STATE OF MICHIGAN

COURT OF APPEALS

DANIEL NICHIOW,

Plaintiff-Appellant,

v

SOTORION CORPORATION,

Defendant-Appellee.

UNPUBLISHED
March 18, 2021

No. 352218
Oakland Circuit Court
LC No. 2018-166917-CB

Before: LETICA, P.J., and CAVANAGH and FORT HOOD, JJ.

PER CURIAM.

In this action arising from a written employment agreement, plaintiff appeals as of right from the trial court's entry of judgment after a jury trial. On appeal, plaintiff challenges the trial court's pretrial orders regarding his claims for payment of posttermination commissions under theories of breach of contract and unjust enrichment, and his breach-of-contract claim for a cell phone allowance. We affirm in part, reverse in part, and remand for further proceedings.

I. BACKGROUND

Defendant supplies technical workers to its customers and retains a percentage of the fees received by the customers for the workers placed with them. Plaintiff is a robotics engineer with experience in programming, repairing, and troubleshooting industrial robots. Plaintiff worked for defendant from 2007 to early 2012, until plaintiff moved to New York. In October 2012, plaintiff returned to Michigan and entered into an employment contract with defendant. The written agreement signed by plaintiff states the following terms regarding compensation:

> Position title is ***Senior Robot Programmer*** with the following compensation and benefits in [United States Dollars]:
>
> - $30.00/hour standard time; up to 40 approved billable hours per week,
> - $45.00/hour overtime, more than 40 approved billable hours per week,
> - $80.00/hour double time; Sundays and approved holidays,

- 3 weeks paid vacation,
- Up to 30 hours per week for short term layoff at company discretion,
- PPO Health insurance plan,
- Enrollment in company retirement plan,
- 5% commission on all billable hours logged for all workers brought to [defendant] by you. Commission is paid monthly. All employment contracts are written by [defendant].

The agreement contains an integration clause, stating that "[t]his letter is the entire agreement between [defendant] and you. Future changes will be done in writing." In an e-mail message five days later, defendant agreed to pay plaintiff's cell phone expenses once plaintiff began referring employees to defendant.

During the nearly four years that plaintiff worked for defendant, plaintiff referred a number of workers to defendant. According to the terms of the employment contract, defendant paid plaintiff a 5% commission for the billable hours of each worker. On May 22, 2016, defendant terminated plaintiff's employment.

On July 10, 2018, plaintiff filed this action, asserting that defendant required plaintiff to contribute to his health insurance premiums,[1] failed to pay plaintiff a $100 monthly cell phone allowance, stopped paying plaintiff the 5% commission for referred workers in 2016, and failed to provide an accounting of billings for employees referred by plaintiff. Plaintiff alleged claims for breach of contract and unjust enrichment, and he also requested an accounting of billings and payments for each worker referred to defendant.

In lieu of filing an answer, defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8). Defendant asserted that plaintiff's breach-of-contract claim was unenforceable as a matter of law because the written agreement did not require the payment of commissions to plaintiff after termination of his employment, a cell phone allowance, or for defendant to provide plaintiff with an accounting of the hours billed for referred workers. Citing *Barber v SMH (US), Inc*, 202 Mich App 366; 509 NW2d 791 (1993), defendant asserted that because an express contract governed the same subject matter, plaintiff's unjust-enrichment claim was also unenforceable and should be dismissed.

Responding to the motion, plaintiff asserted that after the employment agreement was signed, defendant explicitly agreed to pay for plaintiff's cell phone usage, and noted that the employment agreement did not indicate when the obligation to pay commissions ended.

[1] Plaintiff's claim regarding the health insurance premiums was resolved at trial, and is not relevant to this appeal.

The case was originally assigned to Judge Wendy L. Potts, who entered an opinion and order, dated December 19, 2018, granting in part and denying in part defendant's motion for summary disposition. Addressing plaintiff's breach-of-contract claim, the court first noted that "the contract is silent with respect to a cell phone allowance." Finding that the complaint did not allege the existence of any agreement other than the employment contract attached to the complaint, the court granted summary disposition in favor of defendant on plaintiff's claim for payment of a cell phone allowance. Similarly, noting that the contract's language did not obligate defendant to provide an accounting, the court granted summary disposition on plaintiff's claim "that defendant breached the contract by failing to provide such an accounting."

However, the court denied summary disposition on plaintiff's breach-of-contract claim for payment of posttermination commissions, noting that the contract was silent regarding termination of the contract and the obligation to pay commissions after the termination of employment. Addressing plaintiff's unjust-enrichment claim, the court held that because a written agreement addressed employment benefits, plaintiff's "unjust enrichment claim fails."

After Judge Potts retired, the case was reassigned to Judge Martha D. Anderson. Plaintiff filed an amended complaint that again asserted that the parties had entered into a written employment contract, and added documentation in which defendant purportedly agreed, in writing, to pay plaintiff's cell phone expenses. Alleging a single count of breach of contract, plaintiff asserted that defendant breached the contract by failing to pay a monthly cell phone allowance and a 5% commission on all hours billed by defendant for employees referred by plaintiff, both before and after his termination. Answering the amended complaint, defendant admitted that the parties entered into an express employment agreement, but denied the allegations of breach of contract.

Thereafter, defendant filed a motion for partial summary disposition pursuant to MCR 2.116(C)(10), asserting that it had no obligation to pay commissions after plaintiff's termination. But the court refused to address defendant's motion for summary disposition, finding that the first amended complaint "sets forth a one-count claim for breach of contract, in which there is no allegation or claim for 'post-termination commissions.' Thus, MCR 2.116(C)(10) does not apply." The order further stated that "the motion, in actuality, seeks a ruling from this Court that Plaintiff may not present any argument or evidence at the time of trial relative to 'post-termination commissions' and, as such, a motion in limine is required to be filed relative to same."

Defendant thereafter filed a motion in limine, requesting that the court prohibit any testimony or evidence at trial relating to posttermination commissions. Defendant asserted that because the contract did not expressly provide for posttermination commissions, any evidence regarding plaintiff's claim for posttermination commissions was irrelevant and inadmissible. In response, plaintiff asserted that if the contract did not cover posttermination commissions, then his unjust-enrichment claim must be reinstated.

On June 25, 2019, the trial court entered an order on its own motion, vacating in part Judge Potts's December 19, 2018 opinion and order, and granting partial summary disposition in favor of defendant under MCR 2.116(C)(8), holding:

> Upon Review of the Opinion and Order, this Court finds that this Court's predecessor's reasoning, finding and opinion (relative to the issue of post-

> termination commissions) does not correlate with the same facts and issues presented to the Court relative to . . . the failure to pay cell phone allowance . . . . Thus, the Court finds that same reasoning should apply to both the cell phone allowance and the post-termination commissions, thereby compelling summary disposition as to both claims, pursuant to MCR 2.116(C)(8).

The following day, the court entered an order granting defendant's motion in limine, ruling that "Plaintiff may not offer or introduce evidence related to Post Termination commission."

Plaintiff filed a motion for reconsideration of the June 25 order, asserting that his amended complaint expressly alleged breach of contract regarding the cell phone allowance based on a written amendment to the original contract, that defendant had not requested summary disposition of that claim, and that the order effectively dismissed both that claim and plaintiff's claim for posttermination commissions. Suggesting that the court had overlooked his amended complaint, plaintiff requested reconsideration or clarification of the order.

Addressing his claim for posttermination commissions, plaintiff asserted that the court's reasoning was logically inconsistent. Noting that Judge Potts had properly dismissed his claim for a cell phone allowance because it was not mentioned in the original contract, plaintiff argued that because the contract likewise did not provide for an end date to plaintiff's entitlement to commissions, the court's reasoning did not support the court's decision. Plaintiff concluded by requesting that his breach-of-contract and unjust-enrichment claims for posttermination commissions be reinstated and the order granting defendant's motion in limine be vacated.

Four days later, plaintiff filed a motion for leave to file a second amended complaint and for relief from Judge Potts's December 19, 2018 order, arguing that the court's orders granting summary disposition and defendant's motion in limine precluded his claim to posttermination commissions under any theory. Plaintiff also sought relief from the court's earlier orders under MCR 2.612(C)(1)(a), (c), and (f). Plaintiff requested that he be allowed to amend his first amended complaint to reinstate his unjust-enrichment claim and breach-of-contract claim for posttermination commissions, and that the order granting defendant's motion in limine be vacated.

On August 5, 2019, the trial court entered an order denying plaintiff's motion for reconsideration, holding that the motion merely presented the same issues already considered and rejected by the court, that plaintiff failed to demonstrate a palpable error, and that no clarification was necessary because "the order dated June 25, 2019 speaks for itself." Two days later, the court entered an order denying plaintiff's motion for leave to file a second amended complaint "for the reasons set forth in the Opinion and Order dated 12/19/18, and the Orders dated 06/25/19 and 08/05/19." The court also denied relief pursuant to MCR 2.612(C)(1), "in the absence of any FINAL judgment or order having been entered in this matter." The case proceeded to trial on the issues of payment of health insurance premiums and commissions earned by plaintiff before the termination of his employment. The jury returned a verdict finding that the contract did not obligate

defendant to pay for all of plaintiff's health insurance premiums, but that defendant owed plaintiff $8,734.16 in unpaid commissions. Plaintiff now appeals as of right, challenging the trial court's pretrial orders.

II. ANALYSIS

Plaintiff asserts that the trial court erred by foreclosing his claims to posttermination commissions under the alternative theories of breach of contract and unjust enrichment. We agree that the trial court erred by granting summary disposition on plaintiff's breach-of-contract claim for posttermination commissions, but disagree that the court erred by granting summary disposition on the unjust-enrichment claim.

A trial court's decision on a motion for summary disposition is reviewed de novo. *Zaher v Miotke*, 300 Mich App 132, 139; 832 NW2d 266 (2013). "A motion under MCR 2.116(C)(8) tests the factual sufficiency of the complaint based on the pleadings alone," and "all well-pleaded factual allegations are accepted as true and are construed in a light most favorable to the nonmovant." *Kazor v Dep't of Licensing & Regulatory Affairs, Bureau of Prof Licensing*, 327 Mich App 420, 422; 934 NW2d 54 (2019) (quotation marks and citation omitted). "Judgment is properly granted . . . when the claims are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id*. (quotation marks and citation omitted).

"The proper interpretation of a contract is a question of law, which this Court reviews de novo." *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 47; 664 NW2d 776 (2003). Whether a claim for unjust enrichment can be maintained is also a question of law, subject to de novo review. *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 193; 729 NW2d 898 (2006).

Trial court decisions on motions for leave to amend pleadings are reviewed for an abuse of discretion, *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997), as are decisions on motions for reconsideration, *McCoig Materials, LLC v Galui Constr, Inc*, 295 Mich App 684, 693; 818 NW2d 410 (2012), and motions in limine, *Bellevue Ventures, Inc v Morang-Kelly Investment, Inc*, 302 Mich App 59, 63; 836 NW2d 898 (2013). "An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010).

A. BREACH OF CONTRACT

"[A]n employment contract is just a contract." *Thomas v John Deere Corp*, 205 Mich App 91, 93; 517 NW2d 265 (1994). The goal of contract interpretation "is to give effect to the intent of the parties, to be determined first and foremost by the plain and unambiguous language of the contract itself." *Wyandotte Electric Supply Co v Electrical Technology Sys, Inc*, 499 Mich 127, 143-144; 881 NW2d 95 (2016). If the language of a contract is unambiguous, the contract must be construed according to its plain meaning. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010). However, if the terms of a contract permit two or more reasonable interpretations, "factual development is necessary to determine the intent of the parties and summary disposition is inappropriate." *SSC Assoc Ltd Partnership v Gen Retirement Sys of City of Detroit*, 192 Mich App 360, 363; 480 NW2d 275 (1991).

Plaintiff argues that the trial court erred by adding a provision to the employment contract that he was only entitled to payment of commissions during his employment with defendant. Conversely, defendant argues that the employment contract is unambiguous and clearly states that plaintiff's right to commission payments "exists 'with' the position of Senior Robot Programmer" and "will be paid only so long as [plaintiff] retains the position title Senior Robot Programmer." However, defendant provides no authority supporting an interpretation of "with" sufficiently expansive to preclude payment of commissions after the termination of plaintiff's employment, and the agreement does not "clearly" state that commissions will be paid only during plaintiff's employment with defendant.

At best, the contract is silent on this issue, and this silence permits two equally reasonable interpretations regarding payment of commissions for employees referred during plaintiff's employment: one that precludes payment of commissions following the termination of plaintiff's employment and one that requires the payment of commissions, even after the termination of plaintiff's employment, for "all workers brought to [defendant] by [plaintiff]." Although "[s]ilence does not equal ambiguity if the law provides a rule to be applied in the absence of a provision to the contrary," *Norman v Norman*, 201 Mich App 182, 184; 506 NW2d 254 (1993), neither party has cited any applicable rule of law addressing this issue. Indeed, both parties cite caselaw in which the contracts were not silent, but explicitly addressed the termination of commissions. See *Barber*, 202 Mich App at 375 (emphasis omitted) (holding that the plaintiff was not entitled to commissions after his termination because an agreement specifically stated that commissions would only be paid on "orders received and shipped as of the date of the termination,"); *Clark Bros Sales Co v Dana Corp*, 77 F Supp 2d 837, 843 (ED Mich, 1999) (finding that the agency agreement unambiguously provided that the plaintiff was entitled to "commissions earned up to the date of termination," and thus, the agreement limited the extent of the plaintiff's entitlement to commissions).[2]

In this case, plaintiff argues that the trial court impermissibly inserted a provision limiting defendant's obligation to pay posttermination commissions, such as those found in *Barber* and *Clark Bros*. Conversely, defendant argues that the word "with" in the description of compensation and benefits is equivalent to the express limitation found in *Clark Bros*, and that the parties were not required to expressly state that posttermination commissions would not be paid. Defendant also argues that this Court's decision in *Barber* does not require that the parties explicitly state that posttermination commissions will not be paid.

We are not persuaded by defendant's argument that the term "with" is sufficiently expansive to preclude payment of commissions after the termination of plaintiff's employment. The agreement does not clearly state that commissions will be paid only as long as plaintiff is employed by defendant. Rather, one reasonable interpretation of the contract language, including the word "with," is that plaintiff is entitled to a 5% commission for the billable hours of all employees referred by plaintiff during his employment, but will not be entitled to any commissions

[2] Federal precedent applying Michigan law is not binding on this Court, but may be considered "highly persuasive when it addresses analogous issues." *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 360; 597 NW2d 250 (1999).

for any employees referred after his employment is terminated. The agreement itself provides no basis for concluding that plaintiff's right to commissions for billable hours of employees referred by him during his employment are automatically terminated along with his employment. Indeed, it is clear that "with" merely serves to state that if plaintiff agreed to accept the position of Senior Robot Programmer, he would be entitled to compensation and benefits, including 5% commission on all billings for employees referred by him during his employment. Nothing in the agreement expressly limits the payment of commissions to billings occurring before termination.

Plaintiff cites *Stark v Kent Prod, Inc*, 62 Mich App 546; 233 NW2d 643 (1975), as an example of a case in which the employee recovered posttermination commissions. In *Stark*, however, this Court noted that "the agreement specifically provided that plaintiff would receive compensation on all net sales to Chevrolet, which were on the books before he commenced employment, as well as those which he solicited or obtained during the life of the agreement." *Id.* at 549. If that case indeed involved posttermination commissions, which is not apparent from this Court's opinion, such commissions were specifically covered in the agreement, unlike the agreement in this case, which is silent on the issue.

Plaintiff also asserts that his argument is supported by the "known facts," supporting this assertion with citation to deposition testimony. However, because the motion for summary disposition was brought and granted pursuant to MCR 2.116(C)(8), a court considers only the pleadings; documents and testimony produced during discovery may not be considered. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999), citing MCR 2.116(G)(5).

Defendant cites two unpublished federal court decisions in support of its argument that silence on the issue of posttermination commissions does not require that they be paid, but neither decision is persuasive on this issue. We agree that the contract's silence on the issue of posttermination commissions does not, by itself, require the payment of such commissions. Rather, because the employment contract is ambiguous on this issue and no rule of law governs its resolution, further factual development is necessary to resolve the ambiguity. Therefore, summary disposition under MCR 2.116(C)(8) is inappropriate. *SSC Assoc Ltd Partnership*, 192 Mich App at 363. Judge Potts properly denied summary disposition on plaintiff's breach-of-contract claim regarding posttermination commissions, and Judge Anderson erred by vacating that decision and granting summary disposition on that claim pursuant to MCR 2.116(C)(8).

B. UNJUST ENRICHMENT

To prevail on a claim for unjust enrichment, a plaintiff must prove that the defendant received a benefit from the plaintiff and that the retention of that benefit by the defendant is unjust. *Karaus v Bank of New York Mellon*, 300 Mich App 9, 23; 831 NW2d 897 (2012). If both elements are satisfied, the law will "imply a contract in order to prevent unjust enrichment." *Barber*, 202 Mich App at 375. However, a contract will not be implied if there is an express contract governing the subject matter. *Liggett Restaurant Group, Inc v Pontiac*, 260 Mich App 127, 137; 676 NW2d 633 (2003). Moreover, "[n]ot all enrichment is unjust in nature, and the key to determining whether enrichment is unjust is determining whether a party unjustly received and retained an independent benefit." *Karaus*, 300 Mich App at 23.

Plaintiff again cites *Barber*, 202 Mich App 366, as support for his assertion that because the written contract did not specify when the commissions would end, he is entitled prevail on his unjust-enrichment claim. *Barber* does not support this conclusion. In *Barber*, this Court refused to imply a contract because the agreement specified that commissions would be paid on orders received and shipped as of the date of termination. *Id.* at 375. This Court did not find that the plaintiff might prevail under an unjust-enrichment theory if the agreement were less specific.

Plaintiff also cites *Clark Bros*, 77 F Supp 2d at 837, as "perhaps the clearest, most detailed teaching on this issue." However, as with *Barber*, the precedential value of that decision is negligible because, like *Barber*, the written contract expressly limited the payment of commissions to those earned before termination. *Id*. at 841. Despite this clear limitation on the payment of commissions, the plaintiff in *Clark Bros* argued that the contract was ambiguous because it was silent regarding the payment of commissions on orders received after the date of termination. *Id.* at 844. The federal district court disagreed, finding that the contract was neither ambiguous nor silent on the issue of posttermination commissions "merely because it fails to also state that post-termination commissions are not owed, or that [the] Defendants must pay only the commissions earned before the termination date." *Id.*

Plaintiff asserts that this statement was the basis for the federal district court's denial of the unjust-enrichment claim in *Clark Bros*. This assertion is incorrect. The federal district court noted that the contract was not silent on the issue of posttermination commissions and held that where the contract "addresses and controls the payment of commissions, Plaintiff cannot pursue quasi-contractual claims based on different obligations purportedly arising outside the four corners of the Agreement." *Id.* at 852. As in *Barber*, the court did *not* state that the plaintiff could prevail on an unjust-enrichment claim if the agreement were less specific.

Plaintiff also cites *Turner Assoc, Inc v Small Parts, Inc*, 59 F Supp 2d 674 (ED Mich, 1999), as a decision supporting the viability of an unjust-enrichment claim where an express contract is silent on the issue. In *Turner*, the federal district court noted that whether plaintiff could prevail on a quantum meruit theory depended on whether there had been an offer and an acceptance, then stated that the "[p]laintiff would be foreclosed from quantum meruit *only if* it is first established that a valid and enforceable contract governed [the] defendant's payment of post-termination commissions." *Id.* at 683. From this, plaintiff posits that because the employment contract in this case does not refer to posttermination commissions, a viable claim for unjust enrichment may be asserted. But *Turner* does not support such a broad interpretation. Instead, the federal district court's statement regarding quantum meruit was in reference to whether the plaintiff's predecessor in interest accepted a modification to the agency agreement concerning posttermination commissions, which if true, would have created a valid contract concerning the commissions. *Id*. at 680-683. Because there is no dispute concerning the existence of a valid contract in this case, *Turner* is simply inapplicable.[3]

[3] Moreover, it appears that the relevant language in *Turner* is dicta because it was not essential to the holding that there was a question of fact concerning the existence of a valid contract between the parties. See *Allison v AEW Capital Mgt, LLP*, 481 Mich 419, 436-437; 751 NW2d 8 (2008).

In this case, the parties do not dispute the existence of a contract, but they disagree on its scope, terms, or effect. Because the written contract clearly covered the payment of commissions to plaintiff, no other agreement may be implied regarding those commissions. *Liggett Restaurant Group, Inc*, 260 Mich App at 137. Judge Potts correctly held that because the complaint "alleges that an express agreement existed between the parties with respect to the relevant employment benefits, Plaintiff's unjust enrichment claim fails." We therefore affirm the December 19, 2018 order to the extent that it dismissed plaintiff's claim for unjust enrichment.

C. ORDERS APPEALED

Although plaintiff's brief states only a single issue in the statement of questions presented, plaintiff seeks reversal of five separate orders of the trial court. To the extent that these orders were not implicated in the above discussion, we will address them individually.

Plaintiff seeks reversal of Judge Anderson's June 25, 2019 order vacating in part Judge Potts's December 19, 2018 opinion and order and granting summary disposition on plaintiff's claim of breach of contract. Judge Potts's order denied defendant's motion for summary disposition relative to plaintiff's claim of breach of contract for defendant's failure to pay plaintiff's cell phone allowance and posttermination commissions. Judge Potts explained that summary disposition was warranted on the issue of the cell phone allowance because the employment contract, and by extension the complaint, was silent regarding a cell phone allowance. Regarding the posttermination commissions, Judge Potts determined that, construing the allegations in favor of plaintiff, summary disposition was unwarranted because the claim was not clearly unenforceable as a matter of law.

Judge Anderson vacated in part the December 19, 2018 order and granted defendant summary disposition on plaintiff's breach-of-contract claim for posttermination commissions. Judge Anderson explained that Judge Potts's "reasoning, finding and opinion . . . does not correlate with the same facts and issues presented to the Court relative to . . . the failure to pay cell allowance. Thus, the Court finds that same reasoning should apply" to plaintiff's claim for posttermination commissions. Judge Anderson's reasoning is premised on an incorrect reading of the December 19, 2018 opinion and order, which granted summary disposition because the payment of a cell phone allowance was not mentioned in the written agreement and because plaintiff did not allege that "any agreement, other than the written employment contract, existed between the parties." However, because the original employment contract *does* explicitly mention the payment of commissions on referred workers, the same reasoning cannot be applied to both the cell phone allowance and the posttermination commissions. Moreover, as discussed above, the employment contract permitted two reasonable interpretations concerning the payment of posttermination commissions. Thus, we reverse Judge Anderson's June 25, 2019 order to the extent that it dismissed plaintiff's claim for breach of contract relating to posttermination commissions.

Plaintiff also seeks reversal of Judge Anderson's June 26, 2019 order granting defendant's motion in limine and excluding evidence or testimony regarding posttermination commissions. The order does not explain the court's reason for precluding evidence of the posttermination commissions. Regardless, we can surmise that the order was predicated on the June 25, 2019 dismissal of plaintiff's claim regarding posttermination commissions. Because the trial court erred

by granting summary disposition concerning plaintiff's claim for posttermination commissions, the decision to exclude evidence of the commissions was outside the range of principled outcomes. See *Bellevue Ventures, Inc*, 302 Mich App at 63. Therefore, we reverse the June 26, 2019 order.

Next, plaintiff seeks reversal of the trial court's August 5, 2019 order denying his motion for reconsideration. In this motion, plaintiff requested that (1) Judge Anderson reinstate his breach-of-contract claims for payment of a cell phone allowance and posttermination commissions, (2) vacate the June 26, 2019 order granting defendant's motion in limine, and (3) reinstate the unjust-enrichment claim for payment of posttermination commissions. We need only address plaintiff's claim for the cell phone allowance because we have already addressed the other claims.

In Judge Potts's December 19, 2018 order, plaintiff's breach-of-contract claim for a cell phone allowance was dismissed because the pleadings did not support the claim. Thereafter, plaintiff filed an amended complaint, reasserting the claim of breach of contract for failing to pay the cell phone allowance. To the amended complaint, plaintiff attached e-mails that he asserted amended the employment contract to provide for the cell phone allowance. In the June 25, 2019 order, Judge Anderson referred to Judge Potts's December 19, 2018 order granting summary disposition of the cell-phone-allowance claim, stating that the reasoning supporting summary disposition of that claim also supported granting summary disposition of the breach-of-contract claim for payment of posttermination commissions. Despite that only the breach-of-contract claim for posttermination commissions was properly before the court, Judge Anderson, in reference to Judge Potts's earlier order, included language in the June 25, 2019 order that "the Court finds that same reasoning should apply to both the cell phone allowance and the post-termination commissions, *thereby compelling summary disposition as to both claims, pursuant to MCR 2.116(C)(8).*" It is apparent that Judge Anderson failed to recognize the import of the first amended complaint in both the June 25, 2019 and the August 5, 2019 orders. Given plaintiff's first amended complaint, which contained documents that purported to amend the employment contract to provide for payment of plaintiff's cell phone allowance, Judge Anderson abused her discretion by denying plaintiff's motion for reconsideration.

Finally, plaintiff seeks reversal of the August 7, 2019 order denying his motion for leave to file a second amended complaint reinstating his claim for unjust enrichment. A request to amend a pleading "pursuant to MCR 2.118 should be freely granted, unless the amendment would not be justified." *Ormsby v Capital Welding, Inc*, 471 Mich 45, 53; 684 NW2d 320 (2004). An amendment is not justified if it would be futile. *Id.* An amendment would be futile if "ignoring the substantive merits of the claim, it is legally insufficient on its face . . . ." *PT Today, Inc v Comm'r of the Office of Fin & Ins Servs*, 270 Mich App 110, 143; 715 NW2d 398 (2006).

In this case, an express contract provided for the payment of a 5% commission on billings related to employees referred to defendant by plaintiff. Plaintiff cites this contract as the basis for his claim to payment of posttermination commissions. Because a contract cannot be implied if there is an express contract governing the subject matter, *Liggett Rest Group*, 260 Mich App at 137, any amendment stating a claim for unjust enrichment would be futile. Thus, we affirm the order denying plaintiff's motion for leave to file a second amended complaint.

III. PLAINTIFF'S REQUESTED RELIEF

In addition to seeking reversal of the five orders discussed earlier, plaintiff requests that this Court rule that he is entitled to prevail on his unjust-enrichment claim as a matter of law, direct the trial court on remand to require defendant to supplement its document production, and consider ordering reassignment of this case to a different judge on remand. We decline these requests.

First, as a matter of law, plaintiff cannot prevail on his unjust-enrichment claim. Second, MCR 2.302(E)(1) requires parties to supplement discovery responses if the responses are incomplete, and plaintiff has made no showing that defendant has refused any request for supplemented responses. Third, plaintiff never moved to disqualify Judge Anderson under MCR 2.003, which requires a showing of actual bias or prejudice. *Cain v Mich Dep't of Corrections*, 451 Mich 470, 495; 548 NW2d 210 (1996). Plaintiff has made no showing of any bias. Moreover, plaintiff failed to raise this issue in his statement of questions presented, *English v Blue Cross Blue Shield of Mich*, 263 Mich App 449, 459; 688 NW2d 523 (2004), and he fails to cite authority in support of his request for reassignment. *Movie Mania Metro, Inc v GZ DVD's Inc*, 306 Mich App 594, 606; 857 NW2d 677 (2014). Accordingly, we decline to further consider this issue.

Affirmed in part, reversed in part, and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Anica Letica
/s/ Mark J. Cavanagh
/s/ Karen M. Fort Hood