

STATE OF MAINE
SAGADAHOC, SS.

BUSINESS AND CONSUMER COURT
Location: West Bath
Docket No. BCD-WB-CV-10-37

JOHN E. McDONALD, JR.,

Plaintiff

v.

ORDER ON DEFENDANTS'
MOTION TO DISMISS

SCITEC, INC., ET AL,

Defendants

Before the court is Motion of Scitec, Inc., Telematrix, Inc., and CETIS, Inc. ("Defendants") to Dismiss Counts I and II of the Second Amended Complaint of John E. McDonald, Jr. ("Plaintiff") for failure to state a claim upon which relief can be granted, pursuant to M.R. Civ. P. 12(b)(6). Count I of Plaintiff's complaint seeks a declaratory judgment that Teledex qualifies as a "Contact" under the parties' Commission Agreement and that Plaintiff is entitled to commissions from Defendants' manufacturing relationship with Teledex. Count II alleges breach of the Commission Agreement by unlawful termination of the agreement. The parties agree that Illinois substantive law governs this dispute.

FACTUAL BACKGROUND

For the purposes of the motion, the court assumes that all the facts alleged in the complaint are true. *See Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 8, 843 A.2d 43, 47.

Plaintiff is an individual residing in Veazie, Maine. (Pl.'s Compl. ¶ 1.)¹ Scitec is an Illinois corporation with a principal place of business in Colorado.² (Pl.'s Compl. ¶ 2.) Plaintiff

¹ All citations to the Plaintiff's complaint refer to the Plaintiff's Second Amended Complaint.

and Scitec entered into a Commission Agreement on April 8, 2002.³ (Pl.'s Compl. ¶ 7.) At the time of the agreement, Plaintiff had extensive contacts in the hotel communications industry; Scitec had expertise in manufacturing telephones, but its manufacturing capabilities and factories were underutilized. (Pl.'s Compl. ¶¶ 8-9.) Scitec wanted to increase its sales and/or generate new manufacturing business for its factories. (Pl.'s Compl. ¶ 10.)

The parties intended and agreed that Plaintiff would receive a commission on sales of Scitec products to Plaintiff's business contacts, and on the sales generated by Scitec's manufacture of goods, products, or services of Plaintiff's business contacts. (Pl.'s Compl. ¶ 13.) Plaintiff agreed to provide Scitec with "certain information about, and introductions with, businesses (the "Contacts") that desire, or may desire, to acquire goods and/or manufacturing services from [Scitec]." (Pl.'s Compl. ¶ 12; Comm'n Agreement ¶ 1.) To qualify as a "Contact" under the Agreement, the entity could not be a current customer of Scitec and had to be approved in writing prior to the date of introduction. (Pl.'s Compl. ¶ 14; Comm'n Agreement ¶ 1.)

Pursuant to the Commission Agreement, Scitec agreed to pay Plaintiff "an amount equal to five percent (5%) of the product sales only (excluding shipping and handling, sales taxes, use taxes, other taxes) paid to Scitec by the Contacts, up to the gross amount of \$5,000,000" within the prior 12-month period. (Pl.'s Compl. ¶ 15; Comm'n Agreement ¶ 2.) For gross amounts over \$5,000,000 paid by the Contacts to Scitec within the prior 12-month period, Plaintiff was to be paid a 4% commission on the product sales. (Pl.'s Compl. ¶ 16; Comm'n Agreement ¶ 2.) Payments were due on the fifteenth of each month for the previous month's sales. (Pl.'s Compl. ¶ 17; Comm'n Agreement ¶ 2.)

² Scitec merged with Telematrix and CETIS prior to the alleged breach, but after execution of the Commission Agreement. (Pl.'s Compl. ¶ 5-6.)

³ The Commission Agreement was attached to the Plaintiff's complaint as Exhibit A.

On January 28, 2003, Scitec's President approved a company called Teledex as a Contact under the Commission Agreement via e-mail. (Pl.'s Compl. ¶ 18.) Plaintiff provided Scitec with information about Teledex and arranged meetings between the two companies, in which they discussed the possible purchase and sale of Teledex and the possibility of Scitec manufacturing some or all of Teledex's products. (Pl.'s Compl. ¶ 19.) Presently, Defendants are selling and/or manufacturing Teledex goods, products, or services or products that bear all the technical attributes of Teledex products. (Pl.'s Compl. ¶ 20.)

On April 7, 2010, Plaintiff served Defendants with a summons and complaint alleging that he was entitled to payment for commissions on any sale of Teledex goods, products, or services manufactured by Defendants. (Pl.'s Compl. ¶¶ 31, 35.) On April 8, 2010, Defendants terminated the Commission Agreement, effective that day. (Pl.'s Compl. ¶ 36.)

DISCUSSION

I. Standard of Review

A motion to dismiss pursuant to M.R. Civ. P. 12(b)(6) "tests the legal sufficiency of the complaint and, on such a challenge, 'the material allegations of the complaint must be taken as admitted.'" *Shaw v. Southern Aroostook Comm. Sch. Dist.*, 683 A.2d 502, 503 (Me. 1996) (quoting *McAfee v. Cole*, 637 A.2d 463, 465 (Me.1994)). When reviewing a motion to dismiss, this court examines "the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Id.* Further, the court may consider documents central to the plaintiff's claim, such as a contract in a breach of contract case, when evaluating the motion to dismiss without converting the motion into a motion for summary judgment. *See Moody*, 2004 ME 20, ¶ 11, 843 A.2d at 48.

A dismissal under M.R. Civ. P. 12(b)(6) will be granted only “when it appears beyond a doubt that the plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim.” *Id.* (quoting *Hall v. Bd. of Envtl. Prot.*, 498 A.2d 260, 266 (Me. 1985)). “The legal sufficiency of a complaint challenged pursuant to M.R. Civ. P. 12(b)(6) is a question of law.” *Bean v. Cummings*, 2008 ME 18, ¶ 7, 2008 ME 18, 939 A.2d 676, 679 (citations and internal quotation marks omitted).

II. Count I – Declaratory Judgment

In Count I, Plaintiff seeks a declaration that Teledex is a Contact under the Commission Agreement and that he is entitled to payment for commissions “on any sales to Teledex and on any sale of Teledex goods, products, or services manufactured by Defendants or those bearing all the technical attributes of Teledex products.” (Pl.’s Compl. ¶¶ 30-31.) *See* 14 M.R.S. §§ 5953, 5955 (permitting a court to declare the “rights, status and other legal relations” of parties by construing a contract). Defendants contend that Plaintiff’s claim to commissions on the manufacture or sale to third parties of Teledex products or those bearing all the attributes of Teledex products is foreclosed by the plain, unambiguous language of the Commission Agreement. (M. Dismiss 2-5.)

Pursuant to Illinois law,

[t]he primary objective in construing a contract is to give effect to the intent of the parties. A court must initially look to the language of the contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties’ intent. Moreover, because words derive their meaning from the context in which they are used, a contract must be construed as a whole, viewing each part in light of the others. The intent of the parties is not to be gathered from detached portions of a contract or from any clause or provision standing by itself. If the language of the contract is susceptible to more than one meaning, it is ambiguous.

Gallagher v. Lenart, 874 N.E.2d 43, 58 (Ill. 2007) (citations omitted); *see also Farm Credit Bank of St. Louis v. Whitlock*, 581 N.E.2d 664, 667 (Ill. 1991) (“The intention of the parties to

contract must be determined from the instrument itself, and construction of the instrument where no ambiguity exists is a matter of law.”).

The Commission Agreement states that Scitec “shall pay [Plaintiff] an amount equal to five percent (5%) of the product sales . . . paid to [Scitec] by the Contacts.” (Comm’n Agreement ¶ 2 (emphasis added).) At issue is what the parties intended by “product sales” and whether it includes manufacturing services performed by Scitec for a Contact. Defendants contend that “there is only one possible commissionable event contemplated in the plain language of the Agreement: product sales paid to Scitec by a Contact.” (M. Dismiss 4.) Defendants further contend that Plaintiff’s assertion regarding the parties’ intent (that Plaintiff would receive a commission on both sales and services provided by Scitec to a Contact) is plainly contradicted by this sentence in the Commission Agreement and that the merger clause in the agreement prevents using the parties’ intent to change the terms of the agreement.⁴ (M. Dismiss 4.) Plaintiff contends that when read in the context of the rest of the agreement, “product sales” is ambiguous because a reasonable interpretation could include the sale of both goods and manufacturing services. (Pl.’s Opp’n M. Dismiss 4-5.)

Upon review of the entire agreement, the court concludes that the language of the agreement supports both parties’ interpretations. Whether “product sales” includes manufacturing services is informed by the language the parties used throughout the Commission Agreement to refer to the events that were contemplated under the agreement. The prefatory

⁴ Paragraph 8.2 of the Commission Agreement is a merger clause that provides:

Each party acknowledges that it has read this Agreement, understands it, and agrees to be bound by its terms and further agrees that it is the complete and exclusive statement of the Agreement between the parties, which supersedes and merges all prior proposals, understandings and all other agreements, oral and written, between the parties relating to this Agreement. The Agreement may not be modified or altered except by a written instrument duly executed by both parties.

language to the Commission Agreement states that Scitec “desires to increase its sales and/or generate new manufacturing business by transacting for the manufacture and sale of its goods and/or its services with third parties which [Plaintiff] has or will establish contacts.” Plaintiff agreed to “provide to [Scitec] certain information about, and introduction with, businesses (the “Contacts”) that desire, or may desire to acquire goods and/or manufacturing services from [Scitec].” (Comm’n Agreement ¶ 1.) Scitec promised to “maintain adequate records of all transactions with the Contacts, such that it is possible to determine the payment amounts due under this Agreement.” (Comm’n Agreement ¶ 4.) Further, Plaintiff was entitled to a disclosure of “all transaction relating to products created and/or services provided by [Scitec] for any Contacts, including without limitation all information relating to sales, service, leasing, sales prices, contract prices, and identification of products and services” every three months or on demand. (Comm’n Agreement ¶ 6.)

The parties acknowledged that Plaintiff would neither “be responsible for any costs relating to the services or products provided by [Scitec]” nor “be liable for any losses, claims, or damages to any person or property arising out of any goods and/or services created or provided by [Scitec].” (Comm’n Agreement ¶¶ 3, 5.) Likewise, Scitec would “not be liable to [Plaintiff] for any losses, claims, or damages to any person or property arising out of [Scitec]’s failure or refusal to any representations made by [Plaintiff] regarding [Scitec] or its goods and/or services.” (Comm’n Agreement ¶ 5.)

The Commission Agreement contemplates and discusses both goods *and* services, indicating by its plain terms that the parties intended the agreement to cover both goods and services provided by Scitec to Contacts introduced by Plaintiff. *See Gallagher*, 874 N.E.2d at 58. Nevertheless, the paragraph on payments refers only to “product sales” and does not discuss

services. Defendants contend that the parties' intent was for Plaintiff to provide Defendants with information on the Contacts, businesses that might desire to acquire goods and/or manufacturing services from Scitec, but Scitec only agreed to pay Plaintiff for 5% of product sales paid to Scitec. (M. Dismiss 5.) Had the agreement used consistent terminology in how it defined the scope of the agreement, this argument might have been persuasive. The Agreement, however, is inconsistent in its terminology; it refers interchangeably to the "goods and/or manufacturing services from [Scitec]," "services or products provided by [Scitec]," "transactions with the Contacts," "goods and/or services created or provided by [Scitec]," and "transactions relating to products created and/or services provided by [Scitec] for any Contacts." (Comm'n Agreement ¶¶ 1, 3-6.) By focusing on one sentence within the agreement, Defendants neglect the primary purpose of contract interpretation, which is to give effect to the intent of the parties as evidenced by the express language of their entire agreement. *See Gallagher*, 874 N.E.2d at 58; *McKinney v. Allstate Ins. Co.*, 722 N.E.2d 1125, 1127 (Ill. 1999). Viewing the allegations most favorably to Plaintiff, *see Shaw*, 683 A.2d at 503, the court is not persuaded that the plain language of the agreement forecloses the Plaintiff's allegation regarding the intent of the parties, and the contract is thus ambiguous. As such, Plaintiff has stated a claim upon which relief may be granted and dismissal is inappropriate.

III. Count II – Breach of Contract and Breach of the Duty of Good Faith and Fair Dealing

In Count II, Plaintiff alleges that Defendants' unilateral termination of the Commission Agreement constitutes (a) a breach of contract, and (b) retaliation for filing the present lawsuit in violation of the duty of good faith and fair dealing. (Pl.'s Compl. ¶¶ 37-39.) The court will address each allegation in turn, viewing them in the light most favorable to the Plaintiff.

A. Breach of Contract through Unilateral Termination

Defendants contend that because the Commission Agreement contains no durational term, the agreement is terminable at will by either party. (M. Dismiss 5-8.) Pursuant to Illinois law, a contract of indefinite duration is “terminable at the will of either party,” but an “agreement without a fixed duration but which provides that it is terminable *only* for cause or upon the occurrence of a specific event is in one sense of indefinite duration, but is nonetheless terminable only upon the occurrence of the specified event and not at will.” *Jespersen v. Minn. Mining & Mfg. Co.*, 700 N.E.2d 1014, 1016 (Ill. 1998). In *Jespersen*, the Supreme Court of Illinois explained the rationale for this rule:

Where parties have failed to agree on a contract’s duration, the contract is construed as terminable at the will of either party because they have not agreed otherwise and it would be inappropriate for a court to step in and substitute its own judgment for the wisdom of the parties.

Id. at 1017. A termination provision that is equivocal or permissive, however, does not exempt the contract from this general rule. *See id.* at 1016; *accord R.J.N. Corp. v. Connelly Food Prods., Inc.*, 529 N.E.2d 1184, 1187 (Ill. App. Ct. 1988) (holding that if the objective termination event cannot be ascertained from the agreement, the duration is indefinite and terminable at will).

The Commission Agreement contains only two relevant references to how the agreement may terminate.⁵ The first reference is in the section on payment and provides:

Payment for gross amounts paid to [Scitec] by any Contacts shall continue until the earlier of five (5) years after the Agreement is terminated upon mutual agreement or the Contact receives any amounts from a competitor of [Scitec] as the result of an introduction by [Plaintiff] to the competitor for a product that [Plaintiff] has introduced for [Scitec].

⁵ Eventual termination of the agreement is contemplated within several other paragraphs of the Commission Agreement, but only to the extent that the provisions within those paragraphs survive the agreement’s termination. (*See Comm’n Agreement ¶¶ 6, 7, 8.7.*)

(Comm'n Agreement ¶ 2.) The second reference is in the section on confidentiality, stating that “[a] violation of this section shall give [Scitec] the right to immediately terminate this Agreement with [Plaintiff] and to make no payment on any sale made after the termination of this Agreement.” (Comm'n Agreement ¶ 7.) Neither reference provides an objective event that will terminate the agreement. *See Jespersen*, 700 N.E.2d at 1017; *R.J.N. Corp.*, 529 N.E.2d at 1187. The first merely determines how long Plaintiff will receive payments for services rendered pursuant to the Commission agreement; the second is discretionary, giving Defendants the *right* to terminate the agreement, but not delineating a terminating event. The agreement is thus indefinite in duration and terminable at will by either party for any reason or for no reason. *See Jespersen*, 700 N.E.2d at 1016. Defendants did not breach the agreement by unilateral termination. *See id.*

B. Breach of the Duty of Good Faith and Fair Dealing

Defendants next argue that the duty of good faith and fair dealing “does not override the clear right to terminate at will, since no obligation can be implied which would be inconsistent with and destructive of the unfettered right to terminate at will.” (M. Dismiss 6 (quoting *Jespersen v. Minn. Mining & Mfg. Co.*, 681 N.E.2d 67, 70 (Ill. App. Ct. 1997), *aff'd*, 700 N.E.2d 1014 (Ill. 1998).)

“A covenant of good faith and fair dealing is implicit in every contract as a matter of law.” *Horwitz v. Sonnenschein Nath & Rosenthal LLP*, 926 N.E.2d 934, 946 (Ill. App. Ct. 2010) (quoting *Franz v. Calaco Dev. Corp.*, 818 N.E.2d 357, 378 (Ill. App. Ct. 2004)). “The doctrine of good faith requires a party vested with contractual discretion to exercise that discretion reasonably and with proper motive, not arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectations of the parties.” *Franz*, 818 N.E.2d at 378.

However, whether the duty of good faith and fair dealing applies to the termination of a contract that is terminable at will is questionable under Illinois law. As noted, the Illinois Supreme Court has held that when a contract is terminable at will, either party may “terminate the agreement for any reason or no reason without committing a breach of contract.” *Jespersen*, 700 N.E.2d at 1017. The Seventh Circuit, applying Illinois law in the employment context, has stated that

if a contract . . . in Illinois permits discharge without cause, use of that power is not contingent on satisfying a court that the decision was an exercise of ‘good faith and fair dealing.’ One party need not reveal to the other the criteria that will lead it to terminate the relation, when the contract allows any reason (or none) to suffice.

L.A.P.D., Inc. v. Gen. Elec. Corp., 132 F.3d 402, 404 (7th Cir. 1997). Plaintiff alleges that Defendants terminated the contract in “retaliation” for filing the present suit against them. Taking that allegation as true, Plaintiff has still failed to state a claim upon which relief can be granted because a party may terminate a terminable at will contract for any reason or no reason and the duty of good faith and fair dealing cannot abrogate that right. *See Jespersen*, 700 N.E.2d at 1017; *Mid-West Energy Consultants, Inc. v. Covenant Home, Inc.*, 815 N.E.2d 911, 915 (Ill. App. Ct. 2004). Alternatively, were the duty to apply to the termination of a terminable at will contract, the court would determine that the termination of the Commission Agreement is not in violation of the duty of good faith and fair dealing because it is neither an arbitrary nor capricious response to the institution of a lawsuit by a party with which one is expected to do business.

Based on the foregoing, and pursuant to M.R. Civ. P. 79(a), the Clerk is directed to enter this Order on the Civil Docket by a notation incorporating it by reference and the entry is

Defendants’ Motion to Dismiss Count I of the Plaintiff’s Second Amended Complaint is DENIED; and

Defendant's Motion to Dismiss Count II of the Plaintiff's Second Amended Complaint is GRANTED.

Date: October 18, 2010



Chief Justice, Superior Court