

STATE OF MICHIGAN  
IN THE 20<sup>th</sup> CIRCUIT COURT FOR THE COUNTY OF OTTAWA

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COLBURN HUNDLEY, INC.,

Plaintiff,

v

DAANE'S DEVELOPMENT CO. and,  
DAVID DAANE,

Defendants.

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**OPINION AND ORDER on**  
**MOTIONS FOR SUMMARY**  
**DISPOSITION**

File No. 13-03373-CK

Hon. Jon A. Van Allsburg,  
Circuit Court Judge

Plaintiff, Colburn Hundley, Inc., initiated this case in March 2013 by filing suit in the 58<sup>th</sup> District Court against Daane's Development Company (DDC) for a money judgment on a commission payment it alleged was due on February 1, 2013. It later moved to transfer the case to the circuit court to add another claim against DDC, alleging that DDC breached another contract for commissions by failing to make a payment due on May 1, 2013. The district court ordered the case transferred on July 2, 2013. Plaintiff filed its First Amended Complaint for Money Judgment (Complaint) on July 29, 2013, and named David Daane as a defendant in addition to DDC. Defendants DDC and David Daane responded to the Complaint by filing Motions for Summary Disposition pursuant to MCR 2.116(C)(7) and (8). DDC also filed its Answer and Affirmative Defenses. Plaintiff requested summary disposition pursuant to MCR 2.116(C)(10) in its response to defendants' motions.

Plaintiff is a company that provides real estate commercial broker services. DDC owns and is the landlord of several commercial real estate developments, including a development called "Clock Tower," in Gaines Township, Michigan. Plaintiff claims that it was the listing agent for the Clock Tower property and is owed commissions on the lease renewals or extensions of two tenants, "Di's Hallmark" (Hallmark) and "Pet Supplies Plus" (PSP).

Plaintiff attached to its Complaint several documents that it alleges define the terms of its contracts with defendants. The earliest is a set of lease agency contracts (which the parties refer to as listing agreements) on the Clock Tower property signed by David Daane as owner and dated May 16, 1990. The listing agreements provide for a brokerage fee upon execution of a lease and at the beginning of each new or extended term of the original lease. The first lease with Hallmark was executed by David Daane and dated November 30, 1990. Plaintiff maintains that an Addendum to the lease identified DDC as the landlord and all lease payments were made to DDC. DDC paid commission payments to plaintiff on this lease when it was initiated and upon renewal until 2013.

Plaintiff likewise alleges that its agreement on the PSP lease was also articulated in multiple writings, including a Landlord Closing Statement dated on October 24, 1996, the same date as the lease, signed by David Daane on behalf of DDC, which provided that a lease commission of 4% be paid to plaintiff at the beginning of each new or extended term of the original lease.

Defendant DDC, in its Motion for Summary Disposition, asserts that there is no valid, enforceable contract between plaintiff and DDC regarding the Hallmark lease and that Counts I and IV of the Complaint should therefore be dismissed. DDC argues there is no contract because:

1. The listing agreement and the lease addendum are signed by David Daane in his individual capacity and not on behalf of DDC.
2. The listing agreement refers to property address different than that on the lease.
3. Neither the listing agreement nor the addendum to the lease allow for the survival of the agreement to successors or assigns of the lessor.
4. The addendum is almost 15 years old, well beyond the six-year statute of limitations for contract actions.

David Daane reiterates DDC's arguments in his Motion to Dismiss Counts II and V. He adds that he signed the contract documents attached as Exhibits 1 and 3 to plaintiff's complaint in his personal capacity and that the contract between him and plaintiff has long since expired.

DCC asserts that there is no contract between plaintiff and DDC regarding the PSP lease and that Counts III and IV should therefore be dismissed. It argues that there is no enforceable contract because:

1. The Preliminary Agreement to Lease dated September 12, 1996, is not a listing agreement and no listing agreement is attached.
2. There is no reference in the Preliminary Agreement that identified PSP other than a handwritten Post-it note.
3. The Preliminary Agreement does not provide for renewal commissions.
4. The document is dated 1996, well beyond the six-year statute of limitations for contract actions.

#### **Dismissal under MCR 2.116(C)(7)**

DDC's and David Daane's only proffered grounds for dismissal pursuant to MCR 2.116(C)(7) are arguments that the contracts at issue originated more than 15 years ago. Plaintiff, in response, correctly notes that the statute of limitations in contract actions begins to run when a contract is breached, not when it is executed. *Vandendries v General Motors Corp*, 130 Mich App 195; 343 NW2d 4 (1983). The alleged breaches occurred in February and May 2013, when DDC refused to pay commissions which plaintiff maintained were due on the Hallmark and PSP leases. Plaintiff has thus stated a claim within the applicable statute of limitations and dismissal is not warranted under MCR 2.116(C)(7).

#### **Dismissal under MCR 2.116(C)(8)**

With respect to defendants' motions for dismissal pursuant to MCL 2.116(C)(8), for failure to state a claim on which relief can be granted, the court tests the legal sufficiency of the complaint, accepting all well-pleaded factual allegations as true and construing them in a light most favorable to the nonmovant. *Maiden v Rozwood*, 461 Mich 109, 119-20; 597 NW2d 817, 823 (1999). The court may consider any reasonable inferences or conclusions that can be drawn from the allegations. *Peters v Dep't of Corrections*, 215 Mich App 485, 486; 546 NW2d 668 (1996). "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Maiden*, 461 Mich at 119, quoting *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

Regarding the Hallmark lease, plaintiff responds to DDC's first and third points by proffering factual evidence that ties DDC to the obligation to pay commissions. Plaintiff alleges that when David Daane executed the lease, he did not personally own the property. DDC executed an addendum to the lease on the same day that David Daane executed the lease, executed later lease agreements, and received rental payments made under the lease agreement. Plaintiff also alleges in its pleadings that DDC ratified the agreement by its actions in that it paid to plaintiff all of the commissions due on the Hallmark lease until 2013. As to DDC's second point, plaintiff alleges that lack of a correct address is not dispositive and that the address changed once construction was complete. Again, plaintiff points to the commission payments DDC made as evidence that there was no confusion as to the identification of the property on which the commissions were due.

Plaintiff also argues that, whatever issues defendants may raise as to the contract documents, plaintiff also pled ratification of the agreements for commissions by DDC. DDC claimed that David Daane signed the Hallmark listing agreement in his individual capacity, but did not address the issue of whether DDC's subsequent action in paying the commissions constituted ratification.

The Michigan Supreme Court adopted the rule of ratification, as stated in the Restatement of Agency 2d, in *David v Serges*, 373 Mich 442, 443-44; 129 NW2d 882 (1964):

When an agent purporting to act for his principal exceeds his actual or apparent authority, the act of the agent still may bind the principal if he ratifies it. The Restatement of Agency 2d, § 82, defines ratification thusly:

Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.

“Affirmance” is defined in § 83 of the Restatement:

Affirmance is either

- (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
- (b) conduct by him justifiable only if there were such an election.

Plaintiff alleges that DDC accepted the benefits of the leases and made commission payments to plaintiff pursuant to the commission agreements whose terms are evident in the various documents attached to the Complaint. DDC does not deny that it is the landlord on the Hallmark lease. Nor does it deny that it made commission payments, although it alleges that it paid by mistake. Defendants' only argument against ratification is that plaintiff did not attach documents proving ratification to its Complaint, which is not required under the Michigan Rules of Court. What is required under MCR 2.116(C)(8) is a showing by the movant that no factual development could possibly justify recovery. Defendants have not met this burden.

Regarding the PSP lease, DDC's technical critique of the Preliminary Agreement does not establish that plaintiff has failed to state a contract claim for commission payments under the PSP lease. DDC does not address its alleged history of commission payments. Moreover, none of DDC's allegations address the Landlord Closing Statement attached as Exhibit 11 to the Complaint and referenced in paragraph 34 of plaintiff's Complaint, which states that plaintiff was to be paid a lease commission of 4% at the beginning of each new or extended term of the original lease.

Defendants have failed to establish any basis for dismissal of Counts I through IV pursuant to MCR 2.116(C)(8).

#### **Dismissal of David Daane under MCR 2.116(C)(1)**

Defendant David Daane also seeks dismissal for lack of personal jurisdiction. By means of an affidavit signed by his son, he maintains that he is not a Michigan resident, has not been in Michigan in several years, owns no property here individually, and has not transacted business in Michigan in many years.

Plaintiff maintains that it has jurisdiction over David Daane under MCL 600.705(1) on the grounds that Mr. Daane transacted business in this state by signing contracts that are at issue in this litigation. Plaintiff also argues that the affidavit by Mr. Daane's son attached to the motion is inadmissible because there is nothing showing that Daniel Daane has any legal authority to speak for his father and because it suffers from several credibility issues.

The affidavit is not relevant to the issue of this court's jurisdiction over David Daane. At issue is whether this court has jurisdiction because of the business he conducted in this state. He asserts that the contracts at issue are "hardly the type of contracts contemplated by MCL 600.701," but cites no law in support of this proposition. With respect to the listing agreement related to the Hallmark, which defendants admit David Daane signed, he argues that this contract is long expired and plaintiff's claim is barred by the statute of limitations. As noted above, the statute of limitation argument fails even for the oldest contracts at issue because the alleged breach of the agreements signed in 1990 did not occur until 2013.

Michigan's Long-Arm Statute gives Michigan courts jurisdiction over non-residents who transact *any* business in the state. "[E]ven a single contact with the forum state may suffice for personal jurisdiction if it is directly and substantially related to the plaintiff's claim." *Lafarge Corp v Altech Environment, USA*, 220 F Supp 2d 823, 828 (ED Mich, 2002). Moreover, this court has jurisdiction over David Daane for business he conducted in his corporate as well as in his personal capacity. *Domino's Pizza PMC v Caribbean Rhino, Inc*, 453 F Supp 2d 998, 1003 (ED Mich, 2006). David Daane's motion for dismissal due to lack of personal jurisdiction must be denied.

### **Dismissal of Count V**

In Count V, plaintiff alleged that DDC was an alter ego of David Daane and asked the court to declare that DDC and David Daane constitute a single collective entity or common enterprise that is liable to plaintiff on its claims.

Defendants move to dismiss this Count on the ground that it fails to state a claim under Michigan law. The defendants argue that plaintiff is attempting to pierce the corporate veil without stating a claim as required under Michigan law. They cite *Dutton Partners, LLC v CMS Energy Corp*, 290 Mich App 635, 643; 802 NW2d 717 (2010), which indicates that under Michigan law, corporate forms are presumed to define separate and distinct entities and then sets forth the requirements for piercing the corporate veil:

[C]ourts may ignore this presumption and the corporate veil may be pierced if, under the circumstances, respecting an otherwise separate corporate existence will "subvert justice or cause a result that would be contrary to some other clearly

overriding public policy.” *Wells v Firestone Tire & Rubber Co*, 421 Mich 641, 650; 364 NW2d 670 (1984). For the corporate veil to be pierced, the plaintiff must aver facts that show (1) that the corporate entity is a mere instrumentality of another entity or individual, (2) that the corporate entity was used to commit fraud or a wrong, and (3) that, as a result, the plaintiff suffered an unjust injury or loss. *RDM Holdings, Ltd v Continental Plastics Co*, 281 Mich App 678, 715; 762 NW2d 529 (2008).

Plaintiff responded that it is invoking the “Common Enterprise Doctrine” or “Single Business Entity Doctrine,” which is an equitable veil-piercing theory, and then cites Texas common law and a Sixth Circuit Court of Appeals case regarding disregard of corporate entities under an FTC Act in support of this theory. Plaintiff also recited allegations of fraud it could have made. But because plaintiff did not include any allegations of fraud in its claims under Count V, that claim is dismissed pursuant to MCR 2.116(C)(8) for failure to state a valid claim under Michigan law.

Defendants motions to dismiss plaintiff’s Complaint are thus GRANTED only with respect to Count V and DENIED in all other respects.

Plaintiff’s request for summary disposition pursuant to MCR 2.116(C)(10) is DENIED without prejudice as premature.

*IT IS SO ORDERED.*

Dated: October 10, 2013

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Hon. Jon A. Van Allsburg, Circuit Judge