

STATE OF MICHIGAN
COURT OF APPEALS

CRAFT AGENCY, INC.,

Plaintiff/Counterdefendant-
Appellee,

v

DANIEL RICKARD,

Defendant/Counterplaintiff-
Appellant.

UNPUBLISHED

August 30, 2005

No. 250500

Jackson Circuit Court

LC No. 03-001445-CK

Before: Donofrio, P.J., and Markey and Fort Hood, JJ.

PER CURIAM.

Defendant appeals as of right from the trial court's order granting plaintiff's motion for summary disposition of defendant's counter complaint. We affirm in part and reverse in part.

This appeal arises from a dispute regarding payment of commissions.¹ In 1999, the parties began negotiations for defendant to develop plaintiff's existing employee benefits insurance business. On December 14, 1999, plaintiff sent a letter to defendant indicating that it had reviewed defendant's proposal for employment and would like for him to become part of the "family." The letter contained the following proposal regarding compensation:

We are agreeable to most items on your proposal, but will need clarification on some[.] You are welcome to utilize your home office and staff[,] etc. We would however, want all correspondence to be funneled through the Craft Agency, as well of course, all commissions. Our Accounting Department will reconcile all statements and be responsible for all payments. You would be paid weekly, but have commissions reconciled monthly.

¹ Plaintiff company filed this litigation seeking injunctive relief, contending that defendant was acting in violation of a covenant not to compete agreement. Following an evidentiary hearing, the trial court granted plaintiff's request for injunctive relief. The parties agreed to enter into a permanent injunction for a set period of time, and plaintiff's injunctive relief is not at issue on appeal.

We would propose a commission split of 50% new and 25% renewal for individual life long-term care, and long-term disability, and 50% new and renewal on group benefits. We would request that this be kept strictly confidential.

We would be willing to forward a draw of \$7,000 per month against commission for the initial six months.

Defendant began his employment with plaintiff. Defendant signed a covenant not to compete agreement and an acknowledgment that he was an at-will employee. During the course of employment, defendant sought to change his employment status and the rate of commissions. Defendant apparently was dissatisfied because of plaintiff's alleged failure to pay expenses in accordance with the original agreement. Despite any disagreement, defendant continued to promote plaintiff's insurance and allegedly reached an agreement that would net substantial commissions. Defendant alleged that plaintiff terminated his employment to avoid payment of the substantial commission he was entitled to based on his efforts. Consequently, in response to plaintiff's complaint for injunctive relief, defendant filed a counter complaint. Following a hearing on the propriety of summary disposition, the trial court granted plaintiff's motion for summary disposition of the counter complaint.

Defendant first alleges that the trial court erred in granting summary disposition of his claim for commissions based on the procuring cause doctrine. We agree. In *Reed v Kurdziel*, 352 Mich 287, 289; 89 NW2d 479 (1958), the plaintiff was a manufacturer's agent for thirty-eight years. He entered into an agreement with the defendants to sell "Mill Stars." The agreement provided that the plaintiff would receive a commission for the amount of Mill Stars sold over and above a certain basic price. Both parties admitted a contract, but a dispute arose regarding the terms of the contract. The plaintiff alleged that the terms of the contract provided that the customers were his exclusive customers for whom he would receive a commission on the original order, and all reorders from those customers. The defendants alleged that the plaintiff was to receive commissions only upon written orders. After a trial, a verdict was rendered in favor of plaintiff. The defendants appealed alleging that the verdict was against the great weight of the evidence, and it was error to hold them liable for commissions on subsequent sales to distributor accounts as well as for commissions after the agency relationship was terminated. *Id.* at 289-293. The *Reed* Court explained the procuring cause doctrine as follows:

An examination of the law with reference to commissions allowed agents or brokers seems to indicate that it is difficult to determine a set line of decisions, particularly with reference to the right of an agent with an exclusive agency to recover commissions on sales made where he is the procuring cause. However, when they are viewed as a whole and brought into proper focus, they disclose the law applicable to the question is well settled and that the seeming confusion results from the application of that law to the particular facts of the specific cases in question. 12 ALR2d 1360, 1363, states as follows:

"The relationship between agent or broker and principal being a contractual one, it is immediately apparent that whether an agent or broker employed to sell personalty on commission is entitled to commissions on sales made or consummated by his principal or by another agent depends upon the

intention of the parties and the interpretation of the contract of employment, and that, as in other cases involving interpretation, all the circumstances, must be considered. * * * This rule is recognized and stated in the American Law Institute, 2 Restatement, Agency, § 449, Comment a.”

It would appear that underlying all the decisions is the basic principle of fair dealing, preventing a principal from unfairly taking the benefit of the agent’s or broker’s services without compensation and imposing upon the principal, *regardless of the type of agency or contract*, liability to the agent or broker for commissions for sales upon which the agent or broker was the procuring cause, notwithstanding the sales made have been consummated by the principal himself or some other agent. In Michigan, as well as in most jurisdictions, the agent is entitled to recover his commission whether or not he has personally concluded and completed the sale, it being sufficient if his efforts were the procuring cause of the sale. In Michigan the rule goes further to provide if the authority of the agent has been cancelled by the principal, the agent would nevertheless be permitted to recover the commission if the agent was the procuring cause. [*Id.* at 293-295 (citations omitted, emphasis added).]

Applying the law to the facts, the *Reed* Court concluded that there was ample evidence from which the trial court could conclude that the oral agreement between the parties did not have a time limitation, and the plaintiff was to receive commissions on original sales as well as reorders. *Id.* at 295-296. Moreover, the *Reed* Court expressly noted that the defendants terminated the contract with the plaintiff of their own volition, and they had a legal right to end the contract. *Id.* at 297. Nonetheless, the right to end the contractual relationship with the plaintiff did not relieve the defendants of the obligation to pay commissions. *Id.* at 297-298.

In *Butterfield v Metal Flow Corp*, 185 Mich App 630, 631-633; 462 NW2d 815 (1990), the plaintiff was hired to be a manufacturer’s representative for the defendant company. The parties reached an agreement for representation that included a commission based on sales and a stock transfer. The plaintiff continued to represent other manufacturers during his employment with the defendant. After a three-year period, the plaintiff was terminated from his employment with the defendant. The continued representation of other companies was a reason cited for the termination. The plaintiff also was advised that the end of his employment resulted in the termination of his ownership stock interest. Although the plaintiff was awarded a verdict by a jury, he contested the jury’s failure to award him post termination sales commissions. This Court reiterated the *Reed* principles that the procuring cause doctrine applied regardless of the type of agency relationship. *Id.* at 636.

On appeal, the plaintiff did not succeed on his claim for post termination commissions, with this Court holding that the question of the terms of the contract were properly reserved for resolution by the trier of fact:

Defendant argues that plaintiff’s argument is without merit because the trial court adequately instructed the jury on plaintiff’s theory of recovery for posttermination sales commissions and the jury rejected plaintiff’s claim.

Defendant also argues that the principle set forth in *Reed* applies to a sales agent's procurement of sales, not customers.

Generally, when the terms of a contract are contested, the actual terms of the contract are to be determined by the jury even when the evidence of the contract terms is uncontradicted. *Guilmet v Campbell*, 385 Mich 57, 69; 188 NW2d 601 (1971). This Court will not set aside a jury's verdict if there is competent evidence to support the jury's findings. *Hodgins v the Times Herald Co*, 169 Mich App 245, 257-258; 425 NW2d 522 (1988), lv den 432 Mich 895 (1989).

The trial court gave both initial and supplemental instructions setting forth plaintiff's theory of recovery for posttermination sales commissions and adequately instructed the jury concerning plaintiff's theory of recovery.

Brown testified that defendant's agreement with plaintiff called for a three percent sales commission to be paid for all sales on defendant's accounts procured by plaintiff. However, he also maintained that that agreement was to govern while plaintiff remained as a manufacturer's representative for defendant. Accordingly, there is competent evidence to support the jury's finding that plaintiff is not entitled to posttermination sales commissions. There is also competent evidence contained in the record from which the jury could have inferred that plaintiff committed the first substantial breach of the contract and that defendant was therefore not required to perform under the contract. [*Id.* at 636-637.]

In the present case, plaintiff alleges that defendant received a salary and was an at-will employee. Consequently, because he was not a commissioned independent sales representative, summary disposition was appropriate in its favor. However, in deposition testimony, plaintiff's representative acknowledged that defendant received a draw against commissions. While plaintiff submitted copies of defendant's W-2 forms to support the salary claim, the salary earned varied, presumably with the amount of commission earned in any given year. We note that plaintiff's characterization or exercise in semantics regarding the payment of wages versus commissions and the at-will employment status of defendant does not entitle plaintiff to summary disposition. The case law that has evolved expressly concluded that the characterization of the agency relationship was not dispositive. *Reed, supra*; *Butterfield, supra*. Moreover, the case law acknowledged that employment relationships may be terminated at will. *Reed, supra*. Simply put, the nature of the relationship does not allow the principal to deprive the agent of what has been earned.² *Id.*

² Plaintiff also alleges that summary disposition is appropriate based on *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 530; 473 NW2d 652 (1991), wherein the Supreme Court stated, "The right to renewal commissions depends on the contract between the agent and the insurance company. Unless otherwise provided by contract, renewal commissions or future commissions do not rest upon the sale of the original policy." (Citations omitted.) However, in the present case,
(continued...)

Defendant next alleges that the trial court erred in dismissing his claim based on the sales representative commissions act, MCL 600.2961. We disagree. This act “does not apply to commissions generated from the sale of insurance policies.” *Klapp v United Ins Group Agency, Inc (On Remand)*, 259 Mich App 467, 474; 674 NW2d 736 (2003); see also *Mahnick v Bell Co*, 256 Mich App 154, 162-163; 662 NW2d 830 (2003) (“Services do not constitute goods or products within the meaning of the SRCA.”).

Defendant next alleges that the trial court erred in dismissing his fraud claim. We agree. With regard to the fraud claim, the counter complaint raised the following allegations:

29. As a result of unilateral changes in the terms of Counter-Plaintiff’s employment and expense reimbursement arrangement initiated by Counter-Defendant, in and about July of 2002, Counter-Plaintiff attempted to negotiate with principals of Counter-Defendant in order to reestablish those rights unilaterally revoked by Counter-Defendant.

30. Contemporaneous with Counter-Plaintiff’s discussions with principals of Counter-Defendant, Counter-Plaintiff continued to expend his entire efforts in advancement of the employee benefits insurance business of Counter-Defendant.

31. Between September 2002 and January 2003, in particular, Counter-Plaintiff expended all of his efforts to retain the employee benefits insurance business of one of Counter-Defendant’s largest clients, Sparton Corporation.

32. Solely as a result of the efforts of Counter-Plaintiff, Sparton Corporation signed contracts for employee benefits coverage which will generate commissions in 2003 for amounts in excess of \$260,000.

33. Counter-Defendant was well aware of the efforts which would have to be expended by Counter-Plaintiff in obtaining the business of Sparton Corporation for 2003.

34. Counter-Defendant was well aware that Counter-Plaintiff was expending all his time and effort procuring business in reliance on the fact that he would be receiving the agreed upon 50% of commissions paid.

35. Since as early as July/August of 2002, principals had decided that they had no intention of retaining the services [of] the Counter-Plaintiff after Sparton Corporation executed its insurance contracts and, further, had no intentions of

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defendant presented evidence of a letter documenting the manner of computation of commissions to be issued for both initial policies and renewal policies. This document did not provide the duration or any limitation on the time frame for payment and whether termination would have any bearing on the commissions. Accordingly, plaintiff’s request for summary disposition on this basis is without merit. However, as stated in *Butterfield, supra*, the intention of the parties is to be determined by the trier of fact. Therefore, defendant’s request for summary disposition is also inappropriate. *Reed, supra; Butterfield, supra*.

paying commissions to Counter-Plaintiff which would become due upon payment of premiums.

36. Counter-Defendant knew or should have known through the exercise of reasonable care that Counter-Plaintiff would rely on Counter-Defendants ongoing promise to pay him 50% of all commissions generated through his efforts in developing employee benefits insurance business.

In *Eerdmans v Maki*, 226 Mich App 360, 366; 573 NW2d 329 (1997), this Court set forth the elements of a fraud claim and the general rule that fraud does not apply to future promises:

To establish a cause of action for fraud or misrepresentation, a plaintiff must prove (1) that the defendant made a material representation, (2) that the representation was false, (3) that when the defendant made the representation, the defendant knew that it was false or made it recklessly without knowledge of its truth or falsity, (4) that the defendant made it with the intent that the plaintiff would act on it, (5) that the plaintiff acted in reliance on it, and (6) that the plaintiff suffered injury. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 208; 544 NW2d 727 (1996). An action for fraudulent misrepresentation must be predicated on a statement relating to a past or an existing fact. *Id.* at 208-209. Future promises are contractual and cannot constitute actionable fraud. *Id.*

Although the general rule provides that future events involving fraud are not actionable, an unfulfilled promise to perform in the future is actionable where there is evidence that it was made with a present undisclosed intent not to perform. *Foreman v Foreman*, 266 Mich App 132, 143; ___ NW2d ___ (2005), citing *Rutan v Straehly*, 289 Mich 341, 348-349; 286 NW 639 (1930). Additionally, liability for fraud may be predicated on statements that relate to future events when the statements were intended to be and accepted as representations of fact which involved matters peculiarly within the knowledge of the speaker. *Foreman, supra* quoting *Crook v Ford*, 249 Mich 500, 504-505; 229 NW 587 (1930).

Plaintiff's motion for summary disposition was premised on MCR 2.116(C)(8). We are only required to examine the allegations, accept them as true in favor of the nonmoving party, determine if they state a claim as a matter of law, and allow amendment if there is a deficiency in the pleadings. MCR 2.116(C)(8); MCR 2.116(G)(5); MCR 2.116(I)(5); *Adair, supra*. Review of the allegations contained in the counter complaint reveal that defendant stated a cause of action based on fraud. Although the payment of commissions based on the sale of insurance would occur in the future, defendant alleged that plaintiff made promises with a present intention not to perform in the future. *Foreman, supra*. Accordingly, the trial court erred in granting summary disposition on the basis of MCR 2.116(C)(8).

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

/s/ Pat M. Donofrio
/s/ Jane E. Markey
/s/ Karen M. Fort Hood