STATE OF MICHIGAN

COURT OF APPEALS

ARTHUR B. KUZIN,

Plaintiff/Counterdefendant-Appellant,

v

A&J PRECISION TOOL CO., INC., a/k/a A N J PRECISION TOOL CO., A&J PRECISION, INC., PRORC, and PRO RACING COMPONENTS,

Defendant/Counterplaintiff-Appellee.

UNPUBLISHED
March 30, 2001

No. 217895
Oakland Circuit Court
LC No. 97-001876-CB

Before: Whitbeck, P.J., and Murphy and Cooper, JJ.

PER CURIAM.

Plaintiff Arthur Kuzin appeals as of right from an order granting defendant A&J Precision Tool Company's motion for summary disposition under MCR 2.116(C)(10). We affirm.

I. Basic Facts And Procedural History

A&J is an automotive parts supplier. Its relationship with Kuzin began when David Olshefsky, A&J's sales and marketing director, attended a business meeting at a company Kuzin's brother owned. At that meeting, Kuzin presented Olshefsky with drawings of a part known as a "clutch floater," which maintains the connection between a car's clutch and the engine's flywheel and is used by the drag racing industry. Subsequently, Kuzin and Olshefsky met with David Every, A&J's president. Ultimately, the parties entered into an oral agreement whereby A&J would manufacture the clutch floaters and retain Kuzin as an independent sales representative. The parties do not dispute that, under this agreement, Kuzin would earn a fifteen percent commission on sales procured for clutch floaters and a five percent commission on new sales business he developed within the drag racing industry for parts other than clutch floaters. Nor do they dispute that they agreed that Kuzin would earn a commission at a rate to determined for orders of parts used outside the drag racing industry and that he would not be entitled to a commission on sales that occurred after he left A&J's hire, unless an order had been procured for

or placed with A&J before he was terminated.[1] Given the that the contract was never reduced to writing, it is not surprising that this commission for parts used outside the drag racing industry is the central point of contention between the parties.

Kuzin was instrumental in introducing a company called Castwell Products and its president, William Cherwonik, to A&J, ostensibly so Castwell Products might produce "cylinder sleeves," which are used in the drag racing industry, for A&J. During Cherwonik's visit to A&J's facilities, he told Olshefsky and Kuzin about one of Castwell Products' customers, Dearborn Gear and Tool Company. Cherwonik, Olshefsky, and Kuzin discussed the possibility of A&J placing a bid with Dearborn Gear to perform machining services. Sometime later, Cherwonik forwarded documents to Kuzin concerning the bidding with Dearborn Gear. Kuzin forwarded these documents to Olshefsky and Every, but he never procured an order from Castwell Products for A&J. No part of A&J's relationship with Castwell Products is at issue here.

Dearborn Gear ultimately asked A&J to bid on performing machining services and Olshefsky submitted a bid on A&J's behalf. There were apparently several meetings and discussions on this subject, some of which Kuzin attended or was informed of, but Kuzin was never present at a meeting that a Dearborn Gear representative attended. When A&J won the bid for machining services with Dearborn Gear, it placed Olshefsky in charge of the account. Olshefsky negotiated A&J's sales contract to manufacture parts for Dearborn Gear, provided Dearborn Gear with the specifications and proposal for the parts to be manufactured, entered A&J into a long-term contract with Dearborn Gear, was listed in A&J's records as its salesperson in charge of the account, and continued to obtain orders from Dearborn Gear until he left A&J in 1998.

In comparison to Olshefsky, Kuzin had far less involvement with Dearborn Gear on behalf of A&J. In 1996, Kuzin had no direct contact with anyone at Dearborn Gear, he never called anyone there, he never wrote to anyone there, and he did not service Dearborn Gear's account. In 1996 or 1997, Kuzin delivered samples of parts to Dearborn Gear, and in 1997, his involvement with Dearborn Gear's account consisted of performing "normal follow up" with Dearborn Gear representatives. Kuzin never personally wrote a proposal or submitted specifications to Dearborn Gear. Nor did he ever negotiate a deal or pricing arrangement. Kuzin is, however, named as the salesperson on packing slips numbered 10704 and 10998 for orders Dearborn Gear placed with A&J.

The parties do not dispute that Dearborn Gear is "outside of the drag racing industry." According to A&J's records, Kuzin's total commissions in 1996 were $15,498.23. This amount included $9,983.10 for orders from the drag racing industry. It also included $5,515.13, which was equal to a two percent commission from Dearborn Gear orders; A&J contends that it "voluntarily" paid this amount to Kuzin in order to support his efforts to procure business within the drag racing industry. From January 1, 1997 through August 31, 1997, Kuzin's total

[1] In his complaint, Kuzin refers to customers outside of the drag racing industry as "general contractors."

commissions were $22,888.39. This amount included $11,904.67 in commissions for selling drag racing parts, $1,928.88 for other orders Kuzin procured, and $9,054.84, which was equal to a two percent commission from Dearborn Gear Orders. A&J claimed that it also "voluntarily" paid this two percent commission to Kuzin.[2]

In August 1997, Olshefsky and Kuzin met to discuss ending Kuzin's representation of A&J, which would become effective September 1, 1997. Olshefsky explained that "it was no longer economically feasible" for A&J to retain Kuzin's services and reviewed his sales performance, commissions, and outstanding debts to A&J. Shortly after this meeting, Kuzin presented Every and Olshefsky with a document entitled "Agreement of Release." This document excused A&J from producing automotive parts for Kuzin or his customers, relieved Kuzin from representing A&J, and prohibited Kuzin from using or distributing A&J's automotive parts designs. A&J then incorporated the typewritten terms of that document into an "Agreement of Release," which Every and Kuzin executed in late August 1997.

In December 1997, Kuzin filed a complaint against A&J pursuant to the portion of the Revised Judicature Act, MCL 600.2961; MSA 27A.2961, which is known as the SRCA because it concerns sales representatives' commissions, alleging that A&J owed him commissions that he had earned by procuring A&J's contractual relationship with Dearborn Gear. A&J answered and counterclaimed, alleging that Kuzin owed it a debt as a result of funds forwarded to Kuzin in his capacity as A&J's independent sales representative.

A&J moved for summary disposition pursuant to MCR 2.116(C)(10) in October 1998, arguing that Kuzin did not procure Dearborn Gear's orders with A&J, which Kuzin disputed. In late January, 1999, the trial court issued an opinion and order granting A&J's motion for summary disposition. The trial court determined that Kuzin was not entitled to commissions on any sales to parties other than Dearborn Gear, agreeing with A&J's argument that these other commissions had "been fully accounted for and applied against [Kuzin's] draw." With respect to the Dearborn Gear commissions, the trial court determined that Kuzin was not entitled to these commissions under the procuring cause doctrine because he contacted Castwell to buy its products, not to sell A&J's products. Cherwoniak, Castwell's president, independently mentioned Dearborn Gear as a potential customer for A&J, but Castwell did not purchase parts from A&J. Thus, from the trial court's perspective, there was no direct link between Kuzin and Dearborn Gear, much less evidence demonstrating that Kuzin secured Dearborn Gear's business for A&J.

The trial court rejected Kuzin's argument that he was nevertheless entitled to a commission on the Dearborn Gear sales because the record revealed that A&J interfered with his opportunity to be the procuring cause in the two businesses' relationship. Rather, the trial court concluded, even though the parties "contemplated" that Kuzin could sell nondrag racing parts, they never reached an agreement on the matter, and consequently Kuzin could not argue that

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[2] Through a complex accounting procedure Kuzin, evidently, was never actually paid the commissions. Rather, the commission amounts were credited against draws and payments for expenses made by A&J to Kuzin.

A&J interfered with his attempt to secure additional business he was entitled to pursue Dearborn Gear's business. The trial court did not discuss the two percent commissions that A&J "voluntarily" paid or credited to Kuzin before granting summary disposition to A&J. A&J voluntarily dismissed its counterclaim in February 1999.

On appeal, Kuzin only challenges the trial court's determination that he is not entitled to a commission on the business A&J transacted with Dearborn Gear under the procuring cause doctrine because, he asserts, he was the "conduit" for their business relationship.

II. The Procuring Cause Doctrine

A. Standard Of Review

"On appeal, an order granting or denying a motion for summary disposition is reviewed de novo."[3]

B. Legal Standard

A motion for summary disposition under MCR 2.116(C)(10) tests the factual underpinnings of a claim other than an amount of damages, and the deciding court considers all the evidence, affidavits, pleadings, admissions, and other information available in the record.[4] The deciding court must look at all the evidence in the light most favorable to the nonmoving party, who must be given the benefit of every reasonable doubt.[5] Only if there is no factual dispute, making the moving party entitled to judgment as a matter of law, would summary disposition be appropriate.[6] However, the nonmoving party must present more than mere allegations in order to demonstrate that there is a genuine issue of material fact in dispute, making trial necessary.[7]

C. Pre- And Post-termination Commissions

The SRCA[8] is the statutory basis for a suit to enforce a commission agreement. In addition to defining critical terms and commission payment deadlines, the SRCA makes a principal liable for actual damages, court cost, reasonable attorneys fees, and, in certain cases, exemplary damages, if the principle fails to abide by the terms of the parties' contract, forcing the sales representative to

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[3] *Walters v Bloomfield Hills Furniture*, 228 Mich App 160, 162; 577 NW2d 206 (1998).

[4] MCR 2.116(G)(5); *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999).

[5] *Atlas Valley Golf & Country Club, Inc v Village of Goodrich*, 227 Mich App 14, 25; 575 NW2d 56 (1998).

[6] See *Auto Club Ins Ass'n v Sarate*, 236 Mich App 432, 437; 600 NW2d 695 (1999).

[7] MCR 2.116(G)(4); *Etter v Michigan Bell Telephone Co*, 179 Mich App 551, 555; 446 NW2d 500 (1989).

[8] MCL 600.2961; MSA 27A.2961.

sue.[9] Assuming for the sake of analysis that the parties had agreed on the material terms concerning any commission Kuzin would earn from securing business for A&J from outside the drag racing industry, the fact that the parties lacked a written contract would not bar Kuzin's suit under this statute because the SRCA does not require a contract to be memorialized in writing.[10] However, because Kuzin relies on his common law rights to a commission under the procuring cause doctrine rather than the existence of a contract, regardless of its form, the SRCA does not form the basis of our analysis.[11]

Michigan case law addressing the procuring cause doctrine dates back more than one hundred years.[12] The procuring cause doctrine provides that 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."[13] If the principal "knowingly accepted and availed itself of [the agent's] services [in procuring the sale]. . . it is well settled that under such circumstances the law will imply a promise to pay a fair and reasonable compensation therefor."[14]

The law does not precisely define what constitutes a procuring cause. A procuring cause has been described as the "'chief means, by which [a] sale was finally effected.'"[15] Whether an agent was a procuring cause generally turns on the facts of the case and the nature of the agency agreement.[16] For instance, a sales agent may become a procuring cause by introducing a customer to the principal and engaging in subsequent negotiations if the agency agreement is to procure a sale.[17] In this case, however, the record does not reveal a dispute concerning whether Kuzin was the primary impetus for Dearborn Gear's business dealings with A&J. Kuzin did introduce Cherwonik to Olshefsky and Cherwonik played some role in arranging A&J's relationship with Dearborn Gear. There is no evidence, however, that Kuzin originally discovered that Dearborn Gear was a likely customer for A&J and facilitated that relationship. We think it key that this doctrine is called the procuring *cause* doctrine. While Kuzin may have set in motion a series events that ultimately led to business transactions between A&J and Dearborn Gear, his role in this chain

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[9] MCL 600.2961(2) - (6); MSA 27A.2961(2) - (6).

[10] Whether the statute of frauds requires a sales commission contract in writing, especially when the commission is for brokering a real property sale, is a separate question not presented here. See MCL 566.132; MSA 26.922.

[11] MCL 600.2961(9); MSA 27A.2961(9) (The SRCA "does not affect the rights of a principal or sales representative that are otherwise provided by law.").

[12] See *McDonald v Boeing*, 43 Mich 394; 5 NW 439 (1880) (plaintiff not procuring cause because agency relationship had not been established).

[13] *Reed v Kurdziel*, 352 Mich 287, 294; 89 NW2d 479 (1958).

[14] *Case v Rudolph Wurlitzer Co*, 186 Mich 81, 85; 152 NW 977 (1915).

[15] *Kinsey v Barth*, 192 Mich 219, 223; 158 NW 872 (1916) (quoting with approval the trial court's instruction to the jury).

[16] See *Reed*, *supra* at 294; *Dtizik v Schaffer Lumber Co*, 139 Mich App 81, 90-91; 360 NW2d 876 (1984).

[17] *Reade v Haak*, 147 Mich 42, 46-47; 110 NW 130 (1907).

of events is too remote to create a question of fact concerning whether he caused that business relationship to exist.[18] Furthermore, Kuzin's failure to participate in the negotiating process, even indirectly, bars his recovery of any commissions for sales negotiated without his assistance under this theory.[19]

According to Kuzin, his agreement with A&J was for procuring *sales*, not merely procuring customers. Yet Kuzin presented no documentary evidence that he procured any sale to Dearborn Gear or that he was entitled to a five-percent commission for any sales to Dearborn Gear. Kuzin admitted that he did not maintain any records of the money exchanged with A&J or work performed on A&J's behalf because he entrusted these accounting tasks to A&J. Therefore, we must rely on A&J's accounting to determine whether a question of fact exists regarding the percentage and total dollar amount of pre- and post-termination commissions A&J owes Kuzin, if it owes him any commission at all.

Kuzin is identified as the salesperson for the orders described on two of A&J's packing slips to Dearborn Gear. A&J credited two-percent commission payments to Kuzin for sales to Dearborn Gear for 1996 and for 1997 through August 31. There is no evidence that he was connected to any other sales to Dearborn Gear. At most, Kuzin was the procuring cause of two sales to Dearborn Gear for which he was already given his two-percent commissions. There is no evidence that he was entitled to any additional commissions for these two sales. The record suggests that Kuzin actually owed A&J money for various advances.

Kuzin claims that he is entitled to commissions for sales A&J made to Dearborn Gear after he was terminated on August 31, 1999. Once an agent can demonstrate that he was the procuring cause of a sale, he may only receive post-termination commissions on that sale if he held exclusive rights to sell the item or service in question, and only if the buyer's subsequent purchases did not require any additional service or negotiation.[20] Where a customer requires additional assistance not previously provided, post-termination commissions are not due.[21] However, Kuzin did not participate in sales negotiations that occurred after A&J terminated him and his oral agreement with A&J did not extend to post-termination commissions; that agreement was only for procuring sales not customers, Kuzin was not an exclusive sales representative otherwise entitling him to post-termination commissions and, most important of all, he presented no evidence of a sale

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[18] See, generally, *People v Hudson*, 241 Mich App 268, 284-286; 615 NW2d 784 (2000) (discussing actual causation).

[19] *Roberts Associates, Inc v Blazer Int'l Corp*, 741 F Supp 650, 653 (ED Mich, 1990) ("As explained in *Wood v Hutchinson Coal Co*, 176 F2d 682 [CA 4, 1949], where the agent does not participate in the negotiation of a given contract of sale with a customer, he is not the procuring cause, even though the agent may have originally introduced the customer to the principal."); see also *Holmes Realty Co v Silcox*, 194 Mich 59, 62-63; 160 NW 465 (1916), quoting *Sibbald v Bethlehem Iron Co*, 83 NY 378, 38 Am Rep 441 (1881) (An agent who fails to secure an agreement may not be entitled to a commission even though he "introduced to each other parties who otherwise would never have met[.]'").

[20] *Roberts, supra* at 655.

[21] *Id*.

order placed before he was terminated that was fulfilled after he was terminated. The fact that A&J credited two-percent commissions to Kuzin during the pre-termination period in 1996 and a portion of 1997 does not have any material bearing on whether A&J owed Kuzin post-termination commissions in the amount of two percent, five percent, or any other amount because there is no proof of additional sales.

D. Impermissible Interference

Kuzin's lack of participation in negotiations would *not*, however, bar him from recovering sales commissions if A&J impermissibly interfered in his ability to participate in the negotiation process. When an agent initiates a sale with a third party on his principal's behalf, and the principal then revokes the authority of the agent in order to prevent the agent from procuring the sale, the agent is nevertheless entitled to recover the commission he would have earned had he been permitted to continue.[22]

Protecting an agent's right to commissions must be balanced with the principal's right to conduct its own business.

> It is well settled that where a principal enters into a non-exclusive representation agreement with an agent, he is not thereby precluded from competing with the agent personally or through another agent. Restatement (Second) Agency, § 449. Where the agent nonetheless successfully procures a sale over the competition of his principal, he will, of course, be entitled to his commission.[23]

Kuzin had this sort of nonexclusive relationship with A&J. Assuming Kuzin did introduce A&J to Dearborn Gear, whether it was improper for A&J to assign the contract negotiations with Dearborn Gear to Olshefsky thereby excluding Kuzin from the stream of communication with Dearborn Gear, is ordinarily the sort of factual question submitted to a jury. Nevertheless, as discussed *supra*, even if A&J did impermissibly interfere as alleged, Kuzin has already received all payments to which he would be entitled. This Court will not reverse if a trial court reaches the right result, even for the wrong reason.[24]

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[22] *Reed, supra* at 294-295.

[23] *Roberts, supra* at 652-653.

[24] *Glazer v Lamkin*, 201 Mich App 432, 437; 506 NW2d 570 (1993).

III. Other Theories

Kuzin he contends that the doctrine of good faith and fair dealing entitles him to receive commissions on the Dearborn Gear sales, even if the procuring cause doctrine does not. This Court need not address this doctrine separately from the procuring cause doctrine because good faith and fair dealing is merely the foundation for the procuring cause doctrine,[25] not a distinct legal theory of recovery.[26]

Kuzin also suggests the he is entitled to a commission for post-termination sales under the theory of quantum meruit.[27] However, because Kuzin did not participate in negotiating those sales and he has not presented any evidence that he procured them before he was terminated, there is no evidence that he "performed and conferred a benefit" for A&J.[28]

Affirmed.

/s/ William C. Whitbeck
/s/ William B. Murphy
/s/ Jessica R. Cooper

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[25] *Butterfield v Metal Flow Corp*, 185 Mich App 630, 636; 462 NW2d 815 (1990); see also *Roberts*, *supra* at 654, n 2 ("Because the concept of fair dealing is subsumed within the procuring cause doctrine, it is unnecessary to consider it as a separate and independent obligation.").

[26] See *Clark Bros Sales Co v Dana Corp*, 77 F Supp 2d 837, 852 (ED Mich 1999) ("Under Michigan law, this implied covenant [of good faith and fair dealing] does not override the express terms of the parties' contract, and cannot form the basis for a claim independent of that contract.").

[27] *Dumas v Auto Club Ins Ass'n*, 437 Mich 521, 541, n 8; 473 NW2d 652 (1991) ("Michigan cases do permit recovery under the theory of quantum meruit where a party has performed and conferred a benefit on another party under a contract within the statute of frauds.").

[28] *Id*.