STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

TRI TECH GROUP INCORPORATED,

Plaintiff/Counter-Defendant,

v

Case No. 14-138347-CB
Hon. Wendy Potts

GLOBAL INDUSTRIAL PARTNERS, LLC,

Defendant/Counter-Plaintiff.
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OPINION AND ORDER RE:
DEFENDANT'S MOTION FOR SUMMARY DISPOSITION OF PLAINTIFF'S COMPLAINT UNDER MCR 2.116(C)(10)
AND
DEFENDANT'S PARTIAL MOTION FOR SUMMARY DISPOSITION OF COUNTER-COMPLAINT

At a session of Court
Held in Pontiac, Michigan
On JUN 5 2015

Plaintiff Tri Tech Group Incorporated and Defendant Global Industrial Partners, LLC are manufacturers' sales representatives. In February 2010 they entered into a "Royalty Agreement" whereby Tri Tech would introduce Global to Tri Tech's existing solar industry customers and assist Global in submitting proposals on behalf of those customers. Global agreed to pay Tri Tech "a royalty equal to 50% of the total commission revenues or fees payable to [Global] in respect of any other parts, assemblies or services provided, directly or indirectly, to the Customer or any of its affiliates or associates by the Company in the future." The Royalty Agreement identified certain customers or projects listed in "Schedule A" attached to the agreement, and states that "[t]he Royalty will be for the production life of the part or as long as [Global] is being paid a commission on part is [sic] Schedule A." Tri Tech agreed that "all costs and expenses of Tri Tech, of whatever sort, shall be borne solely by Tri Tech." The Royalty Agreement had an anti-waiver provision stating that it "may only be changed by a writing signed by authorized representatives of each party." In March 2011, the parties added new projects through an amended Schedule A signed by the parties' principals.

In August 2011 Tri Tech and Global entered into a second agreement to pay each other half of commissions received from a "List of Principals" in Exhibit 1 to the agreement. The 2011 Agreement states that "[e]ach party will pay one-half of all commissions and other compensation received by it from the companies (including their parent, subsidiary or affiliated companies) identified in Exhibit 1 to the other party." The 2011 Agreement further provides that "[a]ll expenses of each party including but not limited to, office, rent, travel, supplies, telephone and other insurance, and the like, shall be borne by each party and not deducted from any payment owed to the other party." While the Royalty Agreement could only be altered by a signed writing, the 2011 Agreement did not contain any anti-waiver clause. Exhibit 1 only lists Imperial Pipe, Steelwind Industries, and BMT Acquisition, however, the 2011 Agreement states that "[a]dditional companies may be added to Exhibit 1 by mutual written agreement of the parties." Tri Tech claims that the parties orally amended Exhibit 1 to add Fetasa and J.F. Ahern as principals, which Global denies. The 2011 Agreement also states that it "shall remain in effect until all payments from each company identified in Exhibit 1 cease."

Global claims that throughout the course of the parties' relationship, it paid Tri Tech $257,245.99 for its portion of commission payments Global received from Steelwind, BMT, and Fetasa. Global further claims that Tri Tech paid Global nothing, despite Tri Tech receiving $13,479.76 from Imperial Pipe. Tri Tech claims that the money Imperial paid was expense reimbursement that is not subject to the 2011 Agreement. Tri Tech also claims that Fetasa and J.F. Ahern owe outstanding commissions or other compensation to Global, and Tri Tech is entitled to 50% of that compensation.

From November 2012 through at least January 2013, Tri Tech and Global's principals discussed modifying or updating their agreements, however, it appears that they were unable to come to terms. On October 18, 2013, Global's attorney sent Tri Tech a payment of $55,000 along with a letter stating that the 2011 Agreement is terminated. In January 2014, Tri Tech filed this action claiming that Global breached the Royalty Agreement and the 2011 Agreement and violated the Michigan Sales Representatives Commission Act by failing to pay commissions. Tri Tech also sought a declaratory judgment regarding the parties' rights to future payment for certain projects, however, Tri Tech voluntarily dismissed this claim. Global filed a counterclaim alleging that Tri Tech breached the agreements and also seeking declaratory relief on the agreements.

The matter is now before the Court on Global's motions to dismiss Tri Tech's claims and to grant Global relief on some of its counterclaims. The motions are brought under MCR 2.116(C)(10), which tests the factual support for its claims. *Maiden v Rozwood*, 461 Mich 109, 119-120; 597 NW2d 817 (1999). In deciding (C)(10) motions, the Court considers the parties' admissible evidence in a light most favorable to the nonmoving party to determine if a genuine issue of material fact exists for trial. *Id* at 120.

A. <u>Breaches of the Royalty and 2011 Agreements</u>

Global first asserts that Tri Tech's Count I alleging breach of the Royalty Agreement and Count II alleging breach of the 2011 Agreement should be dismissed because Tri Tech cannot show that it is entitled to payment of outstanding Fetasa and J.F. Ahern commissions or compensation. Global notes that neither Fetasa nor J.F. Ahern were listed as principals in the Royalty Agreement or the 2011 Agreement and argues that Tri Tech cannot claim that the parties added these principals by oral agreement because both agreements required modifications to be in writing. Although the 2011 Agreement required principals to be added in writing, the Agreement did not bar all oral modifications. Thus, the parties could have orally agreed to waive the requirement of a written modification of Exhibit 1. Further, although the Royalty Agreement had an anti-waiver clause, Tri Tech could show that they orally agreed to waive the anti-waiver clause, provided it can present clear and convincing evidence of a waiver of that provision. See *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 364; 666 NW2d 251 (2003). Whether Tri Tech can present sufficient evidence to prove oral modifications of the parties' agreements is a question of fact for the jury. Global is not entitled to summary disposition on this ground.

Global also asserts that Tri Tech is not entitled to commission payments for the J.F. Ahern projects or proposals because there was no consideration for adding J.F. Ahern as a principal to the 2011 Agreement. As support for this assertion, Global claims that Tri Tech had "absolutely no involvement" with J.F. Ahern matters. However, the 2011 Agreement appears to have consideration on its face because the parties agreed to a mutual exchange of benefits and detriments, and the Court has no authority to question the sufficiency of consideration. *GMC v Dep't of Treasury*, 466 Mich 231, 238-239; 644 NW2d 734 (2002). As for whether consideration existed for the addition of J.F. Ahern, this is dependent on a factual dispute regarding the alleged oral modification of the 2011 Agreement. Thus, Global is not entitled to summary disposition on this ground.

Global further asserts that the 2011 Agreement fails for lack of mutuality of obligation because Global is required to split commissions with Tri Tech, whereas Tri Tech has no such obligation because it does not represent any of the principals on Exhibit 1. However, the plain language of the 2011 Agreement states that "each party" will pay half of the commissions it receives to the "other party." Thus, on the face of the agreement there is mutuality of obligation, and Global is not entitled to summary disposition on this ground.

Global next claims that it is not obligated to pay Tri Tech commissions under the 2011 Agreement because Tri Tech was the first to substantially breach the agreement by failing to pay Global half of expense payments it received from Imperial. As noted above, Tri Tech claims that those payments were reimbursement for Tri Tech's expenses and not subject to the 2011 Agreement's commission split. However, the 2011 Agreement states that Tri Tech must split with Global "all commissions and <u>other compensation</u>" it receives from companies in Exhibit 1 (emphasis added). Whether Imperial's payments to Tri Tech constituted "other compensation" is a question of fact for the jury. Further, assuming Tri Tech is able to prove that the parties orally agreed to add J.F. Ahern to the 2011 Agreement, there would also be a factual dispute whether Global breached the agreement by failing to pay Tri Tech half of retainer payments Global received from J.F. Ahern. Because there are multiple factual disputes regarding the parties' respective alleged breaches of the 2011 Agreement, Global is not entitled to summary disposition on this ground.

B. <u>Violation of the Sales Representatives Commissions Act</u>

Global asserts that Tri Tech's claim that Global violated the Sales Representatives Commissions Act fails because the Act is inapplicable to this case where both parties are sales representatives. Global argues that the Act is intended to compel a manufacturer or distributor to timely pay commissions, and there are no cases holding that the Act applies to an agreement between two sales representatives. However, Tri Tech notes that the Act defines "commissions" to include "compensation accruing to a sales representative for payment by a principal," MCL 600.2961(1)(a), and it further defines a principal to include "a person that . . . [c]ontracts with a sales representative to solicit orders for or sell a product in this state." § 2961(1)(d)(ii). Tri Tech argues, and the Court agrees, that the definitions of commissions and principals under the Act are sufficiently broad to encompass Global's relationship to Tri Tech.

Global also reasserts its position that the payments it received from J.F. Ahern were retainer payments, not commissions, and Global paid Tri Tech all of the commissions it is due. However, these claims are subject to a question of fact. Tri Tech maintains, with some evidentiary support, that the "retainer" payments were disguised commissions that Global arranged in an attempt to avoid paying Tri Tech. Likewise, Global's claim that it paid all commissions it owes Tri Tech is subject to factual disputes. Whether Tri Tech will be able to support its claims at trial is a question for the jury. Therefore, Global is not entitled to summary disposition of Tri Tech's claim under the Sales Representatives Commissions Act.

C. <u>Global's Request for Declaratory Relief Regarding the Agreements</u>

Global asserts that it is entitled to a declaratory judgment that the Royalty and 2011 Agreements are terminable at will because they have no definite term. See *Lichnovsky v Ziebart International Corp*, 414 Mich 228, 240-241; 324 NW2d 732 (1982). However, the 2011 Agreement is not indefinite because it has a term addressing the duration. As noted above, its states that it remains in effect until all payments from the principals in Exhibit 1 cease. Because it refers to a condition under which the agreement will cease to exist, it is not indefinite and not terminable at will. By contrast, the Royalty Agreement has no provision addressing when or how the agreement can be terminated. Paragraph (2)(a) regarding royalties being paid for the "production life of the part" or as long as a commission is paid does not create a termination condition. That provision simply determines the duration of commission payments, and does not refer to when the agreement will terminate or how it can be terminated. Because the Royalty Agreement is an indefinite term agreement, Global is free to terminate it at will. Therefore, the Court grants Global's motion in part by concluding that the Royalty Agreement is of an indefinite term and thus terminable at will, but the 2011 Agreement is not of an indefinite term and is not terminable at will.

Global also asks the Court to conclude that the Agreements are no longer effective because the projects or commission payments addressed in the Agreements are terminated or ceased to exist. But these arguments assume that there is no dispute as to certain key facts, such as whether Global is working on any of the projects identified in the Royalty Agreement or whether Global is entitled to further commission payments that would be subject to the Agreements. Because Tri Tech has presented evidence showing factual disputes on these issues, the Court cannot make this determination as a matter of law.

Global also asserts that if the Agreements are not terminable at will or already terminated, then they are perpetual agreements that are void as against public policy, citing *Twp of Chestonia v Twp of Star*, 266 Mich App 423; 702 NW2d 631 (2005). However, there is no basis for concluding that either agreement is perpetual. As noted above, the Royalty Agreement is terminable at will, and the 2011 Agreement has a definite duration. Global is not entitled to summary disposition on this ground.

D. <u>Conclusion</u>

For all of these reasons, the Court grants in part Global's motion for summary disposition on its declaratory judgment claim by holding that the Royalty Agreement is terminable at will. In all other respects, Global's motions are denied.

The Court adjourns the June 8, 2015 trial date to Monday, July 20, 2015 at 8:30 a.m.

IT IS SO ORDERED.

Dated: JUN 5 2015

Hon. Wendy Potts