

STATE OF MICHIGAN
COURT OF APPEALS

UNISYS CORPORATION,,

UNPUBLISHED

Plaintiff/Cross-Defendant-Appellee,

v

No. 194834

Oakland Circuit Court

JAMES R. GNEWKOWSKI,

LC No. 95-496004-CZ

Defendant/Cross-Plaintiff-Appellant.

UNISYS CORPORATION,

Plaintiff/Cross-Defendant-Appellant,

v

No. 195084

Oakland Circuit Court

JAMES R. GNEWKOWSKI,,

LC No. 95-496004-CZ

Defendant/Cross-Plaintiff-Appellee.

Before: Taylor, P.J., and Griffin and Saad, JJ.

TAYLOR, P.J., (concurring in part and dissenting in part.)

In Docket No. 194834, I agree that the order granting summary disposition of defendant's counterclaim was properly entered by the trial court. In Docket No. 195084, I dissent because summary disposition of plaintiff's complaint was improper.

In Docket No. 194834, I concur that the order granting summary disposition should be affirmed. I write separately to indicate my analysis, which differs from the majority. Under the Sales Compensation Plan, after a sales representative has filed a request for commission, plaintiff must either pay the claim or question it. If a dispute exists, the ADR procedure requires the sales representative to send a letter to the Branch/District Manager explaining the basis for contesting the Commission Accounting Department's determination. After the Branch/District Manager's determination, if either

party disagrees, there are second and third inquiries required by the procedure before the commission amount is determined, and only then can the dispute be brought to the courts.

Defendant originally requested a commission of \$17,529.70 on December 16, 1993. Plaintiff then mailed defendant a check for \$9,628.42 on April 30, 1994. However, on May 6, 1994, plaintiff mistakenly sent defendant a duplicate check for \$9,628.42. The check dated April 30, 1994, alerted defendant that a conflict existed. The June 1, 1994, letter from plaintiff that said that an overpayment had occurred gave defendant another notice of the existence of a dispute. Therefore, the twelve-month limit for utilization of the ADR procedure began to run, at the latest, on June 1, 1994.

Defendant never pursued the next step in the ADR procedure by sending a letter to the Branch/District Manager. The failure to send such a letter constituted an abandonment of the ADR procedure. The plan says that “failure to file an Initial Inquiry within this time frame [twelve months] will constitute a waiver of complaint on a Plan participant’s behalf.” It also states that “this procedure is mandatory and a prerequisite to any other remedy.” Thus, under the contract, defendant’s claim is barred and he is precluded from any further efforts to collect the disputed amount.

Defendant claims that MCL 600.2961(8); MSA 27A.2961(8) bars application of the contract. I disagree. Once a commission is determined, this statute allows a sales representative damages (actual damages caused by a failure to pay and double damages for an intentional failure to pay) if the commission is not paid within forty-five days. The statute also forbids the waiver of rights granted under the statute. The statute does not apply to this dispute because defendant did not meet a condition precedent. The statute does not come into play unless there is an agreed-to commission, which there never was in this case. Thus, the statute is irrelevant to defendant’s claim. While defendant is entitled to keep the first check for \$9,628.42, he has no claim to anything further. Defendant was owed that amount under any construction of the obligations.

In Docket No. 195084, I dissent because plaintiff’s efforts to recover the second check for \$9,628.42 falls outside of the ADR procedure. The parties were free to make the ADR procedure as broad or narrow as they wished. *Port Huron Area School Dist v PHEA*, 426 Mich 143, 151, n 6; 393 NW2d 811 (1986). It is hornbook law that an employer has no obligation to arbitrate issues that it never agreed to arbitrate. *St Clair Prosecutor v AFSCME*, 425 Mich 204, 222; 388 NW2d 231 (1986). Defendant only agreed to utilize the ADR procedure with reference to disputes relating to incentive compensation. Because the second \$9,628.42 check was sent as a result of a clerical error, it is not a “commission dispute.” For example, if plaintiff had mistakenly sent defendant a check for \$962,842 and later asked defendant to return all but the \$9,628.42 plaintiff had intended to send, I doubt the majority would claim the parties’ dispute was a compensation dispute. The original check pertained to and established a true dispute. The second check for \$9,628.42, obviously sent in error, should be treated as such and not as a commission dispute.

Another flaw in the majority’s ruling requiring plaintiff to use the ADR procedure to recover the second check is the fact that plaintiff cannot initiate proceedings under the procedure. While the language of the contract requires both parties to exhaust the ADR mechanisms; § V J 2 reveals that plaintiff can only appeal decisions once the sales representative begins the process. It is those appeals

to which the exhaustion requirement relates. Subsections (b) and (c) of § V J 2 (the appeals in the ADR process) detail what the sales representative or Branch/District Manager must do. This is in sharp contrast to the language in subsection (a), the initial inquiry section, which only speaks of what the sales representative must do. Thus, the duty of plaintiff to exhaust the ADR procedure is only triggered by the sales representative's initiation of the procedure. Because defendant never wrote to the Branch/District Manager initiating the ADR procedure, plaintiff was in no manner bound, nor in fact able, to use the ADR in an effort to recover the second check.

Because I find the trial court erroneously granted summary disposition of plaintiff's complaint, I do not reach plaintiff's claim that the court abused its discretion in denying its request to file an amended complaint. I note however that the majority has failed to address this issue.

For the foregoing reasons, I concur in Docket No. 194834 and dissent in Docket No. 195084.

/s/ Clifford W. Taylor