STATE OF MICHIGAN

IN THE 20th CIRCUIT COURT FOR THE COUNTY OF OTTAWA

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COLBURN HUNDLEY, INC.,

Plaintiff,

v

DAANE'S DEVELOPMENT CO. and DAVID DAANE,

Defendants.
_____/

OPINION AND ORDER on MOTIONS FOR SUMMARY DISPOSITION

File No. 13-03373-CK

Hon. Jon A. Van Allsburg,
Circuit Court Judge

Plaintiff's motion for summary disposition is granted on its breach of contract claims against defendant Daane's Development Company (DDC).

Plaintiff, Colburn Hundley, Inc., is a company that provides real estate commercial broker services. Defendant DDC owns and is the landlord of several commercial real estate developments, including a development called "Clock Tower Center" in Gaines Township, Michigan. Plaintiff claims that it was the listing agent for certain Clock Tower Center properties and is owed commissions on the lease renewals or extensions of two tenants, "Di's Hallmark" (Hallmark) and "Pet Supplies Plus" (PSP). Plaintiff initiated this case by bringing an action against DDC for a money judgment on the Hallmark commission payment, which it alleged was due on February 1, 2013. It later moved to transfer the case to the circuit court to add another claim against DDC, alleging that DDC breached the contract for commissions on the PSP lease by failing to make a payment due on May 1, 2013. The district court ordered the case transferred on July 2, 2013.

Plaintiff filed its First Amended Complaint for Money Judgment (Complaint) on July 29, 2013, and named David Daane as a defendant in addition to DDC. Defendants DDC and David Daane responded to the Complaint by filing Motions for Summary Disposition pursuant to MCR

2.116(C)(7) and (8). DDC also filed its Answer and Affirmative Defenses. Plaintiff requested summary disposition pursuant to MCR 2.116(C)(10) in its response to defendants' motions. In an Opinion and Order dated October 10, 2013, the court denied plaintiff's request for summary disposition pursuant to MCR 2.116(C)(10) without prejudice as premature. As to defendants' motions, the court granted summary disposition for dismissal of Count V, in which plaintiff alleged that DDC was an alter ego of David Daane. In denying defendants' other requests for summary disposition, the court ruled that it had jurisdiction over David Daane as an individual and that defendants' statute of limitations defense was without merit.

Plaintiff's current motion for summary disposition requests judgment in plaintiff's favor pursuant to MCR 2.116(C)(10) on Counts I and II for breach of an agreement to pay commissions on the Hallmark lease. David Daane is included as a defendant on this claim because he signed the original agreement without identifying whether he was acting in his individual capacity or as DDC's representative. Plaintiff requests judgment in its favor on Count III against defendant DDC for commissions on the PSP lease based on an agreement between plaintiff and DDC. Plaintiff also seeks dismissal of defendants' affirmative defenses, including statute of frauds, statute of limitations (which has already been dismissed), and defendants' contention that no valid contract exists. Related to this last defense are claims that plaintiff was not the procuring cause of the leases at issue and that Jeff Hundley was not able to enter into a contract on behalf of plaintiff. Defendants responded to plaintiff's current motion for summary disposition with a request for summary disposition in their favor on the grounds that plaintiff does not have valid contracts for commission payments.

A motion pursuant to MCR 2.116(C)(10) tests the factual support of a claim. *Smith v Globe Life Ins Co,* 460 Mich 446; 597 NW2d 28 (1999). The court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Haliw v Sterling Hts*, 464 Mich 297, 302; 627 NW2d 581, 584 (2001). When contractual language is clear, construction of the contract is a question of law for the court. *Comerica Bank v Cohen*, 291 Mich App 40, 46; 805 NW2d 544 (2010).

The statute of frauds requires that contracts for real estate commission payments be in writing. MCL 566.132(1)(e). An agreement that is subject to the statute of frauds is void unless a "note or memorandum of the agreement, contract, or promise is in writing and signed with an authorized signature by the party to be charged with the agreement, contract, or promise." MCL 566.132(1).

Case law supports plaintiff's position that all that is required of the writing for payment of commissions is that it state a promise to pay a commission with respect to sale or lease of real estate. The writing need not be as definite and certain as an agreement to purchase real estate. *Badger v Finlayson*, 219 Mich 660, 661-62; 189 NW 988 (1922); *Cochran v Staman*, 201 Mich 630, 640-41; 167 NW 1015 (1918).

Plaintiff has provided ample evidence that the statute of frauds is satisfied with respect to the commission agreements at issue. Included with plaintiff's motion is an affidavit by Jeff Hundley to which several documents are attached. With respect to the Hallmark store, the earliest (Ex 1) is a lease agency contract (which is also called a listing agreement) on the Clock Tower retail center signed by David Daane as owner and dated May 16, 1990. The listing agreement provides for a brokerage fee upon execution of a lease and at the beginning of each new or extended term of the original lease. The first lease with Hallmark (Ex 2) was executed by David Daane and dated November 30, 1990. An addendum to the lease dated November 30, 1990, identified DDC as the landlord (Ex 3). Also signed on November 30, 1990 was a Landlord Closing Statement (Ex 4) which David Daane signed on behalf of Daane's Food Market. Plaintiff characterizes the reference to Daane's Food Market as a scrivener's error resulting from their use of a form they had used in the past in their work with David Daane. In 1996, when Hallmark renewed it lease, the parties signed another Landlord Closing Statement, dated January 3, 1996 (Ex 5). David Daane signed the 1996 agreement on behalf of DDC.

Both the November 30, 1990, and the January 3, 1996, Landlord Closing Statements clearly identified the property and the tenant. They indicated that a commission of 6% was due to plaintiff and included the following language:

> If Tenant or anyone in his behalf shall exercise an option in the original lease to renew or extend the original term, a lease commission based on the above rate

shall also be paid at the beginning of each new or extended term of the original lease.

These document clearly satisfy the requirements of the statute of frauds. Each states a promise to pay a commission with respect to the renewal of a lease.

As to the issue of the error in identifying the owner in the early documents, plaintiff argues that DDC ratified the actions of its agent, David Daane. There is no dispute that DDC was the landlord for the inception of the Hallmark lease or that all lease payments were made to DDC. Moreover, DDC acknowledged in writing in the First Amendment to Lease, dated March 28, 2005, that it entered into the initial lease with Molitor and Molitor, Inc. d/b/a Di's Hallmark, on November 30, 1990. There is also no dispute that DDC made commission payments to plaintiff on the Hallmark lease consistent with the agreement stated in writing in the Landlord Closing Statements when the lease was initiated and upon each renewal until 2013.

In response to plaintiff's motion, defendant DDC asserts that there is no valid, enforceable contract between plaintiff and DDC regarding the Hallmark lease because:

1. The listing agreement does not correctly identify the Hallmark space in that the street number in the property address is wrong.
2. The Landlord Closing Statements lack consideration for renewal commissions.
3. Plaintiff was not the procuring agent for the Hallmark lease.
4. Neither the listing agreement nor the addendum to the lease allow for the survival of the commission agreement to successors or assigns of the lessor.
5. Jeff Hundley was not a broker and thus not qualified to sign the Landlord Closing Statement.

DDC also argues that its payments were based on plaintiff's misrepresentation that DDC has a legal obligation to pay and do not constitute ratification.

Analyzing the issue of whether there is a valid agreement for commissions on the Hallmark property under the fundamental principles of contract law, it is clear that there is an agreement. "A basic requirement of contract formation is that the parties mutually assent to be bound." *Rood v Gen Dynamics Corp*, 444 Mich 107, 118; 507 NW2d 591 (1993). Mutual assent is assessed using an objective test, considering the express words and visible acts of the

parties, and "whether a reasonable person could have interpreted the words or conduct in the manner that is alleged." *Id.* at 119. This analysis begins "by looking 'to all the relevant circumstances surrounding the transaction, including all writings, oral statements, and other conduct by which the parties manifested their intent.' *Rowe*, 437 Mich [627,] 641; 473 NW2d 268 [(1991)]." *Id.*

While it is clear that, in the early days of leasing activity in the Clock Tower Center development, the parties were not certain of the pertinent street addresses and David Daane did not clearly indicate, when he signed documents, that he was acting on behalf of DDC, the documents clearly show that there was mutual assent between plaintiff and David Daane that the landlord, i.e., DDC, would pay commissions to plaintiff upon renewal of the lease plaintiff obtained with Hallmark. The terms of the agreement are spelled out in writing in each Landlord Closing Statement and the consideration for the parties' agreement is clear from the related documents and indicated in the closing statement, which states that the commission was to be paid when a lease was renewed or extended. Moreover, case law provides that consideration need not be expressed in the writing. *Benedek v Mechanical Products, Inc,* 314 Mich 494, 511; 22 NW2d 901, 906 (1946).

There is no merit to defendants' claim that there is no valid agreement because plaintiff was not the procuring agent for the Hallmark lease. Defendants' attempt to introduce irrelevant evidence as to events prior to the first commission agreement cannot alter the terms of the written agreement DDC entered into with plaintiff. Defendants' claim that the commission agreements are unenforceable because Jeff Hundley cannot sign on his company's behalf is also irrelevant and immaterial to plaintiff's claim. For an agreement to be enforceable against DDC, it need only be signed by an agent of DDC. MCL 566.132(1). DDC's claim that the Hallmark agreement does not apply to successors or assigns of the lessor cannot succeed for several reasons, including the fact that DDC itself entered into a written agreement to pay commissions to plaintiff in 1996.

The issue of whether plaintiff's agreement for commissions was an agreement with DDC and not just with David Daane in his personal capacity is resolved as to DDC's obligations on the Hallmark lease by the 1996 Landlord Closing Statement, signed by David Daane on behalf of DDC. The facts also support plaintiff's claim that DDC ratified the initial agreement when the

Hallmark lease was initiated. The Michigan Supreme Court adopted the rule of ratification, as stated in the Restatement of Agency 2d, in *David v Serges*, 373 Mich 442, 443-44; 129 NW2d 882 (1964):

> When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it. The Restatement of Agency 2d, § 82, defines ratification thusly:
>
> Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.
>
> "Affirmance" is defined in § 83 of the Restatement:
> Affirmance is either
> (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
> (b) conduct by him justifiable only if there were such an election.

There is ample uncontroverted evidence that DDC acted in a manner that indicates it elected to affirm David Daane's actions as DDC's agent. DDC accepted the benefits of the Hallmark lease and made commission payments to plaintiff pursuant to the commission agreements whose terms are evident in the various documents.

DDC claims that it is not bound by ratification or the evidence of its history of payments because it paid the commissions by mistake in reliance of plaintiff's misrepresentation that payments were due. In essence, DDC claims it was mistaken in thinking the commission agreement was valid. DDC was not mistaken in making payments. It breached a valid agreement between DDC and plaintiff when it failed to make payment in 2013.

Plaintiff likewise demonstrates that it has an agreement with DDC for commission payments on the PSP lease that satisfies the statute of frauds. The agreement was articulated in multiple writings, including a Preliminary Agreement to Lease (Ex 15) and a Landlord Closing Statement (Ex 25). The closing statement was dated on October 24, 1996, the same date as the lease, and signed by David Daane on behalf of DDC. It provided that an initial lease commission of 6% was to be paid to plaintiff and that a 4% commission was to be paid to plaintiff at the beginning of each new or extended term of the original PSP lease.

DCC asserts that there is no enforceable contract between plaintiff and DDC regarding the PSP lease because:

1. The Preliminary Agreement to Lease dated September 12, 1996, is not a listing agreement and plaintiff has failed to produce a valid listing agreement.
2. The Preliminary Agreement does not provide for renewal commissions.
3. There is no legal consideration for the alleged promise in the Landlord Closing Statement for the promise to pay commissions.
4. Jeff Hundley was not a broker and thus not qualified to sign the Landlord Closing Statement.
5. Commission payments made by DDC to plaintiff were based on plaintiff's misrepresentation that there was a legal obligation for payment.
6. The PSP lease was assigned to a new owner, GR PSP LLC, on November 20, 2012.

DDC's first two objections are immaterial because DDC is bound by the written agreement in the Landlord Closing Statement. DDC's third, fourth, and fifth objections are also without merit for the reasons addressed above in the discussion of the Hallmark lease. DDC's claim that it does not owe further commissions because the lease has changed hands is without merit on the basis of the contract terms. The Landlord Closing Statement states:

> We also agree that if Tenant or anyone in his behalf shall exercise an option in the original lease to renew or extend the original term, a lease commission of 4% shall also be paid at the beginning of each new or extended term of the original lease.

The document DDC attached to show that the lease was transferred makes it clear that the assignee is stepping into the shoes of and acting on behalf of the tenant by renewing the original October 24, 1996 lease. The written agreement between the parties expressly provides for the payment of commissions upon a renewal or extension in these circumstances. DDC has no grounds on which to refuse to make the commission payments provided under the Landlord Closing Statement. Summary disposition is appropriate against DDC for breach of contract on the PSP lease as well as on the Hallmark lease.

Plaintiff's motion for summary disposition requested judgment against DDC and David Daane jointly for breach of the Hallmark agreement. Defendants filed a joint response in opposition to plaintiff's motion for summary disposition and did not address the issue of whether David Daane is liable in his personal capacity to pay commissions under the initial listing agreement for the Hallmark property. Neither of the parties has addressed the application of agency law[1] or ratification of the contract by DDC to the liability of David Daane. For this reason, summary disposition is DENIED on Count II.

For the reasons stated above, summary disposition is GRANTED in favor of plaintiff on Counts I and III against DDC. DDC owes damages for its breach of the commission contracts in the amount of $31,707.90 plus interest and costs.

Defendants' request for summary disposition in their favor is DENIED and their affirmative defenses are dismissed.

IT IS SO ORDERED.

Dated: February 17, 2014

_____/s/_____
Hon. Jon A. Van Allsburg, Circuit Judge

[1] Michigan courts recognize that an agent acting on the behalf of a disclosed principal does not become a party to a contract absent facts demonstrating that the agent intended to become a party to the contract. *Riddle v Lacey & Jones,* 135 Mich App 241, 246-47; 351 NW2d 916 (1984). In circumstances where it is not clear from the face of the contract whether a party signed on his own behalf or as an agent, Michigan law permits the introduction of parol evidence to show whether the signatures were made in a representative capacity. *Armstrong v Andrews,* 109 Mich 537, 540-41; 67 NW 567 (1896); *Mok v Iroquois Bldg Co*, 4 Mich App 307, 310; 144 NW2d 813 (1966).