

STATE OF MICHIGAN  
COURT OF APPEALS

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ROYER CONSULTING GROUP, INC., f/k/a  
ANM INTERNATIONAL, INC.,

Plaintiff-Appellant,

v

RC COMPANY,

Defendant-Appellee.

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UNPUBLISHED  
April 4, 2006

No. 257620  
Oakland Circuit Court  
LC No. 2003-052029-CK

Before: Schuette, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Plaintiff appeals as of right from a circuit court order granting plaintiff's motion for summary disposition. The circuit court's order directed defendant to pay plaintiff \$3,335.25 "in full satisfaction of [defendant's] obligations" under the parties' Licensing Agreement, but also ordered plaintiff to pay defendant "\$8,330.80 in full satisfaction of [plaintiff's own] obligations under the Agreement." We reverse.

I. FACTS

The parties entered into a Licensing Agreement whereby plaintiff granted defendant the exclusive license to manufacture and distribute a product designed by plaintiff (described below as a Holiday Tree Pole Hook, a device used to hang overhead holiday lights) in exchange for royalties on the sale of the product. The agreement did not specify a definite term, but included a schedule of royalty payments and required guaranteed minimum royalty payments of \$2,500 a year, with a cap of \$120,000 over the term of the agreement. The agreement contained a clause allowing acceleration of the \$120,000 total royalty amount under specified circumstances, and also included a clause allowing defendant to terminate the agreement on 60 days written notice. In the event of termination, paragraph 7 of the agreement provided that "Licensor shall to [sic] purchase all current inventory of the Licensed Product at Licensee's cost."

At some point, plaintiff claimed that defendant was in default and brought this action seeking acceleration of the total royalty amount. Defendant subsequently gave written notice of its termination of the agreement. Plaintiff moved for summary disposition. The trial court found that the agreement was ambiguous, but then concluded that the acceleration clause did not apply because defendant had exercised its right to terminate the agreement. The court awarded plaintiff \$3,335.25, the amount of royalties it determined were owed to plaintiff, but also

concluded that plaintiff was independently liable to defendant under paragraph 7 of the agreement, which it found obligated plaintiff to purchase defendant's inventory upon defendant's termination of the agreement. Accordingly, the court directed plaintiff to pay defendant \$8,330.80 in satisfaction of plaintiff's liability under paragraph 7.

## II. STANDARD OF REVIEW

This Court reviews the trial court's grant or denial of summary disposition *de novo*. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) provides for summary disposition when, "except as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." In deciding a motion under this subrule, the trial court considers any pleadings, affidavits, depositions, admissions, or other documentary evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of fact exists. MCR 2.116(G)(2); *Ritchie-Gamester v City of Berkley*, 461 Mich 73, 76; 597 NW2d 517 (1999). "Issues of contract interpretation are questions of law," which are also reviewed *de novo*. *46th Circuit Trial Court v Crawford Co*, 266 Mich App 150, 159; 702 NW2d 588 (2005).

## III. ACCELERATION OF ROYALTY PAYMENTS

Plaintiff first challenges the trial court's refusal to accelerate the total royalty amount in accordance with paragraph 3 of the parties' agreement. We find that a factual issue remains as to whether defendant breached the contract.

The dispute that defendant claims exists was for the remaining payments that were due at the end of June, 2003. This is, of course, the last payment that plaintiff claims was not timely made, thus invoking the acceleration clause. Defendant submitted documentary evidence in support of its assertion that there was a dispute as to how much it owed because of setoffs that defendant was claiming relative to inventory that it held. In light of the different documents submitted to the trial court, some of which appear to show plaintiff's agreement with allowing setoffs, there appears to be at this stage of the proceedings a legitimate dispute as to the amounts that were owed. Further discovery should shed some light on the issue.

In order to provide clarity on remand, we note that if the trial court determines that defendant breached the contract, then the acceleration clause is triggered. However, conversely, if the trial court determines that defendant did not breach the contract, then, by the terms of the contract, defendant may terminate the contract and the acceleration clause would not be triggered.

## IV. SET-OFF FOR DEFENDANT

Plaintiff also challenges the trial court's award to defendant of \$8,330.80. Defendant never filed a counterclaim or raised an affirmative defense of setoff, thus, we agree that the trial court's affirmative award of relief to defendant was improper. Although MCL 2.116(I)(2) provides that a trial court, when considering a motion for summary disposition, may enter judgment in favor of the opposing party if it appears to the court that the opposing party is entitled to judgment, that rule does not authorize affirmative relief on an unpleaded claim. Here,

defendant never filed a counterclaim requesting affirmative relief for plaintiff's alleged independent breach of paragraph 7 of the parties' agreement.

As explained in 20 Am Jur 2d, Counterclaim, Recoupment, etc, § 1, pp 261-262, “[a] counterclaim represents the defendant's right to have the claims of the parties counterbalanced, in whole or in part, and to have judgment entered for any excess”; [a] counterclaim does not seek to defeat the plaintiff's claim as a cause of action but is, instead, an independent affirmative claim for relief. MCR 2.110(C)(10) provides that a counterclaim must be clearly designated as such. Thus, to the extent that defendant believed it was entitled to affirmative relief because plaintiff was liable to it for termination damages under paragraph 7, defendant was required to file a counterclaim requesting that relief.

Similarly, to the extent defendant could raise plaintiff's alleged termination liability under paragraph 7 to offset defendant's liability for royalties under paragraph 3, defendant was required to raise the defense of setoff as an affirmative defense. “An affirmative defense is a defense that does not controvert the plaintiff's establishing a prima facie case, but that otherwise denies relief to the plaintiff.” *Cole v Ladbroke Racing Michigan, Inc*, 241 Mich App 1, 9; 614 NW2d 169 (2000). Setoff, by applying one party's debt against the debt of the other, may be an appropriate remedy when two parties owe money to each other. *Walker v Farmers Ins Exch*, 226 Mich App 75, 79; 572 NW2d 17 (1997). See also 20 Am Jur 2d, Counterclaim, Recoupment, etc, § 6, p 270 (a setoff differs from a counterclaim in that a “setoff may be used to offset a plaintiff's claim, [but] it may not . . . be used to recover affirmatively[;] [a] setoff is a reduction from an amount otherwise owed and cannot result in a net recovery in favor of the party asserting the defense of setoff”). “A defense not asserted in the responsive pleading or by motion as provided by [the court rules] is waived.” MCR 2.111(F)(2).

Accordingly, because defendant never filed a counterclaim for damages under paragraph 7 and did not timely or properly raise the affirmative defense of setoff, it was not entitled to an award of affirmative relief. We therefore reverse the portion of the trial court's order awarding defendant damages of \$8,330.80.

Reversed and remanded for proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Bill Schuette  
/s/ Christopher M. Murray  
/s/ Pat M. Donofrio