

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

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KENNETH MACKOOL

Plaintiff-Appellant,

v

CIMLINC, INC.,

Defendant-Appellant.

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UNPUBLISHED  
September 6, 1996

No. 183679  
LC No. 94-471439 CK

Before: Hood, P.J., and Griffin and J.F. Foley\*, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting defendant summary disposition pursuant to MCR 2.116(C)(10). We affirm in part, reverse in part, and remand.

On September 7, 1990, defendant hired plaintiff as a sales account manager. The offer of employment indicated that plaintiff would be eligible to earn commissions on sales in accordance with the North American Sales Compensation Plan (Sales Plan). Plaintiff accepted the offer. In April, 1992, defendant divided its North American Sales Division into two divisions, AMT and Linkage. Plaintiff was assigned to the Linkage division, which meant that he could no longer sell AMT products. On April 26, 1993, defendant terminated plaintiff's employment. Defendant gave three reasons for its decision: plaintiff failed to satisfy his sales quota for the past fiscal year; plaintiff disregarded defendant's focus on selling Linkage products; and plaintiff's forecast for the first quarter of the Fiscal Year 1994 indicated that he would not close any business in that quarter.

Plaintiff subsequently brought the present action for breach of employment contract and for payment of commissions. Plaintiff alleged that defendant breached the employment contract by terminating his employment without just cause, and by failing to pay him sales commissions to which he was entitled. Plaintiff did not specify which commissions had been wrongfully denied. According to plaintiff's deposition testimony, his superiors promised him that he would not be fired unless he failed to make the sales quota. Plaintiff testified that defendant wrongfully refused to credit him for certain sales,

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\* Circuit judge, sitting on the Court of Appeals by assignment.

and that this wrongful refusal caused him to fall below his sales quota and caused him to lose commissions.

Defendant ultimately moved for summary disposition pursuant to MCR 2.116(C)(10). Defendant alleged: that plaintiff could not rebut the presumption that his employment was terminable at will, and that plaintiff could have been dismissed regardless of whether he satisfied the quota; that defendant had just cause to dismiss plaintiff; that the Sales Plan reserved for defendant the authority to change sales persons' territorial assignments and to resolve disputes over matters not addressed by the Sales Plan; that defendant properly exercised this authority in each of the sales which formed the basis of plaintiff's complaint; and that plaintiff's failure to submit timely sales forecasts constituted just cause for his termination. Plaintiff did not respond to defendant's motion for summary disposition.

The trial court found that there was a question of fact regarding whether plaintiff's employment was terminable at will, and declined to grant defendant summary disposition on this basis. However, the trial court found that there was no question of fact that plaintiff was not entitled to the disputed commissions and granted the motion. The trial court did not state whether defendant could be granted summary disposition on the ground that plaintiff's failure to submit sales forecasts constituted just cause for termination.

Plaintiff argues that the trial court erred in making findings of fact in order to justify summary disposition in favor of defendant. This Court reviews summary disposition decisions de novo. *G & A Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Lash v Allstate Insurance Co*, 210 Mich App 98, 101; 532 NW2d 869 (1995). The court must consider the pleadings, affidavits, depositions, and other documentary evidence available to it and grant summary disposition if there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law. *Id.* A party opposing a motion brought under MCR 2.116(C)(10) may not rest upon the mere allegations or denials in that party's pleadings, but must by affidavit, deposition, admission, or other documentary evidence set forth specific facts showing that there is a genuine issue for trial. *Id.*

In his deposition, plaintiff testified concerning four categories of transactions for which he was not fully credited: 1) plaintiff received only partial sales credit for sales of Linkage products in his territory when he should have received credit for all sales in his territory; 2) plaintiff was not credited for certain Canadian sales made during a period in which there was confusion over Canadian assignments; 3) plaintiff was not credited for a sale he made to the CSC division of General Motors; and 4) plaintiff was not given a new account bonus for selling a Linkage product to an existing customer who had never before bought a Linkage product.

Defendant argued in its summary disposition motion that each of these matters was within its discretion to decide. We find that defendant demonstrated that the Sales Plan did not state how the Linkage sales made by non-Linkage sales representatives would be credited, and that it exercised its discretion by giving plaintiff partial credit for these sales. Defendant also demonstrated that the CSC

sale was invalid because plaintiff did not receive an order, but only a letter of intent. In addition, defendant demonstrated that the Sales Plan did not state whether a new account bonus could be awarded for a new Linkage sale to an existing customer. Because plaintiff failed to respond to defendant's summary disposition motion, he failed to create a question of fact on these matters. This Court is liberal in finding a genuine issue of material fact. *Id.* Nevertheless, where the opposing party fails to come forward with evidence, beyond allegations or denials in the pleadings, to establish the existence of a material factual dispute, a motion for summary disposition is properly granted. *Id.*

We, however, find that defendant did not demonstrate that plaintiff was not entitled to credit for the disputed Canadian sales. Although defendant demonstrated that it had authority to reassign territory, defendant submitted no proof that these disputed sales were made after plaintiff's Canadian territory had been reassigned. Defendant cited plaintiff's deposition testimony in an effort to prove that plaintiff's real complaint was that the territory had been reassigned. Plaintiff, however, testified that there was a period of confusion during which it was not clear that the territory had in fact been reassigned. Defendant therefore failed to show that it was entitled to judgment as a matter of law as to these sales. We therefore reverse that part of the judgment of dismissal.<sup>1</sup>

Plaintiff further argues that the trial court erred in denying him leave to amend his complaint to add a count of misrepresentation. We disagree. Leave to amend a complaint should be freely given when justice so requires, and denied only for particularized reasons, such as undue delay, bad faith, dilatory motive, repeated failure to cure deficiency by amendments previously allowed, undue prejudice to the opposing party, or futility. MCR 2.118(A)(2); *Ben P Fyke & Sons v Gunter Co*, 390 Mich 649, 656; 213 NW2d 134 (1973). Absent an abuse of discretion that results in injustice, this Court will not reverse a trial court's decision on a motion to amend a complaint. *Price v Long Realty, Inc*, 199 Mich App 461, 469; 502 NW2d 337 (1993).

Plaintiff moved for leave to amend his complaint to add a claim for misrepresentation. In the amended complaint, plaintiff alleged that he was induced to accept defendant's offer of employment by defendant's representations that the Sales Plan was a legally enforceable and binding agreement. Plaintiff claimed that these representations were false because defendant purported to reserve to itself the right to settle all disputes arising as a result of the Sales Plan, without intervention by the judiciary, thereby making the contractual promises illusory. The trial court denied plaintiff's motion for leave to amend his complaint for failure to cite authority which would allow him to add a new cause of action to a complaint which has been dismissed. The trial court's reason was erroneous. Entry of a grant of summary disposition in favor of the defendant does not preclude amendment of the plaintiff's complaint. *Formall v Community Nat'l Bank*, 166 Mich App 772, 783; 421 NW2d 289 (1988).

We, however, decline to reverse the trial court's decision because an amendment would have been futile. An amendment is futile "where, ignoring the substantive merits of the claim, it is legally insufficient on its face." *Id.* An action for fraudulent misrepresentation must be predicated upon a statement of past or existing fact. *Marrero v McDonnell Douglas*, 200 Mich App 438, 444; 505 NW2d 275 (1993). Plaintiff alleged that defendant falsely represented that the Sales Plan was a binding

contract. Plaintiff thus ostensibly alleged that defendant misrepresented an existing fact, namely the legal validity of the Sales Plan. This allegation, however, is substantively indistinguishable from a claim that defendant misrepresented its intent to treat the Sales Plan as a binding contract and abide by its provisions. A future promise is contractual, and is not a statement concerning past or existing facts. *Id.* Furthermore, a mere promise does not constitute fraud, nor is it evidence of fraud. *Id.* Accordingly, defendant's statement that it would abide by the terms of the Sales Plan cannot constitute fraud. Plaintiff's amendment was, therefore, futile, and the trial court did not abuse its discretion in denying leave to amend. This Court will not reverse a decision by the trial court where the right result is reached, but for the wrong reason. *Wayne County v Britton Trust*, 211 Mich App 688, 692; 536 NW2d 598 (1995).

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

/s/ Harold Hood  
/s/ Richard Allen Griffin  
/s/ John F. Foley

<sup>1</sup> We note that since the trial court determined that there was a question of fact as to whether plaintiff was an at-will employee, that ruling by the trial court was not appealed. That factual dispute must be resolved before a determination can be made as to whether plaintiff was wrongfully discharged or was wrongfully denied credit for any Canadian sales.