

STATE OF MICHIGAN
COURT OF APPEALS

GERARD THOMAS COMPANY, INC.,

Plaintiff-Appellee,

V

TODD SWANSON,

Defendant-Appellant.

UNPUBLISHED

October 30, 2001

No. 226163

Oakland Circuit Court

LC No. 99-019431-CK

Before: Holbrook, Jr., P.J., and Cavanagh and Gribbs*, JJ.

PER CURIAM.

Defendant appeals as of right from a summary disposition granted in favor of plaintiff under MCR 2.116(C)(10) and a judgment of \$47,528.10. Defendant requests this Court to set aside the judgment and remand with the direction to enter summary disposition in defendant's favor. We affirm.

Defendant was a sales representative in plaintiff's employ. He received a base salary but was also eligible to participate in a "bonus plan," under which he received one percent of orders received and paid during the calendar year. Defendant had received half of his annual bonus as quarterly "prepayments" and was sued by plaintiff when he refused to return the money after resigning before the end of the year. Defendant asserts that the bonus plan contract forced him to waive his right to payment of earnings if he resigned before the annual payment was made, and that its terms thus violated MCL 600.2961.

The critical subsections of the statute read as follows:

(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.

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

(4) All 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.

* * *

(8) A provision in a contract between a principal and a sales representative purporting to waive any right under this section is void.

(9) This section does not affect the rights of a principal or sales representative that are otherwise provided by law. [MCL 600.2961.]

The contract included the requirement that “[t]o be eligible for a bonus, ... [t]he employee must be employed by the company as of the date, [sic] and time the final payment is made for each calendar year.” This requirement was reiterated in several places in the contract. Under the “Payment” section, for example, the contract read, “... quarterly payments will be made in advance though not yet earned”; under “Repayment,” it said, “... the bonus is only earned on an annual basis but paid out in advance on a quarterly basis”; and under “Over-Riding Qualification,” the contract noted again, “The bonus is not earned or payable unless the employee is in the employ of GTC at the time the final payment is made for the involved year.”

The contract was equally clear about how the timing of the payments was determined.

Each quarterly payment will be made after GTC has received the commissions due with respect to the involved quarter. The actual payment will be made after all appropriate financial paperwork has been completed, and the financial calculations, and adjustments for each quarter finalized. The date of each payment is totally as the discretion of the company.

At the end of each calendar year, a final payment will be determined, and made in order to achieve a payout of 100% of the bonus. The payment will be made as soon as feasible after the close of the year. However, the payment is totally dependent upon: GTC’s clients supplying the involved paperwork in an expeditious fashion; the internal workload to apply such information to make the necessary financial calculations, and the actual receipt of the commissions by GTC. As such, the date of the final payment cannot be fixed, and, in any event, is at the total discretion of the company.

Finally, the contract included a section entitled, “Absolute Right to Modify or Terminate,” that read, “GTC retains the right to modify, adjust, or discontinue this bonus plan at its sole, and exclusive discretion, and without recourse by the employees at any point of time.”

We find that the contract did not violate the statute because defendant had no right to the bonus money prepaid to him by plaintiff. Defendant’s participation in the bonus plan was not mandatory; by choosing to participate, defendant agreed to the terms and conditions the contract imposed.

We distinguish the present case from *Walters v Bloomfield Hills Furniture*, 228 Mich App 160; 577 NW2d 206 (1998), cited by defendant in support of his argument. The salesman in *Walters* began his employment under one set of terms; when his employer subsequently changed those terms, the salesman was in no position to choose whether or not to accept the new terms. In the present, when defendant signed the bonus agreement contract, he agreed to meet certain conditions in order to be eligible to receive a bonus. When he resigned before the end of the year, he failed to meet one of those conditions and forfeited his right to any of the bonus, including the money advanced to him in quarterly payments. See *Gravelly v Pfizer, Inc*, 170 Mich App 262; 427 NW2d 613 (1988).

Finally, defendant argues that the contract permitted plaintiff total discretion in the timing of the annual payment, thus making defendant's right to receive payment illusory and violating MCL 600.2961. This issue was not raised in the pleadings and was only raised in the trial court during the argument presented at the hearing; it is therefore not preserved on appeal. *Fast Air, Inc v Knight*, 235 Mich App 541, 549; 599 NW2d 489 (1999). Regardless, this issue has no merit. Although the specific date payment is to be paid cannot be determined from the terms of the contract, MCL 600.2961(3) provides that in such circumstances, past practices of the parties or custom and usage in the state may be used to determine the timing. Nothing in the record indicates that plaintiff ever did anything but pay reasonably soon after the end of the year. The literal terms of the contract may permit plaintiff to pay at any time, but defendant made no allegations that the time of payment could not be determined.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Roman S. Gribbs