

**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 summary disposition, which seeks dismissal of Plaintiff's sole remaining claim for breach of contract.¹ The Court dispenses with oral argument pursuant to MCR 2.119(E)(3).

In his Complaint, Plaintiff claims that he was a former employee of Defendant – working in its sales department from 2007 through November 3, 2014. The parties' central dispute revolves around the proper calculation of commissions that Plaintiff was to receive. It appears undisputed that Plaintiff was paid a \$36,000 base salary. But Plaintiff claims that the parties also agreed that he was to receive a commission equal to 30% of the **gross** profits on each sale that he was responsible for. Defendant, on the other hand, claims that the agreement was for 30% of **net** profits.

The difference between these two calculations is substantial. If based on his calculations, Plaintiff was underpaid by some \$103,822.79. Based on Defendant's calculations, however, Plaintiff was actually overpaid by \$18,652.62. Unfortunately, there appears to be no written contract

¹ On August 26, 2015, the Court granted Defendant's prior motion for partial summary disposition, thereby dismissing Plaintiff's Count I based on the Sales Representatives Commissions Act.

establishing whether Plaintiff's commission was based on **gross** or **net** profits.

In any event, Defendant now moves for summary disposition under MCR 2.116(C)(10), which tests the factual support for a 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).

In support of its motion, Defendant argues that Plaintiff was entitled to 30% of net profits. Defendant claims that it was the parties' practice that it would make significant "draw" payments against Plaintiff's entitled commissions (sometimes directly to Plaintiff's creditors) with the intention that the parties would reconcile the payments on a yearly basis. These accountings, however, were apparently never done.

As a result of the present lawsuit, Defendant claims that it finally completed its accounting and discovered that it had actually overpaid Plaintiff by \$18,652.62 – using its claimed 30% of **net** profits calculation. In support of these claims, Defendant attaches the Affidavit of its owner, Robert Squier, with an attached spreadsheet showing how it arrived at its figure.

In response to Defendant's motion, Plaintiff claims that the parties actually agreed that he would receive commissions totaling 30% of **gross** profits on the sales that he was involved with. Using this calculation, Plaintiff claims that he is owed \$103,822.79. In support of his claim, Plaintiff attaches (at Exhibit 6) a spreadsheet that details the commissions owed from 2009 through 2014.

These calculations appear the basis used for Plaintiff's **verified** Supplemental Responses to Defendant's First Set of Requests for Admissions – attached as Exhibit 5 to Plaintiff's Response.

Plaintiff's **verified** Supplemental Responses also evidence Plaintiff's position that he was to be paid "a 30% of commission of the gross profit on each sale." (Exhibit 5).

This case presents an all-too-common problem – an apparent verbal agreement with a dispute over the terms thereof. Despite Defendant's argument otherwise, **both** parties present evidentiary support for their positions – Plaintiff via an Affidavit of its owner, and Defendant via his **verified** Responses to discovery requests.

In any event, this motion presents numerous questions of fact that preclude summary disposition. Both parties' submissions contain evidentiary support for their assertions.²

The Court finds that resolution of Plaintiff's breach of contract claim is so substantially intertwined with fact-finding and credibility determinations as to render summary disposition on said claim wholly inappropriate. As a result, Defendant's motion for summary of this claim is DENIED.

IT IS SO ORDERED.

January 6, 2016
Date

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

² Defendant also challenges Plaintiff's credibility. It is well settled, however, that credibility is an issue that must be submitted to the trier of fact. *White v Taylor Distributing Company, Inc*, 275 Mich App 615; 739 NW2d 132 (2007). The *White* Court reasoned that, "courts may not resolve factual disputes or determine credibility in ruling on a summary disposition motion" *Id.* at 625.