

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.

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Case No. 14-08641-CKB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION IN FAVOR OF  
DEFENDANT WEST MICHIGAN DEVELOPERS UNDER MCR 2.116(C)(10)

Once again, the Court must wade into the quagmire of the contractual relationship between Plaintiff Colburn Hundley, Inc. (“Colburn Hundley”) and Defendant West Michigan Developers, Inc. (“West Michigan”). On March 24, 2015, the Court denied motions for summary disposition on the pleadings. Now, both parties have returned, seeking summary disposition under MCR 2.116(C)(10) based upon a wealth of evidence unearthed in discovery. In simple terms, Colburn Hundley demands a handsome commission for the sale of the 30.51-acre parcel that has since been developed into the Tanger Outlet Mall on 84th Street in Byron Center. In contrast, West Michigan insists that its listing agreement with Colburn Hundley expired long before that sale occurred, and that Colburn Hundley subsequently turned down West Michigan’s gratuitous offer of a reasonable share of the commission, so at this point Colburn Hundley should receive nothing. Despite the submission of a mountain of documents by Colburn Hundley in support of its claims for breach of contract, the Court concludes that Colburn Hundley has no contractual right to a commission.

## I. Factual Background

Both sides have moved for summary disposition under MCR 2.116(C)(10),<sup>1</sup> which requires the Court to consider “affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties.” Corley v Detroit Bd of Educ, 470 Mich 274, 278 (2004). The Court agrees that the case can be resolved on the record prior to trial, but the Court must carefully lay out the evidence to explain the nature of the parties’ dispute.

The parties agree on three important facts. First, Defendant West Michigan signed an agency agreement with Plaintiff Colburn Hundley for the listing of the 30.51-acre parcel at issue in this case. See Complaint, Exhibit 1. Second, the most recent extension of that agency agreement expired by its terms on April 13, 2012. See Complaint Exhibit 2. Third, after the agency agreement expired, West Michigan sold the 30.51-acre parcel to Pembroke Acquisition, LLC (“Pembroke”). But beyond that, the two sides vehemently disagree about the nature of their relationship after the expiration of the agency agreement as well as the consequences that flow from that relationship.

Plaintiff Colburn Hundley became involved with Pembroke after the agency agreement with Defendant West Michigan expired. In August 2012, Colburn Hundley’s principal, Jeffrey Hundley, began speaking with Pembroke’s representative and agent, Earl Clements.<sup>2</sup> See Plaintiff’s Brief in

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<sup>1</sup> In its motion for summary disposition, Plaintiff Colburn Hundley has also referred to MCR 2.116(C)(9), which permits the Court to rule in favor of the plaintiff on the pleadings alone. Hackel v Macomb County Commission, 298 Mich App 311, 316 (2012). Because the Court must consider materials outside the pleadings to resolve the competing requests for summary disposition, the Court shall treat Colburn Hundley’s motion as a request for summary disposition exclusively under MCR 2.116(C)(10). See Silberstein v Pro-Golf of America, Inc, 278 Mich App 446, 457 (2008).

<sup>2</sup> Plaintiff Colburn Hundley has suggested that its discussions with Earl Clements about the 30.51-acre parcel began in 2011 before the agency agreement expired, but that contact was on behalf of Cabela’s (which chose to purchase different property), rather than Pembroke. See Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 7 (Deposition of Earl Clements at 19-20).

Support of Motion for Summary Disposition, Exhibit 7 (Deposition of Earl Clements at 11, 19, 54); see also id., Exhibit 9 (August 19, 2012, e-mail from Jeffrey Hundley that he was “meeting with the buyer and his group any minute now”). Hundley’s discussions ripened into an offer from Pembroke on December 21, 2012, to purchase the 30.51-acre parcel for \$5.5 million, id., Exhibit 10 (Bates # WMDI000544), which Hundley sent on to West Michigan’s principal, Pete Bultsma, *via* e-mail on January 3, 2013. Id., Exhibit 10 (Bates # WMDI000538). On January 4, 2013, Bultsma responded to Hundley *via* e-mail, expressing concerns that Hundley had kept Bultsma out of the loop, that “the price of \$5.5” million “didn’t really grab [his] attention to want to sign an agreement,” and that he was “not willing to haggle to get to the number we need.” See id., Exhibit 11. Hundley and Bultsma nevertheless began sharing information about the Pembroke offer, which increased to \$6.5 million on January 21, 2013. See id., Exhibit 12.

The increased purchase price from Pembroke seemed to pique Pete Bultsma’s interest. Thus, on January 28, 2013, Bultsma sent Jeffrey Hundley an e-mail reaffirming that “[t]he asking price on the property is \$6.6 million” and laying out conditions for any deal. See Plaintiff’s Brief in Support of Motion for Summary Disposition, Exhibit 15. On February 4, 2013, Pembroke acceded to those conditions, raising its offer to \$6.6 million. See id., Exhibit 16. After some haggling over details, Hundley sent Bultsma a proposed agreement from Pembroke dated February 12, 2013. Id., Exhibit 18. For the first time, the paperwork properly identified Defendant West Michigan as the seller,<sup>3</sup> and Hundley’s transmittal e-mail to Bultsma stated: “I think you mentioned a couple of weeks ago that you thought I should get 4% of the 8% [commission] but that’s not going to happen and I’m ok with

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<sup>3</sup> Previous drafts had identified “JPW 84th Street, LLC” as the “seller.” As Defendant West Michigan bitterly complains, Jeffrey Hundley had engaged in negotiations with Pembroke without being clear or accurate about the actual seller’s identity.

that.” See id. (February 12, 2013, e-mail from Hundley to Bultsma). Finally, on February 14, 2013, Bultsma signed the letter of intent from Pembroke as “President” of West Michigan. Id., Exhibit 20. Section 9 of that letter of intent, entitled “Brokerage Commission,” stipulated 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[.]” See id.

Pembroke completed the purchase of the 30.51-acre parcel from Defendant West Michigan for \$6.6 million on July 15, 2014. See First Amended Complaint, Exhibit 5. But before the closing, Plaintiff Colburn Hundley began trying to obtain a commission for the sale. In May of 2013, Jeffrey Hundley sent e-mails to Pete Bultsma requesting Bultsma’s signature on a commission agreement “for Colburn Hundley’s share” of the commission. See First Amended Complaint, Exhibit 12. On May 14, 2013, Bultsma rejected the proposed commission agreement, but offered Hundley one and a half percent of the \$6.6 million sale price.<sup>4</sup> By all accounts, Earl Clements eventually received a commission of \$330,000 for the transaction, but Colburn Hundley received nothing. As a result, on September 16, 2014, Colburn Hundley filed this action against West Michigan. Colburn Hundley followed up with a first amended complaint filed on July 10, 2015, advancing two separate claims for breach of contract. Count One seeks a three-percent commission of \$198,000, and Count Two presents a claim “in the alternative” for an eight-percent commission of \$528,000. West Michigan has moved for summary disposition under MCR 2.116(C)(10) on both of those claims, and Colburn Hundley has filed its own motion for summary disposition.

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<sup>4</sup> Pete Bultsma acknowledged that Earl Clements was entitled to a five-percent commission. See First Amended Complaint, Exhibit 12. Bultsma pointed out that Plaintiff Colburn Hundley had sent a proposed agreement for an eight-percent commission, which Bultsma flatly rejected. See id. But Bultsma further explained that he would be willing to pay Sid Smith and Colburn Hundley one and a half percent each. See id.

## II. Legal Analysis

The two sides' competing motions for summary disposition under MCR 2.116(C)(10) require the Court to determine whether "there is no genuine issue regarding any material fact and the moving party is entitled to judgment as a matter of law." West v General Motors Corp, 469 Mich 177, 183 (2003). "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." Id. Here, the Court simply must decide whether either party has established the existence or absence of a contract for a commission on the sale of the 30.51-acre parcel.

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.

On April 14, 2010, the parties entered into a one-year agency agreement with respect to the 30.51-acre parcel. See Complaint, Exhibit 1. By its terms, that agreement granted Plaintiff Colburn Hundley the contractual right to an eight-percent commission if a sale occurred within the time frame pegged to the agreement's expiration on April 13, 2011. Id. On April 5, 2011, the parties renewed that agreement for one year, thereby extending the expiration date to April 13, 2012. Id., Exhibit 2. But after the extension expired, Pete Bultsma of Defendant West Michigan advised Jeffrey Hundley of Colburn Hundley *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, Bultsma closed that e-mail with a terse 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. Thus, although the parties did not formally extend the contractual relationship, they left the door open for Colburn Hundley to remain involved with the 30.51-acre parcel in some form. Consequently, the Court must consider whether subsequent events gave rise to a contractual obligation on West Michigan's part to pay a commission to Colburn Hundley.

A. Count One: Breach of Contract for a Three-Percent Commission.

Plaintiff Colburn Hundley's more modest claim for breach of contract in Count One seeks a commission of three percent to account for the balance of the eight-percent commission reserve that was not paid to Earl Clements, who received a five-percent commission. In Colburn Hundley's view, the existence of the agency agreement coupled with subsequent e-mail correspondence and the

overall eight-percent commission structure for the 30.51-acre parcel lead ineluctably to a finding that Colburn Hundley is contractually entitled to the residual, unpaid three-percent commission left over after Earl Clements received his compensation. The Court disagrees.

By its own terms, the final extension of the agency agreement expired on April 13, 2012. See Complaint, Exhibit 2. Without question, Plaintiff Colburn Hundley did not commence discussions with Pembroke until after the expiration of the agency agreement. See Plaintiff's Brief in Support of Motion for Summary Disposition, Exhibit 7 (Deposition of Earl Clements at 11, 19, 54); see also id., Exhibit 9. Moreover, the sale of the 30.51-acre parcel did not take place until long after the six-month "tail" period for consummation of such a transaction expired on October 13, 2012.<sup>5</sup> Beyond that, West Michigan's principal, Pete Bultsma, plainly declined to sign an extension of the agency agreement in the wake of its expiration. See Complaint, Exhibit 4 (e-mail chain at 2). Finally, when Colburn Hundley attempted to ensure a commission when the land sale appeared imminent, Jeffrey Hundley sent Pete Bultsma an entirely new commission agreement, see First Amended Complaint, Exhibit 12, which Bultsma rejected. To be sure, Bultsma suggested a resolution that involved a one-and-a-half percent payout to Colburn Hundley, see id., but Colburn Hundley rejected that proposal, leaving the parties without any type of contractual agreement providing for a commission for the sale of the 30.51-acre parcel. Accordingly, the Court has no choice but to grant summary disposition to West Michigan under MCR 2.116(C)(10) with regard to Colburn Hundley's breach-of-contract claim in Count One of its first amended complaint.

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<sup>5</sup> The original agency agreement prescribed a commission if "there is a sale within 6 months after expiration of the listing period" to a buyer "who had been introduced to or provided information regarding the Premises during the listing period" by Colburn Hundley or the seller. See Complaint, Exhibit 1 (Agency Agreement, § 2). The record forecloses Colburn Hundley from relying upon that provision in its pursuit of a three-percent commission.

B. Count Two: Breach of Contract for an Eight-Percent Commission.

Plaintiff Colburn Hundley's request in Count Two for an eight-percent commission for the sale of the 30.51-acre parcel on top of the five-percent commission already paid to Earl Clements illustrates the wisdom of the statute of frauds prescribed by MCL 566.132(1)(e). Without written agreements governing real-estate commissions, participants in real-estate transactions could well be called to account for commissions for all sorts of real-estate agents, both known and unknown to the buyer and seller. Count Two attempts to transform an option agreement – as opposed to the agency agreement between Colburn Hundley and Defendant West Michigan – into a vehicle for a long-term extension of the agency agreement itself. The Court simply cannot adopt that approach.

On April 14, 2010, Defendant West Michigan signed an “Option to Purchase” agreement that afforded JPW 84th Street, LLC (“JPW”) “the exclusive option to purchase” the 30.51-acre parcel during a one-year period that ran “from the Effective Date” of the option agreement.<sup>6</sup> On April 1, 2011, the members of JPW all signed an amendment “to extend the option period under the [option] Agreement to April 1, 2012.” See First Amended Complaint, Exhibit 2. By all accounts, JPW did not exercise its option by April 1, 2012, so the option agreement expired by its own terms without any action. In sum, the option period came and went without incident, so the unexercised rights of JPW under the expired option agreement seemingly had no impact whatsoever upon the completely separate agency agreement between West Michigan and Plaintiff Colburn Hundley. In Count Two, however, Colburn Hundley asserts that the option period, which ran through April 1, 2012, had the effect of tolling the listing period under the agency agreement because the 30.51-acre parcel was tied

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<sup>6</sup> The acronym “JPW” appears to be derived from the first names of the three members of the limited liability company, *i.e.*, Jeffrey Hundley, Pete Bulstma, and W. Sidney “Sid” Smith. All three of those men signed documents on behalf of JPW. See First Amended Complaints, Exhibits 1 & 2.

up (and thereby unsalable) until the option period expired. The Court concludes that the existence and duration of the option agreement had no impact on the end date of the agency agreement. When a contract like the agency agreement has a specified end date, which the parties agree in writing to extend to a date certain, that date certain cannot be extended *sub silentio* by some other contract that is not incorporated into the terms of the agency agreement.<sup>7</sup> Indeed, the alternative, *i.e.*, permitting a separate, unreferenced agreement to govern the duration of a written contract with a specified end date, could create chaos. Although the Court applauds the creativity of the plaintiff, the Court cannot adopt the approach to contract interpretation urged by Colburn Hundley. Thus, the Court must grant summary disposition to West Michigan on Count Two of the first amended complaint.

### III. Conclusion

For all of the reasons set forth in this opinion, the Court must award summary disposition to Defendant West Michigan under MCR 2.116(C)(10) on both counts in the first amended complaint. Moreover, because the Court has considered and rejected the best theories Plaintiff Colburn Hundley

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<sup>7</sup> The Court's use of the term "*sub silentio*" may be slightly inapt. Plaintiff Colburn Hundley points to a provision in the agency agreement that states:

OPTIONS. In the event Seller grants an option to purchase or lease the Premises, other than an option which is part of a lease, Seller agrees that the running of the term of this listing shall automatically be suspended for the duration of the option and, upon expiration of the option, shall automatically recommence and continue for the remainder of said term so that the listing period before and after the option will total the original term of the listing.

See Complaint, Exhibit 1 (Agency Agreement, § 5). This language arguably could extend the term of the agency agreement to reach the "original term of the listing," *i.e.*, one year, but even a one-year extension of the agency agreement's expiration date to April 13, 2013, would do Colburn Hundley no good in its quest for a commission under that agreement. Consequently, Colburn Hundley must rely upon the farfetched contention that the one-year agency agreement must be extended for *two* additional years to account for the option. Needless to say, that is a bridge too far.

can advance in its endeavor to obtain a real-estate commission for the sale of the 30.51-acre parcel, the Court shall not afford Colburn Hundley another opportunity to amend its complaint. See MCR 2.116(I)(5); see also Ormsby v Capital Welding, Inc, 471 Mich 45, 53 (2004).

IT IS SO ORDERED.

**This is a final order that resolves the last pending claim and closes the case.**

Dated: May 11, 2016



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