

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

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ACTIVE MARKETING, INC.,

Plaintiff-Appellant,

v

SKF USA, INC.,

Defendant-Appellee.

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UNPUBLISHED

December 29, 2005

No. 255663

Wayne Circuit Court

LC No. 03-305031-CK

Before: Owens, P.J., and Saad and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting summary disposition to defendant. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case involves a question of entitlement to payment of post-termination commissions. Plaintiff and defendant had a long-term relationship where defendant hired plaintiff to be a sales agent for defendant to sell automotive after-market parts. Plaintiff received a flat-rate commission from defendant for all of its sales. Their relationship was based on a verbal contract. The parties never discussed entitlement to post-termination commissions

In correspondence dated December 13, 2002, defendant notified plaintiff that it was terminating the sales representation relationship effective December 31, 2002. The notice also told plaintiff to stop all activities for defendant at the end of December 2002 and stated that defendant would continue to pay plaintiff's commissions through the end of February 2003.

In February 2003, plaintiff filed a complaint, claiming that it was entitled to additional post-termination commissions on all reorders of sales it originally made for defendant. Defendant filed a motion for summary disposition, arguing that plaintiff had not met its evidentiary burden to create a genuine issue of material fact, plaintiff was not the sole procuring cause of the reorders, and there had been an accord and satisfaction when plaintiff received the notice of termination and accepted the post-termination commission payments through February 2003. The trial court granted the defense motion.

A trial court's grant of summary disposition under MCR 2.116(C)(10) is reviewed de novo by this Court. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). A motion for summary disposition under MCR 2.116(C)(10) requires that the moving party specifically

identify the issues which it believes contain no genuine issue as to any material fact. *Maiden, supra*, 120. Once that is done, the non-moving party must then “set forth specific facts at the time of the motion showing a genuine issue for trial.” *Id.*; MCR 2.116(G)(4). Courts are to consider substantively admissible evidence that was actually provided in opposition to the motion. *Maiden, supra*, 121. “A reviewing court may not employ a standard citing the mere possibility that the claim might be supported by evidence produced at trial. A mere promise is insufficient under our court rules.” *Id.*

The basic principle underlying the procurement cause doctrine is that of fair dealing to prevent a “principal from unfairly taking the benefit of the agents or broker’s services without compensation. . . .” *Reed v Kurdziel*, 352 Mich 287, 294; 89 NW2d 479 (1958). An “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.” *Id.* Michigan also extends the rule so that “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.*, 295.

When applying Michigan law, a federal district court stated as follows:

If subsequent purchase orders are submitted by a customer which involve no additional servicing or negotiation, then the salesman securing the original account may well be entitled to commissions on those sales. Of course, in the usual case each subsequent order will require some further customer services and under those circumstances the agent securing the previous order will have no claim for additional commissions. It is a question of fact for the jury whether subsequent purchases were effectuated by additional customer services or were made solely on the force of the original representations. [*Roberts Assoc, Inc v Blazer Int’l Corp (On Reconsideration)*, 741 F Supp 650, 655 (ED Mich 1990).]

Defendant relies on the deposition of plaintiff’s president, Mr. Imonen, to show that follow-up services or “further customer services” are required to continue receiving reorders. Mr. Imonen stated in his deposition that probably 25% of his time was devoted to looking for new customers and 75% of his time, “give or take,” was spent with existing customers. Mr. Imonen also testified that plaintiff’s sales people could influence reorders by visiting the clients and walking their shelves looking at the inventory and pointing out what was low. He also noted that time spent with the existing clients was divided between showing new products, suggesting changes in inventory and how to increase sales, as well as socializing to keep up face time with the clients.

Based on the rules governing motions for summary disposition under MCR 2.116(C)(10) and MCR 2.116(G)(4), defendant provided the deposition of Mr. Imonen and specifically identified the issue that follow-up service influences reorders by the clients, and it is undisputed that plaintiff is no longer providing such follow-up service. The burden then shifted to plaintiff to show with specificity the existence of a genuine issue of material fact on that issue. *Maiden, supra*, 120; MCR 2.116(G)(4).

Plaintiff relied on statements from the same deposition to support its position. Mr. Imonen believed plaintiff was entitled to receive additional post-termination commission

payments because most of the reorders will keep coming in automatically without further servicing being necessary. According to Mr. Imonen “[t]he orders just keep coming in. The people that they’ve hired don’t have to go out and solicit the business; it’s there.”

Plaintiff’s deposition statements do not provide any specific facts supporting its assertion that no follow-up service is necessary on certain reorders. While deposition statements could qualify under the rules for showing a genuine issue, the statements relied upon by plaintiff are in essence nothing more than a promise to show substantive admissible evidence at trial concerning the efforts actually utilized to obtain reorders. Such statements, without specific supporting facts, are not sufficient to create a genuine issue of material fact. *Maiden, supra*, 121. Accordingly summary disposition was properly granted to defendant because plaintiff did not establish a genuine issue of material fact with specificity.

Defendant’s second argument, that of accord and satisfaction, will also be addressed because the trial court’s order did not specify which of defendant’s argument it accepted as the basis of its grant of summary disposition.

To prove the existence of an accord and satisfaction, a defendant must show (1) its good-faith dispute of (2) an unliquidated claim of the plaintiff, (3) its conditional tender of money in satisfaction of the claim, and (4) the plaintiff’s acceptance of the tender (5) while fully informed of the condition. [*Faith Reformed Church v Thompson*, 248 Mich App 487, 492; 639 NW2d 831 (2001).]

The condition upon which the tender is made must be “clear, full, and explicit.” *Id.* The plaintiff must be fully informed that satisfaction will occur upon negotiating the check or keeping the funds offered. *Nationwide Mut Ins Co v Quality Builders Inc*, 192 Mich App 643, 649; 482 NW2d 474 (1992).

In the present case, defendant relies on the notice to form the basis of the accord and satisfaction. The notice, however, states nothing about a full and final resolution to claims. Rather, it only states that defendant would pay post-termination commissions until the end of February 2003. Such a statement does not rise to the level of a clear, full and explicit explanation of the condition of payment fully informing the plaintiff that satisfaction of its claim would occur upon the negotiation of those checks. Hence, accord and satisfaction is not applicable to this case and cannot serve as the basis for granting defendant’s motion for summary disposition because the final element of accord and satisfaction was not met. Nonetheless, summary disposition was proper based on the failure to meet the evidentiary proofs to support the procuring cause doctrine.

Affirmed.

/s/ Donald S. Owens  
/s/ Henry William Saad  
/s/ Karen M. Fort Hood