

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

WILSONTOWN, L.L.C., a Michigan  
limited liability company,

Plaintiff,

vs.

COLBURN HUNDLEY, INC., a Michigan  
corporation; and JOHN M. COLBURN, JR.,

Defendants.

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Case No. 13-10545-CBB

HON. CHRISTOPHER P. YATES

OPINION AND ORDER GRANTING SUMMARY DISPOSITION TO  
PLAINTIFF AND AGAINST DEFENDANTS UNDER MCR 2.116(C)(10)

On Halloween of 2013, Defendant Colburn Hundley, Inc. (“Colburn Hundley”) sent a spooky demand for a sizable commission based upon the sale of a 3.9-acre parcel of property in Wyoming, Michigan. See Complaint, Exhibit B. In response, Plaintiff Wilsonstown, L.L.C. (“Wilstontown”) refused to tender such a treat to Colburn Hundley, but Wilsonstown placed \$91,000 with an escrow agent “until a court having jurisdiction over this matter issues a final non-appealable order directing how it shall disburse the deposit.” See id., ¶ 26. The Court concludes that Wilsonstown’s actions do not constitute a trick because Colburn Hundley’s commission claim doesn’t even have a ghost of a chance of succeeding. Accordingly, the Court shall grant summary disposition to Wilsonstown.

I. Factual Background

Plaintiff Wilsonstown has requested summary disposition pursuant to MCR 2.116(C)(10), and the defendants have responded by demanding summary disposition under MCR 2.116(I)(2), so the Court must consider the entire record, including “affidavits, pleadings, depositions, admissions,

and other evidence submitted by the parties,” see Maiden v Rozwood, 461 Mich 109, 120 (1999), in resolving the competing requests for summary disposition. Fortunately, the universe of documents that bear upon the parties’ dispute is relatively limited, so the Court can readily set forth the factual background of the parties’ disagreement.

The roots of this case can be traced to the May 10, 1999, operating agreement of Rivertown, L.L.C. (“Rivertown”), which contemplated that the “Company shall enter into a Broker Agreement for leasing and sales to pay a leasing fee and a sales commission to Colburn Hundley, Inc., which shall provide for the payment of leasing fees and sales commissions” under a defined schedule. See Brief in Support of Plaintiff’s Motion for Summary Disposition, Exhibit J (Operating Agreement of Rivertown, § 9.02). In time, Rivertown not only became Plaintiff Wilsontown, but also entered into agreements authorizing Defendant Colburn Hundley to act as Wilsontown’s agent. See Defendants’ Response to Plaintiff’s Motion for Summary Disposition, Exhibit 6. Significantly, one of the agency agreements empowered Colburn Hundley to act as Wilsontown’s agent with respect to the 3.9-acre parcel of property at issue in this case.<sup>1</sup> See id., Exhibit 7. But that agency agreement identified the time period of the agency relationship as “from 09/12/2011” through “09/12/2012.” Id. Moreover, on December 2, 2012, a majority of the members of Wilsontown signed a “Side Letter Agreement” purporting to eliminate “the 4% sales commission” obligation to Colburn Hundley in favor of “a new sales commission [that] shall replace the one that is eliminated per this Side Letter Agreement.” See Brief in Support of Plaintiff’s Motion for Summary Disposition, Exhibit K. Jeffrey Hundley signed that side letter agreement, albeit on behalf of KH Properties LLC. See id.

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<sup>1</sup> To complicate matters, that agency agreement was signed by Jeffrey Hundley on behalf of both Plaintiff Wilsontown and Defendant Colburn Hundley. See Defendants’ Response to Plaintiff’s Motion for Summary Disposition, Exhibit 7.

In August of 2012, Defendant Colburn Hundley entered into discussions with a broker acting on behalf of Gordmans about leasing space at the Wilsontown development in Wyoming, Michigan. See Defendants' Response to Plaintiff's Motion for Summary Disposition, Exhibit 5 (Affidavit of Jeffrey Hundley, ¶¶ 9-13). But on December 14, 2012, Plaintiff Wilsontown pulled the plug on its relationship with Colburn Hundley before a deal between Gordmans and Wilsontown was reached. See Brief in Support of Plaintiff's Motion for Summary Disposition, Exhibit M. Indeed, that letter of termination from Wilsontown expressly directed Colburn Hundley to "cease all efforts on behalf of Wilsontown, L.L.C. including . . . any negotiations with Gordmans." Id. Beyond that, the letter of termination made clear that "Colburn Hundley, Inc. shall no longer have the authority to act on behalf of Wilsontown, L.L.C. with respect to the property that is the subject matter of the Brokerage Agreement for Wilsontown, L.L.C." See id.

On January 4, 2013, National Retail Properties, LP ("National") made contact with Plaintiff Wilsontown to inquire about purchasing the 3.9-acre parcel in Wyoming. See Brief in Support of Plaintiff's Motion for Summary Disposition, Exhibit 1 (Affidavit of Mark Finkelstein, ¶ 2). In the fullness of time, Wilsontown and National signed a letter of intent to purchase the 3.9-acre parcel, see Complaint, Exhibit A, and set the closing date for October 31, 2013. See id. (Affidavit of Mark Finkelstein, ¶¶ 4-5). On that closing date, Jeffrey Hundley sent an e-mail on behalf of Defendant Colburn Hundley demanding "either fifty percent (50%) of the commission for the closing . . . with Wilsontown, LLC today or seven percent (7%) of the sale price if a commission is not being paid." See Complaint, Exhibit B. Instead of meeting that demand, Wilsontown closed on the sale of the 3.9-acre parcel to National and placed \$91,000 in escrow. Wilsontown then filed this suit asking the Court to resolve the dispute arising from Colburn Hundley's claim to that \$91,000 as a commission.

## II. Legal Analysis

Plaintiff Wilsonstown's request for summary disposition under MCR 2.116(C)(10) and the defendants' competing demand for summary disposition under MCR 2.116(I)(2) require the Court to determine whether "the proffered evidence fails to establish a genuine issue regarding any material fact[.]" Corley v Detroit Board of Education, 470 Mich 274, 278 (2004). If no such genuine issue of material fact exists, the Court can declare a winner at this stage of the case. See id. "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." See West v General Motors Corp., 469 Mich 177, 183 (2003). Because both sides agree that this case presents a situation where declaratory relief may be granted under MCR 2.605, see Wiggins v City of Burton, 291 Mich App 532, 561 (2011), the Court must decide whether either side is entitled to a declaratory judgment as to the \$91,000 placed in escrow by Wilsonstown.

This case presents quintessential questions of contract interpretation. Under Michigan law, when faced with a dispute about the meaning of a contract, it is the Court's "obligation to determine the intent of the parties by examining the language of the contract according to its plain and ordinary meaning." In re Egbert R Smith Trust, 480 Mich 19, 24 (2008). "Courts enforce contracts according to their unambiguous terms because doing so respects the freedom of individuals freely to arrange their affairs via contract." Rory v Continental Ins Co, 473 Mich 457, 468 (2005). Thus, "courts are not to rewrite the express terms of contracts." McDonald v Farm Bureau Ins Co, 480 Mich 191, 199-200 (2008). With these principles in mind, the Court must turn to the language of the agreements at the heart of this lawsuit, *i.e.*, the agency agreement and the Wilsonstown operating agreement. See S-S, LLC v Merten Building Limited Partnership, No 292943, slip op at 2 (Mich App Nov 18, 2010)

(unpublished decision) (describing operating agreement “[a]s a contract between the members of a limited liability company [that] is construed according to principles of contract interpretation”); see also MCL 450.4102(2)(r).

By all accounts, Defendant Colburn Hundley did not deal directly with National – the entity that bought the 3.9-acre parcel. But Colburn Hundley nonetheless contends that it effectively made the connection with National during the failed negotiations with Gordmans because National, in its capacity as a real estate investment trust (“REIT”),<sup>2</sup> ultimately purchased the 3.9-acre parcel and then leased the property to Gordmans. The governing language of the agency agreement between Plaintiff Wilsontown and Colburn Hundley, however, undercuts that argument. Specifically, pursuant to the agency agreement, Colburn Hundley was entitled to a commission for the sale of the 3.9-acre parcel if: (1) the sale occurred during the listing period, which ended on September 12, 2012; (2) Colburn Hundley produced “a prospective Buyer ready, willing and able to purchase the Premises . . . during the listing period” that ended on September 12, 2012; or (3) “there is a sale within twenty four (24) 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. See Defendants’ Response to Plaintiff’s Motion for Summary Disposition, Exhibit 7.<sup>3</sup> The sale of the 3.9-acre parcel closed on October 31, 2013 – long after the agency agreement expired. Colburn Hundley plainly did

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<sup>2</sup> “A REIT is an entity that combines the capital of many investors to acquire or invest in commercial real estate; that allows investors to invest in a real estate portfolio under professional management through the purchase of shares; that must pay distributions to its stockholders equal to at least 90% of its income; and is not typically subject to federal income taxes.” Becker v Inland American Real Estate Trust, Inc., No 13 C 3128 (ND Ill Nov 18, 2013) (unpublished decision that can be found at 2013 WL 6068793).

<sup>3</sup> A more legible version of that agency agreement can be found at Exhibit I to the “Brief in Support of Plaintiff’s Motion for Summary Disposition.”

not produce a prospective buyer during the listing period. And Colburn Hundley had no contact with National (the buyer), which manifestly was neither introduced nor provided information by Colburn Hundley. Therefore, the plain language of the agency agreement forecloses Colburn Hundley from asserting any claim to a commission for the October 31, 2013, sale by Wilsontown to National.<sup>4</sup> See Murphy Real Estate Corp v Barron, 55 Mich App 210, 215-218 (1974).

Even assuming, *arguendo*, that the failed discussions between Defendant Colburn Hundley and Gordmans constituted an introduction of National to Plaintiff Wilsontown, the Court still would have no basis for ordering Wilsontown to pay a commission to Colburn Hundley for the sale of the 3.9-acre parcel. On December 14, 2012, Wilsontown exercised its right to terminate its relationship with Colburn Hundley. See Brief in Support of Plaintiff's Motion for Summary Disposition, Exhibit M (termination letter). The operating agreement authorized Wilsontown to take such action, see id., Exhibit J (Operating Agreement of Rivertown, § 9.02(E)), so 60 days after Wilsontown gave written notice of termination to Colburn Hundley, *i.e.*, on February 12, 2013, Wilsontown owed "no further obligation [to Colburn Hundley] except for executed purchase agreements or agreements to lease that ha[d] not yet closed." See id. Consequently, the Court must grant summary disposition in favor of Wilsontown under MCR 2.116(C)(10) because, for at least two separate reasons, Wilsontown had no obligation to pay a commission to Colburn Hundley for the sale of the 3.9-acre parcel that closed on October 31, 2013.

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<sup>4</sup> The attempt by Defendant Colburn Hundley to treat Gordmans and National as one and the same not only contravenes the express language of the agency agreement between Colburn Hundley and Wilsontown, but also runs afoul of the principle that separate corporate entities should be treated as independent actors "absent some abuse of the corporate form[.]" Seasword v Hilti, Inc, 449 Mich 542, 547 (1995). Here, the Court cannot find a shred of evidence suggesting that the parties to the sale of the 3.9-acre parcel involved a REIT in the transaction for the purpose of preventing Colburn Hundley from collecting a commission or for any other improper purpose.

### III. Conclusion

For all of the reasons set forth in this opinion, the Court concludes that Plaintiff Wilsontown is entitled to summary disposition under MCR 2.116(C)(10) and an award of declaratory relief in the following language: Neither Defendant Colburn Hundley nor Defendant John M. Colburn, Jr., has any right to a commission based upon the sale of the 3.9-acre parcel by Wilsontown to National on October 31, 2013, so the \$91,000 placed in escrow pending the outcome of this litigation shall be disbursed *in toto* to Wilsontown, L.L.C.

IT IS SO ORDERED.

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

Dated: July 23, 2014



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