

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

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WILLIAM WHITE,

Plaintiff/Counter-  
Defendant/Appellant,

v

S2 YACHTS INC.,

Defendant/Counter-  
Plaintiff/Appellee.

UNPUBLISHED  
May 10, 2012

No. 304117  
Ottawa Circuit Court  
LC No. 2010-001842-CK

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Before: METER, P.J., and SERVITTO and STEPHENS, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's orders granting summary disposition in defendant's favor and awarding defendant \$38,867.29 in fees and costs. Because there is no question of fact that plaintiff did not earn a commission until a boat was sold by a dealer to a retail customer, we affirm the trial court's summary disposition order. We also affirm the trial court's award of attorney fees and costs, but remand to the trial court to determine which work included in defendant's requested attorney fees was actually performed on defendant's counterclaim and then deduct that portion of the award of attorney fees and costs associated with such work from the total fee award.

Plaintiff was employed as a sales representative for defendant, a boat manufacturer, from 1997 to 2009. Plaintiff's essential job function during that time was to sell boats to dealers, who in turn sold them to retail customers. Plaintiff was paid a base salary and a commission based upon the amount the dealers paid defendant for the boats they had purchased. The amount of plaintiff's base salary and commission rate, as well as the timeframe in which the commission was paid were modified over the years. The dispute giving rise to the instant lawsuit concerns the commission structure that was in place when plaintiff was permanently laid off due to a reduction in work force in February 2009. According to plaintiff, he had sold at least 15 boats to a dealer prior to his termination and was thus owed commissions for the same. He therefore filed the instant action for unpaid sales commissions.

Defendant claimed that under the structure then in place, plaintiff did not "earn" any commission until the boats he sold to the dealer were sold by the dealer to a retail customer. Defendant filed a motion for summary disposition, asserting that there was no question of fact

that plaintiff was not entitled to the claimed commissions because while he had sold the boats in question to the dealer, the boats were not sold to a retail customer prior to plaintiff's termination. According to defendant, then, plaintiff had not earned the disputed commissions. The trial court agreed, granting summary disposition in defendant's favor. Defendant then moved for costs and fees, which the trial court awarded in defendant's favor and against plaintiff in an amount totaling \$38,867.29 (\$37,952.39 in fees plus \$914.90 in costs). Plaintiff now appeals both the summary disposition order as well as the award of fees and costs.

On appeal, a trial court's decision on a motion for summary disposition is reviewed *de novo*. *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008). A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). In reviewing a motion under subrule (C)(10), we consider the pleadings, affidavits, depositions, admissions and other evidence submitted by the parties in a light most favorable to the nonmoving party. *Walsh v Taylor*, 263 Mich App 618, 621; 689 NW2d 506 (2004). Summary disposition under subrule (C)(10) is only appropriate "if the affidavits or other documentary evidence demonstrate that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Miller v Purcell*, 246 Mich App 244, 246; 631 NW2d 760 (2001).

On appeal, plaintiff first contends that the trial court erred in holding that he had not earned his commission until the boats he sold to the dealers were sold by the dealers to a retail customer. We disagree.

Both parties agree that their relationship is governed by the Sales Representative Commissions Act (SRCA). According to the SRCA, "[a]ll commissions that are due at the time of termination of a contract between a sales representative and principal shall be paid within 45 days after the date of termination. Commissions that become due after the termination date shall be paid within 45 days after the date on which the commission became due." MCL 600.2961(4). The SRCA does not determine when commissions become due. Instead, according to the SRCA:

(2) The terms of the contract between the principal and sales representative shall determine when a commission becomes due.

(3) If the time when the commission is due cannot be determined by a contract between the principal and sales representative, the past practices between the parties shall control or, if there are no past practices, the custom and usage prevalent in this state for the business that is the subject of the relationship between the parties. MCL 600.2961.

Plaintiff contends that the critical issue in this matter is not when the commissions became *due*, which he agrees is when the boat was sold by the dealer to a retail customer, but when they were earned by him—which he contends is an entirely different date.

"Commission" is defined in the SRCA as "compensation accruing to a sales representative for payment by a principal . . ." MCL 600.2961(1)(a). The term "accrue" is not defined in the statute. We may therefore examine dictionary definitions to determine the meaning of the term. *People v Rutledge*, 250 Mich App 1, 6; 645 NW2d 333 (2002). Black's

Law Dictionary (7<sup>th</sup> ed.) defines the term “accrue” as “to come into existence as an enforceable claim or right; to arise.” In context, then, a commission under the SRCA is compensation that comes into existence as an enforceable claim or right. According to plaintiff, his commission came into existence and was thus “earned” when he sold a boat to a dealer. At the very least, plaintiff asserts that he presented evidence to raise material questions of fact sufficient to preclude summary disposition on this issue.

In support of his position, plaintiff directs us to the declarations of defendant’s representatives, Nick Bischoff and Steve Busch. Both men agreed that the commission amount represented a percentage of the dealer invoice. Both men also attested, however, that the commission was paid only if and when the boat sold to a retail customer, and that no commission was entered in the company books until the boat is sold to a retail customer. The statements indicate that there is no distinction between when the commission is earned and when it becomes due. Plaintiff, in fact, admitted at his deposition that he was never advised, in writing or verbally that the time he earned his commission differed from the time the commission became due:

Q: I’m focusing on the term earned. Did you get anything in writing which said that the commission was earned as of the date it was – as of when it was sold to the dealer as opposed to when it was sold to the retail customer?

A: I don’t ever remember the word earned being in any of that.

Q: Did anyone tell you that a commission was earned as of when the boat was sold to the dealer as opposed to when it was sold to the retail customer?

A: I don’t remember anybody telling me that.

Q: And you don’t remember seeing that in writing?

A: I don’t.

A review of the submitted evidence supports the trial court’s conclusion that the parties’ past practice was that a commission was earned when the retail sale of a boat occurred. For example, an August 6, 2007, memo sent from Nick Bischoff to plaintiff (among others) states, “I think this is an industry first where a salesman’s commission plan is based entirely on retail sales results and I think it speaks volumes to the retail priority . . .” The document then goes on to relate the 2008 model year commission percentage.

Reviewing a November 6, 2006, memo addressed to plaintiff and others from Nick Bischoff, plaintiff was asked at deposition:

Q: Did you understand that the purpose of the revised compensation program was to promote retail sales?

A: Yes.

Q: Did you understand that one of your duties going forward was to get the boats sold to retail customers as opposed to just getting them placed with dealers?

A: Correct. We knew that all along, because if they didn't sell the boat, we wouldn't get the next order.

Q: But now your commission is being tied to retail sale, correct?

A: That's correct.

Q: And you understood from that in terms of getting your commission, it wasn't enough to get a boat placed with a dealer, it also had to get sold to the retail customer?

A: The dealer had to sell the boat, correct.

Q: And if that didn't happen, you wouldn't get a commission?

A: Correct.

Q: Did you understand that for purposes of earning any percentage of sales compensation, it was not enough for you to place a boat with a dealer?

A: I realize that the boat had to be sold at retail before we got a commission, yes.

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Q: [W]ith respect to . . . the 2008 model year commission plan, did you understand that the percentage of sales component would not be paid unless or until a boat was actually sold to a retail customer?

A: Yes.

Q: And did you understand that if a boat was placed with a dealer but never sold to a retail customer, you'd never get a commission on that boat?

A: Correct.

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Q: And did you understand that no commission would be owing to you unless or until the boat actually sold to a retail customer?

A: Yes.

Plaintiff also admitted at his deposition that if he sold a boat to dealer but the boat were never sold at retail, theoretically languishing forever at the dealer's place of business, he would never be entitled to a commission on the boat.

Where plaintiff acknowledges that no commission would be owed until a retail sale was made, and if no retail sale was made than no commission would be owed to him, then clearly no commission would be earned until a retail sale was made. The retail sale was thus the triggering factor for the actual earning of a commission. Recalling that a commission under the SRCA is compensation that comes into existence as an enforceable claim or right, plaintiff's acknowledgement that he would not get a commission if the boat were not sold to a retail customer is an acknowledgment that his compensation would not come into existence as an enforceable claim or right until the boat was sold at retail.

It is clear from the evidence submitted that the past practices of the parties were that a commission was earned and thus owed by defendant when a boat was sold by the dealer to a retail customer. Plaintiff has submitted no evidence to suggest otherwise and has, in fact, essentially admitted his understanding that the lack of a sale to a retail customer would equate with no commission. The trial court did not err in granting summary disposition in defendant's favor.<sup>1</sup>

Plaintiff next contends that the amount of attorney fees the trial court awarded to defendant was excessive. A trial court's ruling on attorney fees is reviewed for an abuse of discretion. *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008). An abuse of discretion occurs when the result is outside the range of reasonable and principled outcomes. *Woodington v Shokoohi*, 288 Mich App 352, 355; 792 NW2d 63 (2010).

The prevailing party in a SRCA action is entitled to an award of reasonable attorney fees and court costs. MCL 600.2961. To determine the reasonableness of attorney fees, our Supreme Court has directed that a court consider the following non-exhaustive list of factors: "(1) the professional standing and experience of the attorney; (2) the skill, time and labor involved; (3) the amount in question and the results achieved; (4) the difficulty of the case; (5) the expenses incurred; and (6) the nature and length of the professional relationship with the client." *Wood v Detroit Auto Inter-Insurance Exchange*, 413 Mich 573, 588; 321 NW2d 653 (1982). The trial court need not, however, detail its findings as to each specific factor considered. *Id.*

Here, the trial court held a hearing on defendant's motion for costs and attorney fees. Plaintiff was apparently unable to attend the motion hearing, but did not request an adjournment. Instead, defense counsel read an e-mail he had received from plaintiff's counsel into the record wherein plaintiff reiterated the position set forth in his written response ("I also believe [the judge] has to consider each entry on your billings to determine what are reasonable. Some appear to be unit billing, if not most."). At the motion hearing, defense counsel detailed his billing method and referenced the bills provided to the trial court. The trial court indicated that it had reviewed the timesheets and found the amount charged and hourly rate reasonable. The trial court stated that it had taken into account the nature of the litigation, the experience of counsel,

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<sup>1</sup> Plaintiff's supplemental authority, *KBD & Associates, Inc., v Great Lakes Foam Technologies, Inc.*, \_\_\_ Mich App \_\_; \_\_ NW2d \_\_ (2012)(detailing the procuring cause doctrine), leads to no different result, given that the parties' past practices clearly dictate that the commission was earned and due only when a boat was sold to a retail customer. MCL 600.2961.

the prevailing rates in the area and the outcome in the case, and granted defendant's requested fees and costs. While plaintiff contends that the trial court did not adequately consider the *Wood* factors in determining the reasonableness of the requested fees, the only fees that plaintiff specifically challenges as excessive or unreasonable are those that he claims may have been incurred on defendant's breach of contract counterclaim. Otherwise, plaintiff has identified no specific item on the timesheet that he feels was unnecessarily performed work, or represented an overcharge. Nor does he challenge the hourly rate charged by defendant. Defendant made several arguments with respect to the billings submitted to the court and the trial court's statements on the record, while not specific, were sufficient.

As to plaintiff's argument that the award was excessive because it included work performed on defendant's counterclaim, we agree.

In its counterclaim, defendant asserted that at the time of his separation with the company, plaintiff entered into an agreement with defendant regarding boats that were purchased by customers after plaintiff's date of separation. Defendant alleged that under the terms of the agreement, plaintiff was to identify the boats as to which he was seeking compensation and he was to be paid certain compensation with respect to any such boats that were purchased by a retail customer prior to the end of March, 2010. Defendant further alleged that despite this agreement, plaintiff initiated the instant lawsuit, seeking additional compensation for other boats. According to defendant, plaintiff thus breached the parties' contract. This counterclaim was separate and distinct from the claim and response under the SRCA. The award of attorney fees under the SRCA should thus not encompass any work performed on this claim.

In *Peters v Gunnell, Inc*, 253 Mich App 211, 224-225; 655 NW2d 582 (2002), it was made clear that the disposition of any counter complaint has no bearing on a plaintiff's entitlement to attorney fees and costs under the SRCA. In that case, a sales representative (the plaintiff) brought an action for unpaid commissions under the SRCA against his former employer (the defendant). The defendant countersued for the value of product samples ("show equipment") it had allegedly loaned to the plaintiff for demonstration purposes that the plaintiff had failed to return. The matter proceeded to trial, where the plaintiff was awarded unpaid commissions and the defendant was awarded \$1,000.00 in connection with its counterclaim for missing show equipment. The plaintiff thereafter moved for costs and attorney fees, which the trial court granted. The award of attorney fees and costs to plaintiff was contested on appeal. A panel of this Court found the award to be proper, stating:

In regard to defendant's argument that the award of attorney fees was improper because defendant received a judgment on its countercomplaint, the SRCA makes no mention of countercomplaints. Rather, the subsection involving attorney fees and costs refers only to complaints brought by a sales representative under the act and responses to such complaints. MCL 600.2961(6). A response to a complaint relates directly to a plaintiff's cause of action, whereas a countercomplaint involves allegations wholly separate from the original plaintiff's action. Because the attorney fees provision of the SRCA relates only to prevailing parties on original causes of action under the SRCA and responses to those actions, we conclude that the disposition of defendant's countercomplaint has no bearing on plaintiff's entitlement to attorney fees and costs under the SRCA. *Id.*

According to *Peters*, then, a complaint under the SRCA (and a response to the same) is treated as separate and distinct from any other complaint for purposes of awarding attorney fees and costs. As such, it would be inappropriate to award defendant attorney fees and costs incurred in pursuing or defending against any action other than one sounding in the SRCA.

A review of the attorney fees submitted to the trial court reveals that certain charges related to the drafting, discussion concerning, and revision of defendant's counter-claim were included in the attorney fees awarded by the trial court. They are, unfortunately, not listed as a separate charge, such that this Court cannot discern exactly how many hours were devoted to the counterclaim as opposed to the SRCA claim. As a result, remand is necessary to the trial court for a determination as to which work included in defendant's requested attorney fees was actually performed on defendant's counterclaim. The trial court must then deduct that portion of the award of attorney fees and costs associated with such work from the total fee award.

Remanded to the trial court to determine which work included in defendant's requested attorney fees was actually performed on defendant's counterclaim and then deduct that portion of the award of attorney fees and costs associated with such work from the total fee award, affirmed in all other respects. We do not retain jurisdiction.

/s/ Patrick M. Meter

/s/ Deborah A. Servitto

/s/ Cynthia Diane Stephens