

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

COLBURN HUNDLEY, INC., a Michigan
corporation,

Plaintiff,

vs.

WEST MICHIGAN DEVELOPERS, INC.,
a Michigan corporation,

Defendant.

Case No. 14-08641-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER DENYING CROSS-MOTIONS FOR SUMMARY
DISPOSITION PURSUANT TO MCR 2.116(C)(8) AND MCR 2.116(I)(2)

In theory, Michigan law permits courts to recognize a contract based upon handwritten notes on a napkin, an informal exchange of e-mails, or some combination of those sources of information. In practice, however, such informal contracts do not constitute a sensible method of doing business. Here, Plaintiff Colburn Hundley, Inc. (“Colburn Hundley”) has cobbled together enough of that type of evidence to escape summary disposition pursuant to MCR 2.116(C)(8), but Colburn Hundley has not convinced the Court that it should prevail on summary disposition under MCR 2.116(I)(2) at this early stage of the litigation, so the Court must allow the parties to proceed on the merits.

I. Factual Background

“A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of the complaint.” Michigan ex rel Gurganus v CVS Caremark Corp, 496 Mich 45, 62 (2014). Therefore, the Court’s review of such a motion is confined to the factual allegations contained in the complaint. See id. at 63. Similarly, a request for summary disposition under MCR 2.116(I)(2) is limited to the

issues raised in the summary-disposition motion itself, Church Mutual Ins Co v Consumers Energy Co, No 240571, slip op at 4 (Mich App Oct 30, 2003) (unpublished decision), so Colburn Hundley’s reciprocal demand for summary disposition under MCR 2.116(I)(2) should be regarded as a request for relief on the pleadings, *i.e.*, a motion for summary disposition under MCR 2.116(C)(9).¹ Thus, the Court must restrict itself to the pleadings in addressing Colburn Hundley’s competing demand for summary disposition under MCR 2.116(I)(2) as well as the motion under MCR 2.116(C)(8) from Defendant West Michigan Developers, Inc. (“West Michigan”).

According to the complaint, Defendant West Michigan sold a 30.51-acre parcel of property to Pembroke Acquisition Company, LLC (“Pembroke”) in July 2014. See Complaint, ¶ 6. Plaintiff Colburn Hundley alleges that, through a collection of documents, West Michigan bound itself to pay an eight-percent commission to the participating brokers upon the sale of the 30.51-acre parcel. Id., ¶¶ 7-8 & Exhibits 1-2. By all accounts, the most recent listing agreement between West Michigan and Colburn Hundley expired on April 13, 2012, id., ¶ 8 & Exhibit 2, but Colburn Hundley insists that its communications with West Michigan’s principal, Peter Bultsma, gave rise to an enforceable contract beyond the stated expiration date. See id., ¶¶ 9-19.

An April 2013 draft of the purchase agreement leading up to the ultimate sale to Pembroke identifies Plaintiff Colburn Hundley as the “Seller’s Broker,” see Complaint, Exhibit 6 (Contract for

¹ As our Court of Appeals has explained: “A motion under MCR 2.116(C)(9) ‘is analogous to one brought under MCR 2.116(C)(8) in that both motions are tested by the pleadings alone, with the court accepting all well-pleaded allegations as true.’” Hackel v Macomb County Commission, 298 Mich App 311, 316 (2012). “When a party’s defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff’s right to recovery, the motion is properly granted.” Id. Because the defendant has asked for summary disposition under MCR 2.116(C)(8), as opposed to MCR 2.116(C)(10), the Court cannot conduct an analysis akin to review under MCR 2.116(C)(10) in addressing Plaintiff Colburn Hundley’s demand for relief under MCR 2.116(I)(2). See Church Mutual Ins, No 240571, slip op at 4.

the Sale and Purchase of Real Property, § 24.3), and Colburn Hundley asserts an entitlement to three percent of the sale price for its work as the seller’s broker. See Complaint, ¶ 23. When Defendant West Michigan refused to pay any commission to Colburn Hundley in the wake of the closing on the 30.51-acre parcel, Colburn Hundley filed this action demanding \$198,000 as an unpaid commission for that sale based upon a breach-of-contract theory. West Michigan promptly moved for summary disposition under MCR 2.116(C)(8), arguing that it owes no contractual duty to pay any commission to Colburn Hundley. And, in turn, Colburn Hundley requested summary disposition in its own right pursuant to MCR 2.116(I)(2). As a result, the Court must determine whether either side is entitled to summary disposition at this juncture.

II. Legal Analysis

The motion by Defendant West Michigan for summary disposition under MCR 2.116(C)(8) “is properly granted if ‘[t]he opposing party has failed to state a claim on which relief can be granted.’” Gurganus, 496 Mich at 62-63. But if West Michigan’s “defenses are so untenable as a matter of law that no factual development could possibly deny the plaintiff’s right to recovery,” the competing request from Plaintiff Colburn Hundley for summary disposition under MCR 2.116(I)(2) must be granted. Hackel v Macomb County Commission, 298 Mich App 311, 316 (2012). Applying these standards, the Court must decide whether either side is entitled to prevail on the pleadings with respect to Colburn Hundley’s claim for breach of contract.

According to Michigan law, “[a]n agreement, promise, or contract to pay a commission for or upon the sale of an interest in real estate” must be treated as “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.” See MCL 566.132(1)(e). But this “statute of frauds does not require that the entire agreement be in writing[.]” Kelly-Stehney & Associates, Inc v MacDonald’s Industrial Products, Inc, 265 Mich App 105, 111 (2005). Moreover, a “note or memorandum may be sufficient under the statute of frauds in any number of forms, including a letter, an account statement, a draft or note, or a check.” Id. at 113. Also, a “‘note or memorandum’ may be sufficient to satisfy the requirements of the statute of frauds even though it consists of several separate papers and documents, not all of which are signed by the party to be charged, and none of which is a sufficient memorandum in itself.” Id. “Thus, the writing requirement of the statute of frauds may be satisfied by several writings made at different times.” Id. at 114. In sum, the Court cannot apply “narrow and rigid rules for compliance with the statute of frauds.” Id. at 111, citing Opdyke Investment Co v Norris Grain Co, 413 Mich 354, 367 (1982). With this rather generous analytical framework in mind, the Court must turn to the parties’ contractual documents, notes, and memoranda.

On April 14, 2010, the parties entered into a one-year listing agreement with respect to the 30.51-acre parcel.² See Complaint, Exhibit 1. By its terms, that agreement gave Plaintiff Colburn Hundley the right to a share of an eight-percent commission if a sale occurred within six months of the agreement’s expiration on April 13, 2011. See id. On April 5, 2011, the parties renewed their agreement for one year, thereby extending the expiration date to April 13, 2012. See id., Exhibit 2. On July 31, 2012, the principal of Defendant West Michigan advised Colburn Hundley’s principal

² Because contractual documents attached to the complaint constitute “a part of the pleading for all purposes[.]” see MCR 2.113(F)(2), the Court shall consider all of the documents attached to Plaintiff Colburn Hundley’s complaint in determining whether either party is entitled to summary disposition on the pleadings. But the Court shall disregard all additional documents that Colburn Hundley attached to its response to Defendant West Michigan’s summary-disposition motion.

via e-mail:

It is my belief that it will be another four to five years before the economy recovers enough to have movement on the sale of this land. It has already been three years and we have not had any significant interest in the property. At this time I do not wish to renew the listing agreement. Once interest starts to pick up we can meet and discuss getting a new one signed.

See Complaint, Exhibit 4 (e-mail chain at 2). Nevertheless, West Michigan's principal closed that e-mail with the following offer: "If you would like to keep your name on the sign I am more than happy to leave the sign up and in place." Id.

Although the parties did not formally renew the listing agreement, Plaintiff Colburn Hundley continued to market the property. In August of 2012, Colburn Hundley opened negotiations over the purchase price with the broker for Pembroke. See Complaint, ¶¶ 11-13. Colburn Hundley and the broker for Pembroke exchanged a series of letters of intent with the tacit approval of Defendant West Michigan's principal, see Complaint, ¶¶ 14-16 & Exhibit 5, and the proposed purchase price increased from \$4 million to \$6.6 million as the negotiations progressed. Id., ¶ 15 & Exhibit 5. On February 14, 2013, Colburn Hundley's principal sent the seventh (and final) letter of intent to West Michigan's principal, who signed it and then sent it back to Colburn Hundley. Id., Exhibit 5 (e-mail from Mandy Post with letter of intent signed by Peter Bultsma for West Michigan). That letter of intent included a section entitled "Brokerage Commission," which explained that "Seller and Buyer each represent and warrant to the other that, except for Earl Clements of Colliers International and Jeff Hundley of Colburn Hundley, no other real estate agent or broker was involved in negotiating the transaction contemplated herein" Id. (section 9 of the letter of intent signed on February 14, 2013). In other words, the final letter of intent executed by West Michigan expressly acknowledged that Colburn Hundley was involved in the transaction as a broker.

Likewise, the April 2013 “Contract for the Sale and Purchase of Real Property” concerning the 30.51-acre parcel states that each party to that agreement – including Defendant West Michigan – “represents and warrants to the other that it has dealt with no brokers or finders in connection with this transaction other than Earl Clements of Colliers International (“**Buyer’s Broker**”) and **Jeff Hundley of Colburn Hundley (“Seller’s Broker”).**” See Complaint, Exhibit 6 (Contract for the Sale and Purchase of Real Property, § 24.3) (emphasis added). And on May 14, 2013, the principal of West Michigan sent an e-mail to Jeff Hundley – the principal of Plaintiff Colburn Hundley – in which West Michigan disputed Colburn Hundley’s claim to an eight-percent commission, but made clear that West Michigan owed *some* commission to Colburn Hundley. See Complaint, Exhibit 8 (e-mail from Mandy Post to “jeff@colburnhundley.com” and Pete Bultsma). That e-mail suggested that the Colburn Hundley “agreement will need to be revised[,]” id., but that e-mail made clear that the disagreement concerned the appropriate amount of Colburn Hundley’s commission, as opposed to Colburn Hundley’s right to a commission. See id.

Manifestly, Plaintiff Colburn Hundley has attached materials to its complaint that satisfy the statute of frauds prescribed by MCL 566.132(1)(e). See Kelly-Stehney, 265 Mich App at 111-114. At this juncture, however, the Court cannot ascertain whether the parties had a binding contract for a commission at the time of the real estate sale. On one hand, Defendant West Michigan’s principal had refused to sign an extension of the parties’ listing agreement. On the other hand, the documents signed by West Michigan and Pembroke acknowledged Colburn Hundley’s role in the transaction, and e-mail correspondence from West Michigan’s principal seems to recognize Colburn Hundley’s right to a commission. Consequently, the Court cannot yet grant summary disposition to either side on Colburn Hundley’s breach-of-contract claim. Instead, the case must proceed on the merits.

III. Conclusion

In its complaint, Plaintiff Colburn Hundley has furnished a wealth of information supporting its claim of a contractual right to a commission on Defendant West Michigan's sale of the 30.51-acre parcel at issue in this lawsuit. Although the Court recognizes that the statute of frauds mandates that a breach-of-contract claim for a real estate commission requires a writing, see MCL566.132(1)(e), and that the listing agreement between the parties expired before the sale took place, the Court finds that West Michigan has no right to summary disposition on the pleadings under MCR 2.116(C)(8). Similarly, the Court cannot award summary disposition to Colburn Hundley under MCR 2.116(I)(2) because neither the existence of a binding contract at the time of the real estate sale nor the specific terms of that contract are clear. Thus, the Court must allow the parties to conduct discovery, request summary disposition under MCR 2.116(C)(10), and proceed to trial in order to contest the existence and terms of the agreement that forms the basis for Colburn Hundley's breach-of-contract claim.

IT IS SO ORDERED.

Dated: March 24, 2015



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge