

STATE OF MICHIGAN
COURT OF APPEALS

CHESLIN CHEVROLET OLDSMOBILE,

Plaintiff-Appellant/Cross-Appellee,

v

GENERAL MOTORS CORPORATION,

Defendant-Appellee/Cross-Appellant,

and

DETROIT AUTO DEALERS ASSOCIATION
and MICHIGAN AUTO DEALERS
ASSOCIATION,

Amicus Curiae.

UNPUBLISHED

February 15, 2000

No. 212477

Oakland Circuit Court

LC No. 97-537964-CZ

Before: Gage, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting partial summary disposition in favor of defendant pursuant to MCR 2.116(C)(10).¹ Defendant cross-appeals the trial court's order granting plaintiff's motion to clarify the mediation award. We affirm in part, reverse in part, and remand.

Plaintiff contends that the trial court prematurely granted defendant's motion for partial summary disposition because there were genuine issues of material fact regarding plaintiff's sale of vehicles under defendant's company owned vehicle purchase program ("PEP program") and because further discovery was necessary with respect to such sales. We disagree.

It is undisputed that a dealer may not sell a PEP vehicle to someone other than the employee who tagged the vehicle. Defendant presented testimonial and documentary evidence to support defendant's finding that plaintiff sold 124 PEP vehicles to ineligible purchasers. Plaintiff did not submit any evidence to dispute defendant's finding that the purchaser of each of the 124 vehicles was not the employee who tagged the vehicle. Instead, plaintiff argued, as it does on appeal, that the Company

Vehicle Management System (“CVMS”) report is somehow unreliable because defendant “may have” unscrupulously deleted the purchasers’ names from the report. However, Plaintiff did not present any documentary or testimonial evidence to support its speculative theory. Conjecture is not enough to establish a genuine issue of material fact. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193; 540 NW2d 297 (1995).

Plaintiff also contends that there is a genuine issue of material fact regarding whether the sanction of a six-month suspension from the PEP program was warranted. We disagree. There is no factual dispute that defendant had the contractual right to suspend plaintiff from defendant’s PEP program for violating the PEP program rules and guidelines. Plaintiff has presented no authority in support of its position that defendant was required to rationalize its decision.

Plaintiff also contends that summary disposition should have been granted in favor of plaintiff because defendant failed to comply with (1) the management review requirements of the Dispute Resolution Process, and (2) the six month chargeback prohibition of the Motor Vehicle Franchise Act, MCL 445.1561 *et seq.*; MSA 19.856(21) *et seq.* Again, we disagree.

Pursuant to Article 3.2.1 of defendant’s dispute resolution process, a dealer may request a management review of a final decision it receives from a Division employee. The Article provides that:

Dealer’s letter must clearly request Management Review and state the reasons why Dealer believes the decision was inconsistent with its rights under the Dealer Agreement. Dealer must also include a copy of the final decision, if it was in writing, as well as copies of all other documents or information it believes will support its position.

Pursuant to Article 3.2.3, the Division’s Senior Sales Management will review the matter. Article 3.2.4 provides that “Division will issue its written Management Review decision within twenty (20) working days of receipt of Dealer’s request for Management Review.”

Plaintiff made a written request for management review on November 21, 1996. In that request, Plaintiff indicated that it would be delivering additional documents in support of its request for a review. These documents were delivered on December 9, 1996. On December 12, 1996, Chevrolet’s Central Division, which conducts management reviews, notified dealers that the office would be closed for the holidays from December 23, 1996, until January 2, 1997.

Hence, the operative date of plaintiff’s request is December 9 -- the date that Plaintiff provided defendant with all of the documents in support of its request for a review. Based on the affidavits and documentary evidence presented, there is no dispute that defendant’s Central Division Office, which conducts the management reviews, was closed from December 23, 1996, until January 2, 1997. Hence, these days were not “working” days – that is, no work was scheduled to be performed on these days. Consequently, excluding these days from the calculation, defendant’s written management review decision was timely.

Further, assuming, arguendo, that defendant breached the contract by failing to issue a management review decision within twenty working days, Plaintiff has not shown any harm from the alleged breach. There is no remedy for breach of contract in the absence of an actual injury naturally arising from the breach. *Kewin v Massachusetts Mutual Life Ins Co*, 409 Mich 401; 295 NW2d 50 (1980). Here, as noted by defendant, Plaintiff benefited from the alleged delay because defendant stayed enforcement of the sanctions during the management review, thereby giving Plaintiff more time to hold and use \$203,000 of defendant's money.

We also reject plaintiff's contention that §§ 17(5) and (6) of the Act, MCL 445.1577(5) and (6); MSA 19.856(37)(5) and (6), which govern "sales or service promotion events, programs and activities," bar defendant's contractual right to charge back plaintiff's account in the amount of the PEP claims. A review of the record reveals that the PEP program is an ongoing employee-benefit program offered by defendant to give eligible employees the benefit of purchasing company-owned vehicles at a discounted price. This program is in contrast to the typical sales marketing incentives offered by manufacturers, which are of limited duration and include rebate and other incentive offers to purchasers, that are the subject of the statute. Simply put, the PEP claims does not arise from "promotion events, programs, or activities," and therefore the statute is not applicable.²

Lastly, plaintiff argues that the trial court erred by limiting the scope of plaintiff's discovery. However, the discovery sought by plaintiff was not material to the trial court's summary disposition ruling, which resolved whether (1) plaintiff's 124 PEP sales were ineligible under PEP program rules; (2) whether the dealer agreement and incentive manual authorized defendant to charge back the PEP claims and suspend plaintiff from GM employee vehicle purchase programs; (3) whether defendant issued a timely management review; (4) whether the review was timely; and (5) whether the act mandated reversal of defendant's sanctions and dismissal of defendant's legal claims against plaintiff. Rather, plaintiff sought the discovery in an attempt to reveal what plaintiff believed was the true purpose of defendant's audit of plaintiff. However, the purpose of the audit is not relevant to the issues decided by the trial court. Because plaintiff has identified no genuine issue of material fact that may have been created had an order been issued compelling defendant to respond to certain discovery, the trial court's summary disposition rulings render the discovery motion moot.

On cross-appeal, defendant argues that the trial court did not have authority to clarify the mediation award. Defendant also argues that, even if the trial court had authority to clarify the award, the court erred in its determination that the mediation award covered not the entire case but, rather, only those claims not subject to the summary disposition ruling.

MCR 2.403, which governs mediation, does not provide for judicial clarification of a mediation award.³ Rather, where there is uncertainty regarding a mediation award, the trial court must direct the original mediation panel to reconvene and clarify its decision. See, e.g., *Bush v Mobil Oil Corp*, 223 Mich App 222, 228; 565 NW2d 921 (1997). Accordingly, trial court erred by clarifying the award.

Even if the trial court had authority to clarify the award, the trial court's finding that only the warranty claims were submitted to mediation is erroneous. In *Reddam v Consumer Mortgage Corp*, 182 Mich App 754, 757; 452 NW2d 908 (1990), the Court made it clear that the summary disposition

of a claim does not, in and of itself, remove that claim from the purview of the mediation panel. Rather, all claims of all parties are presumed to be evaluated by the mediation panel absent “a showing that less than all issues were submitted to mediation.” *Id.* At the time *Redding* was decided, a party could make this showing by obtaining a certification that the order granting summary disposition with regard to fewer than all claims was a final order pursuant to former MCR 2.604(A).⁴

As this Court noted in *Joan Automotive Industries Corp v Check*, 214 Mich App 383, 388; 543 NW2d 15 (1995), the trial court’s interpretation would ill comport with the purposes to be accomplished by the mediation court rule, which is “to expedite and simplify the final settlement of cases.” *Id.* “To allow the splitting of claims would, necessarily, delay and complicate the resolution of civil actions. Further, the acceptance of a mediation award would not result in the final settlement of a case, because claims that previously had been summarily disposed of would survive mediation.” *Id.* Thus, in *Joan* the Court held:

After reviewing the record, we find no evidence that defendant took the necessary steps to exclude any claim from the consideration of the mediation panel. In fairness, we would note that the trial court’s statements following the parties’ acceptance of the mediation award reflect a belief that only the claim under the Employee Right to Know Act had been mediation, and this belief is reflected in the final judgment entered. However, given both that defendant took no action to exclude the dismissed claim, as required by both *Reddam* and the relevant court rules, and that the lower court’s statement were made only after the parties had accepted the mediation award, this error on the part of the trial court is not sufficient to resurrect defendant’s claim from beyond the pale of mediation.

See also *Bush, supra*.

Hence, we conclude that the trial court erred by concluding that only the warranty claims that were not the subject of the summary disposition motions were submitted to mediation. There is no indication in the award that less than all claims were mediated, and it is undisputed that the parties’ mediation summaries included all of the claims. Under these circumstances, the trial court erred in clarifying the award to find that the PEP claims were not within the purview of the mediation award.⁵

Affirmed in part, reversed in part, and remanded. Jurisdiction is not retained.

/s/ Hilda R. Gage
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey

¹ Those claims not covered by the order of partial summary disposition were dismissed without prejudice.

² Plaintiff also argues that the trial court’s refusal to apply §§ 17(5) and (6) to the warranty claim was in error. This argument, however, is not before this Court due to the dismissal order.

³ The only exception to this rule is MCR 2.403(N)(2), which provides that “If a party’s claim or defense was found to be frivolous under subrule (K)(4), that party may request that the court review the panel’s finding”

⁴ MCR 2.604 has since been amended. The rule no longer provides for the certification of the summary disposition of fewer than all of a parties’ claims as a final order except in very limited circumstances.

⁵ The issue of mediation sanctions, if any, can be addressed in the trial court.