suit was within the six-year period of limitations. We do not agree that any breach must have occurred on or after the closing of the sale at issue.

Paragraph 3[1] of the agreement provides that the seller will pay Weiss a 6% commission on the sale, lease, or exchange of the property "at consumation (sic) of sale or execution of lease or exchange." Although the exclusive right to sell agreement is poorly drafted, when read in context and in light of the whole agreement, this paragraph unambiguously provides that Weiss will become entitled to a commission on the sale, lease, or exchange of the property as of the consummation of the sale, lease, or exchange and the term consummation could plausibly refer to a closing. But it is also readily apparent that paragraph 3 does not apply to the facts of this case. Given that paragraphs 4 and 18 primarily concern the circumstances under which Weiss would be entitled to a commission even after the lapse of the listing period, paragraph 3 must be understood to apply to a sale, lease, or exchange that occurred during the listing period. Because the undisputed facts show that no sale, lease, or exchange occurred within the listing period, paragraph 3 is inapposite. In any event, any claim for a commission under paragraph 3 necessarily accrued by September 2001 and, for that reason, even if Weiss had stated a claim under this paragraph, it would be untimely. However, Weiss did not allege a breach of contract under paragraph 3; he alleged a breach of contract under paragraph 4 and that paragraph does not limit the payment of a commission to the point when the sale, lease, or exchange is consummated:

> 4. If a purchaser/tenant is obtained for the aforementioned property by anyone, including the undersigned, during the life of this contract, at the price and terms named, or upon any other price, terms or exchange to which we consent; or if the aforesaid property is sold (or a contract to sell is entered into or if a deposit is received) within 180 days from the termination hereof to whom the property has been shown during the term of this contract, we agree to pay you the commission or fee indicated above for services rendered.

This paragraph unambiguously provides that Weiss will be entitled to a commission upon the happening of certain specified events and the stated events do not require a real estate closing. Rather, Weiss would be entitled to a commission if a purchaser or tenant "is obtained" during the life of the contract, or if, within 180 days from the "termination hereof," the property is sold, or a contract to sell is entered into, or a deposit received from a person to whom the property was shown during the "term" of the contract. Thus, under paragraph 4, RACO must pay Weiss a commission upon the happening of any triggering event without regard to whether RACO proceeded to a closing. Moreover, because the events must occur "during the life of this contract" or within 180 days of the "termination hereof," it is evident that any breach by RACO under the terms of paragraph 4 had to have occurred within 180 days after the agreement ended.

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[1] We note that the agreement has two paragraphs that are numbered 2 and, as a result, paragraph 3 is actually the fourth paragraph. Nevertheless, we shall refer to the relevant paragraphs by the numbers actually used.

On appeal, Weiss argues that the trial court erred to the extent that it construed the agreement as providing a termination date of September 30, 2001, which was the final day of the exclusive listing period. Instead, Weiss, who apparently drafted the agreement at issue, argues that the phrases "termination hereof" and "term of this contract" must be accorded a different meaning because he could have specifically referred to the "listing period" had he wanted to do so. We find this argument unpersuasive. The agreement at issue granted Weiss an exclusive right to sell the property at issue for a defined period of time that the parties referred to as the "listing period." The listing period is clearly the "term" of the contract. And, although the agreement did not specifically refer to it as such, it is patently clear that the parties intended the agreement to end as of the last day of the listing period—that is, on September 30, 2001. There simply is no other provision that establishes a method for terminating the agreement or a termination date. To hold otherwise would be to hold that the parties intended the agreement to last indefinitely—even after the end of the exclusive listing period—which defies common sense. When read as a whole and in context, the contract at issue is not ambiguous and we will enforce it as written. *Rory v Continental Ins Co*, 473 Mich 457, 468; 703 NW2d 23 (2005). Accordingly, we hold that, as a matter of law, the "term" of the agreement is the same as the "listing period" and the day on which the parties intended the agreement to terminate was September 30, 2001.

When the phrases "termination hereof" and "term of the contract" are given their plain and unambiguous meaning, it is clear that each of the triggering events stated in paragraph 4 had to have occurred within the listing period or by March 29, 2002, which was 180 days after the agreement's termination date. For that reason, any duty that RACO might have had to pay a commission under paragraph 4 arose on or before March 29, 2002 and, similarly, any claim for breach of contract under paragraph 4 accrued to Weiss on or before the same date.

Weiss also claims that he was entitled to a commission under the terms of paragraph 18. Setting aside for a moment the fact that Weiss did not allege a claim for breach of contract under this paragraph, we note that paragraph 18 provides that Weiss would be entitled to a commission if "the Seller and or its relatives, friends, etc" found a buyer *and* consummated the sale "during the listing period and one hundred and eighty days thereafter." Thus, even assuming that Weiss could properly amend his complaint to state a claim under paragraph 18, that claim would have accrued—if at all—on or before March 29, 2002.

In a final effort to save his contract claim, Weiss argues that the agreement did not end on September 30, 2002, because the parties orally agreed to extend the contract. In order to prevail on this theory, Weiss had to present evidence establishing a question of fact as to whether the parties had extended the contract. See *Guerra*, 222 Mich App at 289 (stating that whether the statute of limitations bars the plaintiff's claim is a matter of law for the Court if no material facts are in dispute). Yet Weiss did not present such evidence to the trial court in opposition to RACO and Connell's motion for summary disposition. See *Barnard Mfg Co, Inc*, 285 Mich App at 380-381 (stating that this Court reviews a trial court's decision on a motion for summary disposition by reviewing the evidence actually proffered to the trial court).[2] In his brief in reply to RACO

[2] Accordingly, because Weiss did not properly present his affidavit for consideration by the trial
(continued…)

and Connell's motion for summary disposition, Weiss noted that the exclusive right to sell agreement *could* be orally extended. He then cited evidence that he had brokered an offer to purchase the property by Jiddou, which offer was later rejected by Connell. The fact that Weiss continued to try and broker a deal for the property and that Connell initially agreed to entertain the offer by Jiddou does not support an inference that the parties orally extended the exclusive listing period under their agreement. And the letter from Connell rejecting the offer does not suggest that Connell understood that the exclusive listing period for the property had been extended.

Weiss also relied on Connell's deposition testimony wherein she stated that she understood her letter rejecting the Jiddou offer as also ending the exclusive listing agreement. However, Connell actually testified that her letter terminated the Jiddou "transaction" and when asked whether the letter terminated the listing agreement she stated that she did not "think he ever had a Listing Agreement." Weiss' lawyer then followed up by asking whether it was Connell's "intent to terminate" the exclusive listing agreement with her letter of April 18, 2002, and Connell responded by clarifying that the letter referred to Jiddou's offer to purchase and stating that it was also "another way for me to say to Mr. Weiss that everything is terminated and I didn't want him to bother me anymore." This testimony does not support an inference that Connell had actually extended the exclusive listing agreement. Rather, it supports the opposite inference—that the listing agreement had expired and that she was tired of Weiss' continued involvement with the property despite the termination of the listing agreement.

Finally, Weiss also attached to his brief in opposition to RACO and Connell's motion a copy of a letter that he sent to Connell regarding the property. In the letter, which was dated April, 20, 2002, Weiss states his belief that he would be entitled to a commission under the listing agreement should Connell sell the property to a buyer on her own initiative. However, the letter does not state *any* reason for Weiss' belief—let alone state that he held the belief because the listing agreement had been orally extended. For that reason, the letter cannot support an inference that the exclusive listing agreement had been extended beyond September 2001. When the evidence actually presented by the parties during summary disposition is viewed in the light most favorable to Weiss, see *Alcona Co*, 233 Mich App at 246; *Barnard Mfg Co, Inc*, 285 Mich App at 380-381, the evidence does not establish a question of fact as to whether the parties orally extended the exclusive right to sell agreement.

For the reasons stated, any claim that Weiss may have had under paragraphs 4 and 18 accrued on or before March 29, 2002. Accordingly, Weiss had until—at the latest—March 29, 2008 to file his breach of contract claims under those paragraphs. Because Weiss did not sue until August 2008, the trial court properly dismissed Weiss' contract claim as untimely under MCR 2.117(C)(7).

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court during the summary disposition proceedings, we cannot consider it on appeal. See *Barnard Mfg Co, Inc*, 285 Mich App at 380-381.

## III. PIERCING THE CORPORATE VEIL AND IMPROPER DISTRIBUTION

In his complaint, Weiss framed his claims premised on piercing the corporate veil and improper distribution in terms of his right to recover the commission that RACO and Connell allegedly owed him under the terms of the exclusive right to sell agreement. After determining that the contract claims were barred as a matter of law, the trial court dismissed these claims for failure to state a claim on which relief could be granted. We agree that the allegations stated under these claims had no continuing validity after the dismissal of Weiss' claim for breach of contract. Consequently, the trial court did not err when it dismissed these claims under MCR 2.116(C)(8).

There were no errors warranting relief.

Affirmed. As the prevailing parties, RACO and Connell may tax costs. MCR 7.219(A).

/s/ Kurtis T. Wilder
/s/ Mark J. Cavanagh
/s/ Michael J. Kelly