

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

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ROBERT W. LAY,

Plaintiff-Appellant,

v

RKA PETROLEUM COMPANIES,

Defendant-Appellee.

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UNPUBLISHED

August 27, 2013

No. 308900

Wayne Circuit Court

LC No. 10-008923-CK

Before: MURPHY, C.J., and MARKEY and RIORDAN, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order that granted summary disposition in favor of defendant with respect to breach of contract and unjust enrichment claims in this case involving sales commissions allegedly owed by defendant to plaintiff. This appeal only entails the cause of action for breach of contract; plaintiff does not challenge the dismissal of the unjust enrichment claim. We affirm.

Plaintiff alleged in his complaint that he had been employed by defendant as a government sales supervisor, that over the years defendant paid quarterly sales commissions pursuant to commission agreements, that defendant failed to pay plaintiff commissions due and owing under the applicable sales commission contract for the first and second quarters of 2008, thereby breaching the contract, and that plaintiff tendered his resignation in July 2008.<sup>1</sup> The contract at issue was signed in December 2007, and it indicated that, on top of his salary, plaintiff was to be paid commissions pursuant to a formula and structure set forth in the contract. Under the contract and relative to sales attributable to plaintiff, two percent of the gross profits were to be paid in quarterly commissions with respect to any gross profits below plaintiff's "bar" of \$275,000. Five percent of the gross profits were to be paid in quarterly commissions with respect to those gross profits totaling between \$275,000 and \$400,000. And, finally, seven percent of the gross profits were to be paid in quarterly commissions with respect to those gross profits over \$400,000. The contract further provided that, in regard to commissions, deductions

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<sup>1</sup> The documentary evidence reflected that plaintiff was involved in petroleum sales.

were possible. Specifically, the contract stated that “deductions are at the *discretion* of the manager.” (Emphasis added.) Pursuant to the contract, the sales commission payments were to be made within 45 days of the end of the calendar quarter.

The record contains a company document generated by defendant regarding plaintiff’s sales and commissions, hereafter the S&C document, covering the first two quarters in 2008. In his deposition, plaintiff acknowledged and found no reason to facially disagree with the numbers in the S&C document. As to the first quarter of 2008, the S&C document revealed that the gross profit was \$319,710, that there was an addition to the gross profit of \$70,382, that there was a deduction from the gross profit of \$148,113,<sup>2</sup> that the adjusted gross profit total was \$241,979, that the sales commission on the \$241,979 was \$4,839 ( $\$241,979 \times 2\%$ ), that “an advance” of \$1,500 was subtracted from the commission, that a “carrying cost” of \$17,681 was further deducted from the commission, and that the end result was a *negative* commission of \$14,342. Importantly, it is solely the *deduction* for the “carrying cost” that is ultimately at issue in this appeal, not the other or non-carrying-cost deduction in the S&C document. Absent the carrying-cost deduction, a commission of \$3,339 would be due and owing. We will explain below the meaning of the term “carrying cost.” In his affidavit, plaintiff averred that, despite timely submitted commission billings, he was only paid \$1,500 for the first quarter of 2008. Plaintiff testified that the reference in the C&S document to a \$1,500 “advance” for the first quarter was inaccurate, given that it was a commission payment in plaintiff’s view.<sup>3</sup>

With respect to the second quarter of 2008, the S&C document revealed that the gross profit was \$580,469, that there was an addition to the gross profit of \$60,620, that there was a deduction from the gross profit of \$160,192, that the adjusted gross profit total was \$480,897, that the sales commission on the \$480,897 was \$17,413 (using all three prongs of the contractual

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<sup>2</sup> With respect to these additions and deductions, plaintiff testified that he did not know where the numbers came from, so he could not speak one way or the other concerning their accuracy. The same is true in regard to similar additions and deductions relative to the second quarter of 2008.

<sup>3</sup> We do note that in plaintiff’s appellate brief, he refers to a second S&C document regarding the first quarter, identical in form to the S&C document that we have been discussing, which appears to have been generated earlier and soon after the first quarter, as it contains no data relative to the second quarter, has a lower starting gross profit total, has about \$55,000 less in additions to gross profit, and makes no reference to the deduction for carrying costs. The document was referenced in plaintiff’s deposition, but plaintiff, in his testimony, essentially went along with the more recent S&C document. In his appellate brief, plaintiff takes the starting gross profit amount from the earlier S&C company document, \$319,710, and simply applies the contract percentages to that amount, absent consideration of the \$148,113 non-carrying-cost deduction (found in both documents), to show an outstanding commission of \$6,327 after subtraction of the \$1,500 payment. Ultimately, plaintiff provides no argument against the non-carrying-cost deduction and, even under the more recent S&C document, a commission would still be owed absent consideration of the carrying-cost deduction (\$3339).

formula), that another advance of \$1,500 was subtracted from the commission,<sup>4</sup> that a “carrying cost” of \$12,333 was further deducted from the commission, and that the end result was a commission owing of \$3,580. As reflected in his deposition testimony and affidavit, plaintiff did not receive any commission for the second quarter of 2008. In plaintiff’s appellate brief, he again simply takes the starting gross profit, \$580,469, and applies the contract percentages, resulting in a claimed commission of \$24,362, absent any consideration of the addition to, and non-carrying-cost deduction from, the gross profit. But he fails to present any argument or evidence on why the addition and non-carrying-cost deduction should not apply. Plaintiff acknowledged in his deposition that additions and non-carrying-cost deductions had been made in the past, and he failed to indicate that there was anything wrong in applying those additions and deductions; he was simply unaware of the basis for those numbers.

In his deposition, plaintiff testified as follows regarding the meaning of “carrying cost” as that term is used in the industry:

Carrying cost is the money it takes to bridge the gap between when [defendant] or a fuel supplier pays for the product from the vendor to the point in time which they get their money from the customer, you know, with the bank and the loans, you know.

In his deposition, plaintiff agreed with the following statement made by defense counsel regarding carrying costs and their characteristics:

So with respect to any given customer, if [defendant] submits a bill, you have a client, you made a transaction, an invoice is sent out, and that money isn’t paid by that client . . . for any term past the due date . . ., that would now be a carrying cost. There would be a certain cost in carrying that on the books and records of [defendant].

Plaintiff agreed that defendant has a certain liability associated with carrying costs, that defendant has the right to account for carrying costs in conducting its business, and that defendant generally has the discretion to deduct carrying costs from commissions. Plaintiff, however, complained that defendant failed to bill or invoice customers in a timely fashion, which inevitably increased the span of time between the date of the transaction and defendant’s receipt of payment.<sup>5</sup> According to plaintiff, the delays due to untimely billing practices necessarily increased the carrying costs, diminishing his commissions. Plaintiff acknowledged in his testimony that there are other factors that can create or increase “carrying costs,” such as where the customer simply fails to pay in time despite a timely-delivered invoice. In his deposition,

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<sup>4</sup> This would appear to be in error, as there is no indication of any additional \$1,500 payment to plaintiff, whether coined an advance or otherwise.

<sup>5</sup> Plaintiff testified, “If you are not going to bill the customer, how can they pay an invoice.” He also indicated, “I didn’t cause the delay in the invoicing[.]”

plaintiff agreed that there was nothing in the contract regarding the frequency and pace of billing defendant's customers.

Plaintiff averred in his affidavit that defendant failed to timely submit invoices to purchasers, with delays "often over 40 days[,] result[ing] in increased carrying costs which in turn affected [plaintiff's] commission payment." Plaintiff indicated in his affidavit that the vast majority of the sales at issue concerned government contracts that had to be paid within 30 days under federal law. Plaintiff further averred:

[I] addressed the issue on a number of occasions with my supervisor regarding how dilatory the accounts receivable department was in submitting invoices to the petroleum purchasers, which management admitted. I offered to help the billing department so invoices would be paid timely, but that request was denied.

The record also contains documentary evidence regarding two noncompetition agreements executed by plaintiff in 2001 and 2002; however, we find it unnecessary to explore those agreements and plaintiff's associated actions for purposes of resolving this appeal.<sup>6</sup>

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10), presenting multiple arguments. The trial court summarily dismissed an unjust enrichment claim because of the existence of an express contract. On the breach of contract claim, the trial court dismissed the claim, reasoning:

[Plaintiff] read the provisions and he understood that management had the right to make deductions as it saw fit. And, also, there's no question of fact that the agreement had no provisions as argued by plaintiff to the timeliness of invoices and carrying costs, and it would not be proper for me to impose those provisions in an agreement that is clear, and . . . it doesn't matter whether it's fair or unfair. This is the agreement.

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<sup>6</sup> We do note our disagreement with defendant's argument that plaintiff's breach of the noncompetition agreements eliminated defendant's duty to pay commissions to plaintiff. Defendant relies on the principle that a party who first engages in a substantial breach of a contract cannot thereafter maintain an action against the other contracting party for said party's alleged breach or failure to perform under the contract. *Michaels v Amway Corp*, 206 Mich App 644, 650; 522 NW2d 703 (1994). Here, the contract on commissions is a separate and distinct contract from the noncompetition agreements; a breach of the noncompetition agreements does not justify a breach of the contract on commissions, nor preclude plaintiff's lawsuit. Rather, defendant should have filed a counterclaim if it believed that plaintiff breached the noncompetition agreements. The principle of law cited in *Michaels* addresses situations in which a party to a contract commits a substantial breach of the contract and then later sues the other contracting party for breach of *that same contract*.

Plaintiff argues that the trial court erred in granting defendant's motion for summary disposition, where the language in the contract concerning discretionary deductions implied an obligation to act in good faith and engage in fair dealing.

We review de novo a ruling on a motion for summary disposition, as well as the proper interpretation of a contract. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463; 663 NW2d 447 (2003). A motion brought under MCR 2.116(C)(10) tests the factual support for a party's claim. *Skinner v Square D Co*, 445 Mich 153, 161; 516 NW2d 475 (1994). A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003).

"A party claiming a breach of contract must establish by a preponderance of the evidence (1) that there was a contract, (2) that the other party breached the contract and, (3) that the party asserting breach of contract suffered damages as a result of the breach." *Miller-Davis Co v Ahrens Constr, Inc (On Remand)*, 296 Mich App 56, 71; 817 NW2d 609 (2012). If a contract is unambiguous, we are to construe it according to its plain meaning. *Shay v Aldrich*, 487 Mich 648, 660; 790 NW2d 629 (2010).

"Where a party to a contract makes the manner of its performance a matter of its own discretion, the law does not hesitate to imply the proviso that such discretion be exercised honestly and in good faith." *Burkhardt v City Nat'l Bank of Detroit*, 57 Mich App 649, 652; 226 NW2d 678 (1975); see also *Ferrell v Vic Tanny Int'l, Inc*, 137 Mich App 238, 243; 357 NW2d 669 (1984). Here, the contract provided that "deductions are at the *discretion* of the manager." Assuming the application of the principle enunciated in *Burkhardt*, defendant's discretionary decisions to apply the carrying-cost deduction in the first and second quarters of 2008, as well as the decisions regarding the extent of those particular deductions, had to have been made honestly and in good faith.

Viewing the documentary evidence in a light most favorable to plaintiff, we must generally accept that invoices were not sent to customers in timely fashion. However, there is a dearth of evidence showing that bad faith or dishonesty played any role in the delivery of untimely invoices or in the application of carrying-cost deductions. Delayed billing could have resulted from processing issues, technical problems, staffing shortages, a backlog due to heavy volume, inadvertent human error, or other myriad reasons reflecting honesty and good faith. The existing record provides no insight on the matter. And if the delays in sending out invoices could not be attributed to dishonesty or bad faith, we are not prepared to find a question of fact regarding whether the act of deducting carrying costs from plaintiff's commissions constituted dishonesty or bad faith. Even if management was aware that billing delays were causing a problem that impacted commissions, it did not mean that management therefore had an obligation to ignore economic realities and money flow matters and pay full commissions absent carrying-cost deductions merely on the basis that sales staff were not to blame. It certainly did not mean that management failed to operate honestly and in good faith in applying the carrying-

cost deductions. Plaintiff testified that defendant generally had the right to make carrying-cost deductions.

In his appellate brief, plaintiff states that he had on occasion seen defendant's employees and a vice-president altering numbers; however, plaintiff fails to cite any evidence in the record supporting this claim, nor could we locate any supporting documentation. Moreover, the claim is exceptionally vague and lacks context. In his affidavit, plaintiff stated that defendant had not conducted itself in "good faith." However, "mere conclusory allegations within an affidavit that are devoid of detail are insufficient to create a question of fact." *Hamade v Sunoco, Inc (R&M)*, 271 Mich App 145, 163; 721 NW2d 233 (2006).

Furthermore, with one exception relative to a delay in billing concerning a certain second quarter transaction, plaintiff failed to provide documentary evidence showing that particular commission-driven transactions in the two quarters were not billed out to the customers on a timely basis, resulting in carrying costs. Instead, plaintiff simply made broad based and general claims in his affidavit and deposition about invoicing delays. Plaintiff acknowledged that other reasons can result in carrying costs, e.g., a customer fails to make timely payment, yet he did not provide evidence showing that these other possibilities were not at fault in regard to the specific transactions involving plaintiff. In sum, plaintiff has failed to establish a genuine issue of material fact with regard to showing a breach of the contract.<sup>7</sup>

Affirmed. Having fully prevailed on appeal, defendant is awarded taxable costs pursuant to MCR 7.219.

/s/ William B. Murphy  
/s/ Jane E. Markey  
/s/ Michael J. Riordan

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<sup>7</sup> We note that, even after taking into consideration the carrying costs with respect to the second quarter of 2008, it would appear that a commission of over \$3,000 was still owed to plaintiff. However, plaintiff fails to present any argument on the matter, so we decline to explore it any further.