

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**JAMES DILLON,
Plaintiff,**

v.

**Case No. 15-145990-CK
Hon. James M. Alexander**

**3D SCAN IT, INC,
Defendant.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Defendant's motion for partial summary disposition. In his Complaint, Plaintiff claims that he was a former employee of Defendant – working in its sales department.

Plaintiff claims that he worked for Defendant from 2007 through November 3, 2014 and was paid a \$36,000 base salary and a commission equal to 1/3 of all sales that he made. Relevant to the current dispute, Plaintiff alleges that Defendant consistently and wrongfully withheld commissions during his employment. As a result, Plaintiff alleges a claim for Violation of the Michigan Sales Representatives Commissions Act (MCL 600.2961) as his Count I.

Defendant now moves for summary disposition of this claim under MCR 2.116(C)(8) or (C)(10) – claiming that the same must be dismissed because MCL 600.2961 only applies to the sale of goods, and Plaintiff earned commissions for selling Defendant's services.

A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. A motion under this subrule may be granted only where the claims alleged are so clearly unenforceable as a

matter of law that no factual development could possibly justify recovery. *Wade v Dept of Corrections*, 439 Mich 158; 483 NW2d 26 (1992).

A motion under (C)(10) tests the factual support for Plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Under (C)(10), "In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing *Neubacher v Globe Furniture Rentals*, 205 Mich App 418, 420; 522 NW2d 335 (1994).

Under MCL 600.2961(1)(e) (emphasis added), Michigan's Sales Representatives Commissions Act applies to sales representatives "who contracts with or is employed by a principal for the solicitation of orders or sale **of goods** and is paid, in whole or in part, by commission."

In its motion, Defendant claims that it "is in the business of providing 3D optical measurement services through the use of specialized scanning equipment." These "measurements," Defendant claims, "are generated by skilled technicians using various sophisticated 3D scanning machines." And the end price "is determined by the number of man hours expended for the job and the cost of using the machine." Defendant claims that it also offers training services.

In support of its claim that Plaintiff only sold services, Defendant attaches the affidavit of its President, Robert J. Squier. The Court will note that such evidence cannot be considered for purposes of a (C)(8) motion because, when deciding such a motion, the court considers only the pleadings. MCR 2.116(G)(5). But the Court properly considers such evidence under (C)(10). As a

result, the Court will consider Defendant’s motion only under that subrule.¹

In further support of its motion, Defendant cites Plaintiff’s Complaint at Paragraphs 2 and 8, which respectively allege that Defendant “is a Michigan professional services corporation,” whose “primary area of business is producing 3D optical measurements, . . . for companies wishing to produce identical copies of custom-made products.”

In response to Defendant’s motion, Plaintiff argues that “Defendant does provide the service of optical measurements to its customers, which is what Plaintiff was employed to sell, but each exchange that Defendant makes with a customer is ultimately for the reduction of such measurements onto a flash drive, or disc, for the customers’ future use.” In other words, Plaintiff argues, that “Defendant is essentially selling its customers a blueprint that allows those customers to produce identical copies of custom-made products.”

Michigan courts have addressed the goods versus services distinction in the context of the Sales Representatives Commissions Act, in part, by looking to the definition provided in the UCC.

In *Klapp v United Ins Group Agency, Inc*, 259 Mich App 467; 674 NW2d 736 (2003), the Court of Appeals reasoned: “‘Goods’ means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action.” *Klapp*, 259 Mich App at 471; quoting MCL 440.2105(1).

In *Neibarger v Universal Coops*, 439 Mich 512; 486 NW2d 612 (1992), our Supreme Court noted the difficulty sometimes facing courts when determining whether a transaction constituted a

¹ The Court also notes that, in its motion, Defendant also challenges Plaintiff’s version of events – something wholly inappropriate under a (C)(8) motion, which requires “all well-pleaded allegations are accepted as true, and construed most favorably to the non-moving party.” *Wade v Dept of Corrections*, 439 Mich 158, 162-163; 483 NW2d 26 (1992). This is another reason to only consider Defendant’s motion as one solely brought under (C)(10).

sale of goods or services, reasoning “[i]t is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture.” *Neibarger*, 439 Mich at 536.

As a result, the *Neibarger* Court proposed the following approach:

A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser’s ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser’s ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. *Neibarger*, 439 Mich at 536.

Both parties also rely on *Mahnick v Bell Co*, 256 Mich App 154; 662 NW2d 830 (2003). In *Mahnick*, the plaintiff was the chief project estimator for the defendant general contractor. In his role, the plaintiff would “estimate the cost of completing a construction project on which defendant intended to bid.” *Id.* at 155. The defendant would then, in turn, base its bid on projects on said estimate. The parties later had a dispute about the plaintiff’s commission structure, which resulted in the plaintiff leaving the defendant’s employ. The plaintiff then sued, in part, on a claim under the Sales Representatives Commissions Act.

In order to determine the validity of this claim, the Court of Appeals examined whether the plaintiff sold “goods” or services and reasoned:

as a general contractor, defendant principally provides services to project owners. The fact that the end result of those services may be a product such as a building or a building addition does not change the essential character of defendant’s work as a service provider, or change the character of plaintiff’s work to estimate jobs for defendant into a sale of a good. Thus, for the reasons discussed herein, we conclude that the trial court correctly granted defendant’s motion for summary disposition of plaintiff’s claims under the SRCA. *Mahnick*, 256 Mich App at 164.

In this case, Plaintiff claims that the essential purpose of Defendant’s business is to provide a

physical copy of blueprints, typically on a flash drive or disc so its customers can “produce identical copies of custom-made parts.”

Defendant, on the other hand, claims that the essential purpose of its business is to provide the service of intricate measurements, which result in “an electronic record of the results.”

While the parties dispute the conclusion on the essential character of Defendant’s business, they don’t dispute the actual process employed by Defendant. As stated in Plaintiff’s Complaint, Defendant “is a Michigan professional services corporation,” whose “primary area of business is producing 3D optical measurements.”

For purposes of this motion, the Court will assume that every Defendant customer eventually receives “blueprints” – as Plaintiff argues. But simply because a customer receives a physical item does not mean that these blueprints are goods within the meaning of the Sales Representatives Commissions Act.

As stated in *Neibarger*, 439 Mich 512, the Court must look to the purpose of the dealings between the parties. In this case, the purpose of the dealings appears to be technical scanning and blueprint creation of a particular item – in other words, the service of scanning and blueprint creation.

Similar to *Mahnick*, the fact that Defendant’s services result in physical blueprints does not change the essential character of Defendant’s work as a service provider. It would appear that customers seek Defendant out based on its technical expertise in creating accurate measurements of particular items and not simply because they want a random blueprint.

If the Court were to accept Plaintiff’s argument that blueprints are goods, then it follows that every architect is in the business of selling goods as opposed to services. But this is not the case.

Both an architect and Defendant are selling **the skill in creating the blueprint**, and not the actual blueprint. And this means that the essential character of their business is one as a service provider.

For all of the above reasons and viewing all evidence in the light most favorable to Plaintiff, the Court concludes that there are no material questions of fact in dispute, and Defendant is entitled to judgment as a matter of law. Defendant is in the business of selling services, and as a result, Defendant's motion for partial summary disposition is GRANTED, and Plaintiff's Count I based on the Sales Representatives Commissions Act is hereby DISMISSED under (C)(10).

IT IS SO ORDERED.

August 26, 2015
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge