STATE OF MICHIGAN

MACOMB COUNTY CIRCUIT COURT

E.J. PECK, INC.,

Plaintiff,

vs. Case No. 2015-810-CB

WOLVERINE PLATING CORPORATION,

Defendant.

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OPINION AND ORDER

The parties have filed cross motions for summary disposition. Each side has filed a response to the other's motion, as well a reply brief.

I. Facts and Procedural History

On September 29, 2000, the parties entered into a Manufacturer's Representative Agreement ("Contract"). Pursuant to the Contract, Plaintiff was to act as a manufacturer's representative for Defendant. The Contract had an initial term of five (5) years, and was to continue on a year to year basis thereafter unless terminated by either party at least sixty (60) prior to the expiration of the term.

On or about October 31, 2012, Defendant sent a letter to Plaintiff in which it stated: "[a]s required by our contract dated September 29, 2000, let this letter serve as notice of termination of the contract effective January 1, 2013." (*See* Exhibit 2 to Complaint.) Prior to the January 1, 2013 termination date, the parties met and discussed the Contract on December 5, 2012. At the December 5, 2012 meeting the parties allegedly agreed to modify/amend the terms of the Contract. The parties then

allegedly continued under the terms of the Contract, as amended, for more than two years. On or about December 5, 2014, Defendant allegedly verbally terminated the Contract.

On March 10, 2015, Plaintiff filed its complaint in this matter. In its complaint, Plaintiff contends that Defendant breached the Contract by failing to comply with its termination provision and by failing pay certain commissions. Plaintiff's complaint also includes claims for unjust enrichment (Count II), promissory estoppel (Count III), and declaratory judgment (Count IV). On March 27, 2015, Defendant filed its answer and affirmative defenses in this matter.

On February 16, 2016, Plaintiff filed its motion for summary disposition. On February 29, 2016, Defendant filed its response and counter-request for summary disposition. On March 3, 2016, Plaintiff filed its response to Defendant's counter-request for summary disposition. On March 4, 2016, Defendant filed its reply brief in support of its motion for summary disposition. On March 7, 2016, the Court held a hearing in connection with the motions and took the matters under advisement. In addition, the Court granted Plaintiff leave to file a supplemental brief by March 21, 2016. On March 21, 2016, Plaintiff filed its supplemental brief.

II. Standard of Review

A motion under MCR 2.116(C)(9) tests the sufficiency of a defendant's pleadings by accepting all well-pleaded allegations as true. *Id.* If the defenses are so clearly untenable as a matter of law that no factual development could possibly deny plaintiff's right to recovery, then summary disposition under this rule is proper. *Id.* Further, a court may look only to the parties' pleadings in deciding a motion under MCR

2.116(C)(9). *Id.*

A motion under MCR 2.116(C)(10), on the other hand, tests the factual support of a claim. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). In reviewing such a motion, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties in the light most favorable to the party opposing the motion. *Id.* Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law. *Id.* The Court must only consider the substantively admissible evidence actually proffered in opposition to the motion, and may not rely on the mere possibility that the claim might be supported by evidence produced at trial. *Id.*, at 121.

III. Arguments and Analysis

As discussed above, Defendant sent a letter terminating the Contract on October 31, 2012. (*See* Defendant's Exhibit 2.) On November 1, 2012, Plaintiff acknowledged that Defendant had terminated the Contract. (*See* Defendant's Exhibit 3.) Accordingly, it is undisputed that Defendant's termination notice operated as a termination of the Contract at the end of the 2012 term, which was to run through December 31, 2012. (*See* Defendant's Exhibit 1, at ¶7(a).)

While it is undisputed that Defendant terminated the Contract on October 31, 2012, Plaintiff contends that the parties reached a binding amendment/modification to the Contract before the termination became effective, and that the amendment/modification operated to revoke Defendant's termination and create a modified/amended version of the Contract that the governed the parties' relationship moving forward. In response, Defendant concedes that the parties met on December 5,

2012 and that they agreed to certain modifications/amendments. However, Defendant contends that no binding modification/amendment was reached because (1) the parties failed to reach a meeting of the minds on all essential terms and (2) the alleged modification/amendment was not reduced to writing, and is therefore unenforceable under the statute of frauds.

A. Meeting of the Minds

As a preliminary matter, Defendant asserts that the Contract required all modifications to be in writing, and that a result any oral modification must be established by clear and convincing evidence. In *Quality Products and Concepts Co v Nagel Precision, Inc.*, the Michigan Supreme Court held that "contracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses." *Id.* at 372. However, such oral modifications must be established through clear and convincing evidence demonstrating mutual assent to make the alleged modification(s). *Id.* at 373.

In this case, the Contract provides that its terms cannot be modified unless the modification is in writing and signed by both parties. Specifically, Section 13 of the Contract provides:

> 13. **Modification and waiver.** No waiver or modification of this Agreement shall be valid unless it is in writing and signed by [Defendant] and [Plaintiff]. (*See* Defendant's Exhibit 1.)

Pursuant to the holding *Quality Products*, however, that contractual provision can be overcome if Plaintiff is able to prove, by clear and convincing evidence that the parties agreed to modify the Contract.

In its pleadings, Defendant contends that no binding modification/amendment

was agreed upon because the parties failed to reach a meeting of the minds on all of the terms being negotiated. Generally, parties are free to take from, add to, or modify an existing contract. *Soltys v. Soltys*, 336 Mich 693, 59 NW2d 54 (1953). However, in the same way a meeting of the minds is necessary to create a binding contract, so also is a meeting of the minds necessary to modify the contract after it has been made. *Universal Leaseway System, Inc. v. Herrud & Co.*, 366 Mich 473, 115 NW2d 294 (1962).

While Defendant concedes that the parties both agreed that (1) Defendant would not stop being paid commissions in connection with the Bayloff, William-Bayer and KMI Fastner accounts (collectively, "Accounts") beginning in 2013, and (2) and that if Plaintiff terminated the Contract it would only be paid commission for 12 months following the effective date of termination instead of the 15 month period provided in the Contract, Defendant avers that there was a third dispute that the parties did not resolve. Specifically, Defendant contends that, in addition to the two above-referenced terms, the parties were negotiating whether (a) Defendant would stop paying commissions on outside services, premium charges and testing charges (Defendant's position) <u>or</u> (b) whether Plaintiff would obtain price increases from some of Defendant's customers (Plaintiff's position). Defendant asserts that because the parties had not resolved that material dispute involved in their negotiation no meeting of the minds occurred, and as a result no binding modification/amendment was formed.

Both sides have presented evidence regarding whether they had a meeting of the minds on all essential terms. In support of its position that the parties did not reach an agreement on all essential terms, Defendant relies on Plaintiff's January 2,

2013 email in which Plaintiff's principal stated that the parties needed to schedule a time to continue contract negotiations. (*See* Defendants' Exhibit 10.) Further, Defendant relies on Mr. Peck's deposition during which he testified that as of January 2, 2013, the parties still needed to discuss trying to get price increases from some customers, and that the topic was addressed at a January 10, 2013 meeting without a resolution being reached. (*See* Defendants' Exhibit 8, at 53-54.) Moreover, Mr. Peck testified that the price increase issue continued to be open through September 2014. (*Id.* at 161.) In addition, Defendants rely on an October 31, 2014 email Mr. Peck sent to Defendant in which he stated that:

> Although we have been operating under our verbal agreement 12/5/12 w/you, Tom, and Ken, I thought we should formalize it in writing. Please review the attached documents which I believe covers all the changes agreed upon.
>
> (*See* Defendants' Exhibit 16.)

Mr. Peck testified that the document attached to the October 31, 2014 email ("Proposed Amendment") included the terms he believed the parties had agreed to back in December 2012. (*See* Defendants' Exhibit 8, at 71.) However, the Proposed Amendment included changes to the Contract beyond the two modifications the parties had agreed upon. (*See* Defendant's Exhibit 18.)

In response, Plaintiff avers that parties agreed to continue their relationship under the same terms as provided in the Contract, except that Defendant would stop being paid commissions in connection with the Accounts beginning in 2013, and that if Plaintiff terminated the Contract it would only be paid commission for 12 months following the effective date of termination instead of the 15 month period. Further,

Plaintiffs asserts that while the parties continued to discuss whether Plaintiff would obtain price increases from some of Defendant's customers or whether Defendant would stop paying commissions on outside services, premium charges and testing charges, that discussion was the subject of a separate amendment than the amendments already agreed upon. In support of its position that the parties intended to treat the two agreed upon modifications as an amendment separate from a potential future amendment with respect to price increases/stopping commissions on certain charges, Plaintiff points to several pieces of evidence that indicate that in 2013 the parties began to operate in a manner consistent with the two agreed upon modifications.

First, Plaintiff relies on the Defendant principal's deposition testimony in which he stipulated that Defendant stopped paying Plaintiff commissions on the Accounts beginning in 2013. (*See* Plaintiff's Exhibit D, at 64-77, 119-121.) In addition, Plaintiff avers that the parties' agreement to change the duration Plaintiff would receive commissions after termination is evidence by a January 10, 2013 note Defendant's principal drafted in which he documented, *inter alia*, that Plaintiff would only receive commissions for 12 months if it terminated the agreement. (*See* Plaintiff's Exhibit C.) Moreover, Plaintiff maintains that the parties' agreement to continue their relationship in a manner consistent with the two agreed-upon modifications is supported by Defendant principal's admissions that Plaintiff continued to work for Defendant after December 31, 2012. (*See* Plaintiff's Exhibit D, at 81-118.) Further, Plaintiff has provided the Court with various pieces of evidence

that indicate that the parties continued to work together through December 2014. (*See* Plaintiff's Exhibits H-J.)

The Court has reviewed the various pieces of evidence presented in this case and is convinced a genuine issue of material fact exists as to whether the parties intended for the two agreed upon modifications to act as a first amendment, with a potential future agreement with respect to the remaining issue being negotiated to serve a separate amendment, <u>or</u> whether they intended that an agreement needed to be reached on all of the issues prior to reaching a binding amendment/modification. Consequently, the Court is satisfied that neither party is entitled to summary disposition on the issue of whether the parties had a meeting on the minds of all of the essential terms to a binding amendment/modification of the Contract.

B. Statute of Frauds

Defendant also contends that it is entitled to summary disposition regardless of whether the parties reached a binding amendment because the amendment would have been void under the statute of frauds. MCL 566.132 establishes the statute of frauds, and provides, in pertinent part:

> (1) In the following cases an agreement, contract, or promise is void unless that agreement, contract, or promise, or 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:
>
> (a) An agreement that, by its terms, is not to be performed within 1 year from the making of the agreement.

In this case, it is undisputed that the Contract was required to be in writing under the statute of frauds. Where the underlying agreement is required to be in writing under the statute of frauds, any modification/amendment to its terms must also be in writing. *Zurcher v Herveat*, 238 Mich App 267, 299-300; 605 NW2d 329 (1999); *Schultz v Silver*, 323 Mich 454, 460; 35 NW2d 383 (1949). Accordingly, in order for the alleged amendment/modification to be valid it must satisfy the statute of frauds.

In its motion, Plaintiff contends that the alleged amendment/modification regarding the two agreed upon terms satisfies the statute of frauds. Specifically, Plaintiff relies on Defendant principal's January 2013 note in which he documents a two year agreement that a price increase was to be obtained or else Defendant would not pay commissions on outside services, and that Defendant would continue to pay Plaintiff for one year if he quit. (See Plaintiff's Exhibit C.) In addition, Plaintiff relies on commission checks Defendant paid to Plaintiff after 2012 which did not include commissions in connection with any sales made to the Accounts.

In order for a writing to satisfy the statute of frauds it must contain all of the essential terms of the contract with the degree of certainty which would obviate any necessity for parole evidence. *Assoc of Hebrew Teachers of Metropolitan Detroit v Jewish Welfare Fed*, 62 Mich App 54, 59; 233 NW2d 184 (1975). Moreover, the writing must be signed by the party against the party against whom enforcement of the agreement is sought. *Crown Technology Park v D&N Bank*, FSB, 242 Mich App 538, 548; 619 NW2d 66 (2000); MCL 566.132.

In this case, the January 2013 note is not signed by Defendant. As a result, it by itself cannot satisfy the statute of frauds. With regards to the checks, Plaintiff's mere

assertion that the commission checks Defendant paid to Plaintiff after 2012 did not include commissions in connection with any sales made to the Accounts is insufficient. Plaintiff has not attached the checks, or made any argument how the checks, whether by themselves, or in conjunction with the January 2013 note, satisfy the statute of frauds. Plaintiff has thus failed to establish that any writing(s) exist which individually, or collectively, satisfy the statute of frauds. Consequently, the statute of frauds operates to bar the parties' alleged modification(s).

Having determined that the statute of frauds bars the alleged amendment/modification(s), the Contract was terminated at the end of the 2012 calendar year. Accordingly, Plaintiff's right to commissions would be governed by the Contract irrespective of any unenforceable oral modifications/amendments. Consequently, Defendant's motion for summary disposition of Count I (Breach of Contract) must be granted to the extent Plaintiff seeks to recover commissions beyond those provided in the Contract.

With respect to Count II (Implied Contract, Quantum Meruit/Unjust Enrichment) and Count III (Promissory Estoppel), a claim for unjust enrichment fails where there is an express contract governing the same subject matter. *Belle Isle Grill Corp v City of Detroit*, 256 Mich App 463, 478; 666 NW2d 271 (2003). Accordingly, to the extent Plaintiff seeks to recover damages in connection with Count II for services provided under the Contract, its claim is barred. However, to the extent that Plaintiff seeks to recover compensation for the services it provided after the Contract was terminated at the end of 2012, the Michigan Supreme Court has held that if someone makes a contract for services which is void under the statute frauds and he has rendered

services in reliance upon a void contract, he may recover the value of the services actually rendered. *Smith v Chase & Baker Piano Mfg Co*, 185 Mich 313, 315; 151 NW 1025 (1915). For the reasons discussed above, the parties' alleged modification(s) to the Contract are void under the statute of frauds. However, it is undisputed that Plaintiff continued to provide services to Defendant through December 2014. Consequently, the Court is satisfied that Plaintiff is entitled to recover the value of its services for the period of time it provided such services after the Contract was terminated. The issue as to value of such services has not been addressed and will remain open.

Count III of the Complaint (Promissory Estoppel) seeks to enforce the alleged amendment requiring Defendant to pay Plaintiff commissions after Defendant ended the parties' relationship in 2014. However, as discussed above, the Contract was terminated at the end of 2012, and the parties' alleged oral modifications/amendments are unenforceable under the statute of frauds. Further, Plaintiff's recovery for the services it provided after the Contract was terminated is restricted to the value of such services under *Smith*. Consequently, Defendant's request for summary disposition of Plaintiff's promissory estoppel claim must be granted as that claim fails as a matter of law.

Finally, Count IV of the Complaint seeks a declaration of the parties' rights. For the reasons discussed above, the Court is satisfied that Defendant terminated the Contract effective January 1, 2013. Accordingly, Plaintiff was to continue to earn, and Defendant was required to pay, commissions until January 1, 2015 pursuant to ¶7(e) of the Contract. (*See* Defendant's Exhibit 1). Further, Plaintiff is entitled to receive the value of the services it provided to Defendant after December 31, 2013 in an amount to

be determined. Plaintiff's request for damages in accordance with the parties' alleged modifications/amendments to the Contract must be denied.

IV. Conclusion

Based upon the reasons set forth above, Plaintiff's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Plaintiff's motion for summary disposition of Count II, unjust enrichment, is GRANTED, IN PART. Specifically, Plaintiff is entitled to recover the value of its services for the period of time it provided services to Defendant after the Contract was terminated. The issue with respect to the value of such services remains open. Further, Plaintiff's motion for summary disposition of Count I, breach of contract, is GRANTED to the extent that Plaintiff seeks to recover commissions Defendant owes to it under ¶7(e) of the Contract for the 24 months following Defendant's termination of the Contract effective January 1, 2013. The remainder of Plaintiff's motion for summary disposition is DENIED.

In addition, Defendant's motion for summary disposition is GRANTED, IN PART, and DENIED, IN PART. Specifically, Defendant's motion for summary disposition of Count I, breach of contract is GRANTED to the extent Plaintiff's claim seeks to recover damages under the parties' alleged modifications/amendments to the Contract. Further, Defendant's motion for summary disposition of Count III is GRANTED, and the portion of Count II seeking to recover for services Plaintiff provided prior to January 1, 2013 is GRANTED. The remainder of Defendant's motion is DENIED. This *Opinion and Order* does not resolve the last claim and does not close the case. See MCR 2.602(A)(3).

IT IS SO ORDERED.

Date: MAY 24 2016

Kathy A. Viviano

Hon. Kathryn A. Viviano, Circuit Court Judge