STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KENT

STEVEN M. BROOKS,

Plaintiff, Case No. 24-001399-CBB

v Hon. T. J. Ackert

ACRISURE OF CALIFORNIA, LLC, and ACRISURE, LLC

Defendants.
_____/

OPINION AND ORDER GRANTING, IN PART, DEFENDANTS' MOTION FOR SUMMARY DISPOSITION UNDER MCR 2.116(C)(8)

Introduction

The Court revisits Plaintiff Mr. Brook's claims against Defendants Acrisure of California, LLC and Acrisure, LLC ("Acrisure"). The Plaintiff's initial complaint pleaded claims of breach of express contract, breach of implied contract, unjust enrichment, and promissory estoppel. Defendants acknowledge the parties entered an express contract on April 1, 2020 governing Plaintiff's separation terms. But Defendants requested summary disposition under MCR 2.116(C)(8) on Plaintiff's remaining three claims. On April 26, 2024, the Court heard arguments and issued an oral opinion dismissing Plaintiff's claims for implied contract and unjust enrichment with prejudice, and dismissing his claim for promissory estoppel but permitting Plaintiff to file an amended complaint on the claim by May 31, 2024. Due to procedural issues, the written order was not entered until July 2, 2024.

Plaintiff filed his amended complaint on May 31, 2024 stating claims for breach of contract, breach of contract as modified, breach of implied covenant of good faith and fair dealing, and promissory estoppel. Defendants again seek summary disposition under MCR 2.118(C)(8) on all claims except the breach of contract. The Court heard argument on the motion on September 11, 2024, and it will dismiss the Plaintiff's claims for breach of implied covenant of good faith and fair dealing and promissory estoppel but will permit Plaintiff to proceed on the claim of breach of contract as modified.

Factual Background

Plaintiff is a former employee of Acrisure. (First Amended Complaint, ¶8). On April 1, 2020 Plaintiff executed a Confidential Separation Agreement and Release ("Agreement") with Acrisure. (*Id.* ¶9). The parties agreed that the Plaintiff's employment relationship with Acrisure would terminate on March 31, 2020 (the "Separation Date") and thereafter "all matters involving the parties' employment relationship shall be governed by [the] Agreement." (Agreement, ¶1). For 18 months following the Separation Date (the "Separation Period"), Acrisure agreed to pay Plaintiff compensation, COBRA premiums, and referral fees known as Acquired Entity Payments. (*Id.* ¶2a-c).

This dispute involves payment of the Acquired Entity Payments. Acrisure agreed to pay Plaintiff an amount equal to five percent (5%) (the "Referral Rate") of the Pro Forma Revenue"[1] of any entity acquired by Acrisure if, and only if: (1) Plaintiff referred the acquired entity to Acrisure, and (2) Acrisure acquired the entity during the 18-month Separation Period, which ran from March 21, 2020 to September 21, 2021. (*Id.* ¶2c). Plaintiff alleges Acrisure breached the Agreement by failing to pay the Acquired Entity Payment for the Rick Baker acquisition which closed in December 2023. (First Amended Complaint, ¶ 12). Plaintiff claims he is owed $48,042 under the Agreement. (*Id.* ¶ ¶ 12, 25).

The Agreement provides that its terms contain the entire agreement and understanding of the parties and supersedes all prior discussions, agreements, understandings, and practices of every nature between them related to the topics addressed in the Agreement. (Agreement, ¶11). The parties also agreed that the Agreement "may not be changed or modified, except through an agreement in writing signed" by the Plaintiff and Acrisure. (*Id.*).

The parties acknowledge that the Agreement has not been changed or modified in writing since it was executed on April 1, 2020. However, after the Separation Period ended on September 21, 2021, Plaintiff alleges that Acrisure engaged in various oral and email communications with Plaintiff requesting him "to provide valuable services in connection with vetting, courting, and ultimately closing the Rick Baker deal." (First Amended Complaint, ¶ 15). In his complaint, the Plaintiff highlights key aspects of these communications between June 2023 and January 11, 2024. (*Id.* ¶¶ 17-24). These alleged communications between Acrisure and Plaintiff form the basis of

1 The Agreement defines "Pro Forma Revenue" as "the pro forma amount of revenue from continuing operations on

Plaintiff's claims for breach of contract as modified (Count II), breach of implied covenant of good faith and fair date dealing (Count III), and promissory estoppel (Count IV) set forth in Plaintiff's First Amended Complaint.

Legal Analysis

The Defendants ask the Court to dismiss Counts II, III, and IV of Plaintiff's First Amended Complaint under MCR 2.116(C)(8) asserting the Plaintiff has failed to state a claim on which relief can be granted. A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint and the Court should only consider the pleadings in evaluating the motion.[2] *See, Maiden v Rozwood*, 461 Mich 109, 119-120 (1999). Such relief may be awarded "only where the claims alleged are "so clearly unenforceable as a matter of law that no factual development could possibly justify recovery." *Id.* A court must accept all the factual allegations supporting the claim as true, as well as any reasonable inferences or conclusions that can be drawn from the facts. *ETT Ambulance Service Corp v Rockford Ambulance*, Inc, 204 Mich App 392, 395 (1994). A mere statement of conclusion, unsupported by allegations of fact, will not create a valid cause of action. *York v 50th District Court*, 212 Mich App 345, 347 (1995).

Count II: Breach of Contract As Modified

Plaintiff asserts that the various oral and email communications between himself and Acrisure from June until January 2024 regarding the Rick Baker acquisition represent both Acrisure's intent to waive the integration and non-modification terms of the Agreement and its agreement to pay Plaintiff a 5% referral fee under the Acquired Entity Payment after the Separation Period ended on September 21, 2021. (Plaintiff's Response Brief, p. 8). Plaintiff states that on June 28, 2023, Acrisure's Kyle Miller asked Plaintiff to set up an introduction telephone call between Acrisure and Rick Baker. (First Amended Complaint, ¶17). Plaintiff made the introduction and Acrisure's Mr. Miller thanked Plaintiff and stated, "Keep um [sic] coming!" (*Id.* at ¶18).

On September 20, 2023, Acrisure's Shaun McCracken forwarded Plaintiff an "update" of the Rick Baker transaction and promised to keep Plaintiff informed throughout the due diligence phase. (*Id.* at ¶19). On November 2, 2023, Plaintiff asked Shaun McCracken about the 5% referral fee and McCraken responded, "Steve-yes, no change to that." (*Id.* at ¶20). Based on these communications, Plaintiff alleges that he continued "his efforts to support the closing" of the Baker transaction and on

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which [Acrisure] bases its offer to the applicable Acquired Entity." (Agreement ¶ 2c).

2 When evaluating a motion under MCR 2.118(C)(8) based on a contract, a court may consider the contract in addition to the allegations in the complaint. *Woody v. Tamer*, 158 Mich App 764, 770 (1987); see also, MCR 2.113(C).

December 29, 2023, Shaun McCracken emailed Plaintiff stating Acrisure had closed the transaction and thanked Plaintiff for his help. (*Id.* at ¶¶21-22). On January 7, 2024, Acrisure's McCracken advised Plaintiff the total amount due under the 5% referral fee and that it would be paid within one week. (*Id.* at ¶23). But on January 11, 2024, Plaintiff alleges that Acrisure's Shelby Cowley informed Plaintiff that Acrisure had "decided not to pay him the 5% referral fee and instead would pay him a lesser amount." (*Id.* at ¶24). Plaintiff asserts the difference between the 5% referral fee and the amount Acrisure ultimately paid Plaintiff was $48,042. (*Id.* at ¶25).

Plaintiff argues that under the Michigan Supreme Court decision in *Quality Products & Concepts Co v Nagel Precision, Inc*, 469 Mich 362 (2003), his discussions and email exchanges with Acrisure regarding the 5% referral fee on the Baker transaction constitute "bilateral oral modification" and "amendment by course of conduct" of the Agreement. (*Id.* at ¶¶35, 37). The Michigan Supreme Court explains that a party alleging waiver or modification of a contract must establish a mutual intention of the parties to waive or modify the original contract. *Id.* at 372. The Court then outlined the analysis to determine whether the mutuality requirement for modification has been established. The Court stated:

> The mutuality requirement is satisfied where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract. In meeting this clear and convincing burden, a party advancing an amendment must establish that the parties mutually intended to modify the *particular* original contract, including its restrictive amendment clauses such as written modification or anti-waiver clauses.
>
> Upon proof of an express oral or written agreement, the mutuality requirement is clearly satisfied. This is because where the parties expressly modify their previous contract, rescission of the terms of the prior agreement is a necessary implication. By the clear expression of the parties, contradictory provisions in the agreement are *waived.*
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> However, in situations where a party relies on a course of conduct to establish modification, mutual assent is less clear and thus the rescission, or *waiver*, of the original contract's terms is not so evident. As a result, where course of conduct is the lead basis for modification, a waiver analysis is necessary.
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> As we have stated in another context, a waiver is a voluntary and intentional abandonment of a known right. This waiver principle is analytically relevant to a case in which a course of conduct is asserted as a basis for amendment of an existing contract because it supports the mutuality requirement. Stated otherwise, when a course of conduct establishes by clear and convincing evidence that a contracting party, relying on the terms of the prior contract, knowingly waived enforcement of those terms, the requirement of mutual agreement has been satisfied.

> Further, whereas an original contract's written modification or anti-waiver clauses do not serve as barriers to subsequent modification by express mutual agreement, the significance of such clauses regarding the parties' intent to amend is heightened where a party relies on a course of conduct to establish modification. This is because such restrictive amendment clauses are an *express mutual statement* regarding the parties' expectations regarding amendments.
> Accordingly, in assessing the intent of the parties where the intent to modify is not express, such restrictive amendment provisions are not necessarily dispositive, but are highly relevant in assessing a claim of amendment by course of conduct. Any clear and convincing evidence of conduct must overcome not only the substantive portions of the previous contract allegedly amended, but also the parties' express statements regarding their own ground rules for modification or waiver as reflected in any restricted amendment clauses.
> 469 Mich at 373-375. (citations omitted; emphasis in the original).

Acrisure argues that Plaintiff's factual allegations in the First Amended Complaint fail to establish that Acrisure knowingly waived enforcement of paragraphs 2.c, 11, and 13 of the Agreement. Acrisure contends that Plaintiff does not allege that the parties discussed or referenced a modification of the Agreement, or that the parties even discussed a 5% referral fee prior to the Plaintiff's alleged actions in connection with the Baker transaction. (Acrisure's Brief, p. 6). But Acrisure's argument is too stringent and fails to consider any reasonable inferences or conclusions that can be drawn from the facts in considering whether the allegations set forth a claim of modification of the Agreement. See, *ETT Ambulance Service Corp*, 204 Mich App at 395. While the lack of an allegation can be fatal under MCR 2.116(C)(8), the lack of evidence in support of the allegation cannot. *El-Khalil v Oakwood Healthcare, Inc*, 504 Mich 152, 162 (2019).

In *Quality Products, supra*, the Supreme Court affirmed the trial court's grant of summary disposition under MCR 2.116(C)(8) because there was no evidence that the defendant did anything to encourage or authorize the plaintiff to seek sales outside of the express territory found in the written agreement, or that the defendant affirmatively agreed to any of the plaintiff's unilateral attempts to modify the written sales agreement. 469 Mich at 367. But here Plaintiff alleges that Acrisure invited Plaintiff to make the introduction to Rick Baker, continued to update Plaintiff regarding the transaction's due, and confirmed payment of the 5% referral fee after the Separation Period had ended. The reasonable inference is that Acrisure and Plaintiff engaged in discussions and conduct to have Plaintiff introduce Acrisure to Rick Baker and worked to close the acquisition for which Plaintiff was to receive a 5% commission after the Separate Period ended. On these facts, the Court cannot find the allegations are "so clearly unenforceable as a matter of law that no factual

development could possibly justify recovery." *Maiden*, 461 Mich at 119-120.[3] Accordingly, Acrisure's motion for summary disposition as to Plaintiff's Count II, breach of contract as modified, is denied.

Count III: Breach of Implied Covenant of Good Faith and Fair Dealing

Plaintiff alleges that paragraph 2.c of the Agreement gave Acrisure the discretion to change the "Referral Rate" unilaterally "by providing [Plaintiff] with at least ten (10) days written notice." (First Amended Complaint, ¶ 40). Plaintiff relies on *Kircher v. Boyne USA, Inc.*, No. 360821, 2023 W L7 to 38820 (Mich Ct App Nov 2, 2023) for the proposition that a cause of action based on the breach of the implied duty of good faith and fair dealing exists when a party exercises its discretionary powers under a contract. 2023 WL 7238820, at *3. But Plaintiff's claim fails because there is no discretion in the Agreement for payment of the 5% Referral Fee.

In *Kircher*, the plaintiff and defendants entered into an agreement whereby beginning in 2018 and each year thereafter, the plaintiff could redeem her shares in the company not to exceed $150,000 in value as determined by the agreement. However, the parties had agreed that the defendants had discretion to consider an alternate method to calculate plaintiff's redemption price, and the Court of Appeals found that this is the "type of discretionary authority on which a breach of contract action may be based." *Id.* But the Court of Appeals also confirmed that, absent this type of discretion within a contract, Michigan does not recognize a cause of action for breach of the implied covenant of good faith and fair dealing. *Id.* at *2, relying on *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 476 (2003); *Gorman v American Honda Motor Co, Inc*, 302 Mich App 113, 133 (2013).

Here, the Agreement at paragraph 2.c requires Acrisure to pay Plaintiff a 5% referral fee if he (1) referred the entity to Acrisure, and (2) Acrisure acquired the entity during the Separation Period. Acrisure has no discretion in the payment; if Plaintiff meets the requirements of the contractual provision, then Acrisure must pay Plaintiff the 5% referral fee.

The Acquired Entity Payments provision also provided Acrisure with the right to change the Referral Rate for all referrals by providing Plaintiff with at least ten (10) days written notice of any

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3 The Court's finding does not suggest or infer that Plaintiff has established clear and convincing evidence that the parties knowingly and intentionally waived the integration clause, anti-modification clause, and the referral fee payment criteria under paragraph 2.c of the Agreement. Plaintiff has provided sufficient facts to support a claim but Plaintiff did not attach the emails or provide the full context or circumstances regarding the discussions and conduct between himself and Acrisure. Plaintiff has a high standard of proof to establish the modification of the Agreement based on the circumstances. But the Plaintiff may proceed on his claim of breach of contract as modified.

such change. (Agreement, ¶ 2.c). Unlike the provision in *Kircher* that granted the defendants the discretion to seek alternative methods for calculation of the plaintiff's shares upon the plaintiff's election of redemption, the Acrisure Agreement does not apply after-the-fact or grant Acrisure the right to determine what Referral Rate Acrisure will pay once the acquisition has been completed. Rather, the clear meaning of the provision is that Acrisure may give Plaintiff ten days written notice to change the Referral Rate on all future referrals in which the acquisitions referred by Plaintiff are closed during the Separation Period. As such, Plaintiff's allegations in Count III are no more than a breach of contract claim already covered under Count I of the First Amended Complaint. Accordingly, Acrisure's motion for summary disposition on Plaintiff's Count III, breach of implied covenant of good faith and fair dealing, is granted.

Count IV: Promissory Estoppel

Plaintiff, again, renews his promissory estoppel claim in Count IV of his First Amended Complaint. The elements of a promissory estoppel claim consist of "(1) a promise (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee and (3) that, in fact, produce reliance or forbearance of that nature (4) in circumstances requiring enforcement of the promise if injustice is to be avoided." *Marrero v. McDonnell Douglas Corp.*, 200 Mich App 438, 442-443 (1993). However, a claim for promissory estoppel can only be enforced when an express contract on the same subsequent matter does not exist. See generally, *Barber v. SMH, Inc.*, 202 Mich App 366, 375 (1993); *Novak v. Nationwide Mut. Ins. Co.*, 235 Mich App 675, 687 (1999).

Here, the parties have entered into an express agreement governing the payment of referral fees. Under the paragraph 2.c of the Agreement, the parties expressly agreed that for eighteen months following the Separation Date, Acrisure would pay Plaintiff an amount equal to 5% of the Pro Form a Revenue of any entity acquired by Acrisure and that is (a) referred to Acrisure by the Plaintiff and (b) acquired by Acrisure during the Separation Period. After the Separation Period, Plaintiff has no right to payment of a referral fee.

But Plaintiff alleges that after the Separation Period, Acrisure made an oral promise in 2023 to pay Plaintiff 5% on the Rick Baker acquisition. In 2023, Plaintiff was fully aware of the Agreement and when he began discussions with Acrisure about a referral fee for the Baker acquisition, he knew that he had agreed he would not be paid the referral fee unless there was a written modification to the Agreement permitting payment of the referral fee after the Separation

Period. The doctrine of promissory estoppel does not apply because the parties had an express agreement that addressed the subject matter. *Barber*, 202 Mich App at 375; *Novak*, 235 Mich App at 687.

Plaintiff argues that Acrisure asserts the Agreement ended on September 21, 2021 which coincides with the end of the Separation Period. As such, the parties no longer had an agreement that addressed the subject matter of referral fees. Acrisure has not argued nor can it argue that the Agreement ended on September 21, 2021. The Agreement provides for Separation Benefits to be paid during the Separation Period but the Agreement continues to govern the right of Plaintiff to receive unemployment compensation after the Separation Period, and the Agreement remains enforceable to address issues of the release, covenants not to sue, reasonable cooperation, confidentiality and nondisclosure, and non-disparagement to name a few. The Agreement did not end on September 21, 2021. In 2023, the parties had an enforceable express contract that addressed the subject matter of referral fees, and the doctrine of promissory estoppel does not apply. Accordingly, Acrisure's motion for summary disposition on Plaintiff's claim of promissory estoppel is granted.[4]

Based on the foregoing reasons, the Court orders:

1. Acrisure's motion for summary disposition under MCR 2.116(C)(8) on Plaintiff's First Amended Complaint, Count II, Breach of Contract as Modified, is denied.
2. Acrisure's motion for summary disposition under MCR 2.116(C)(8) on Plaintiff's First Amended Complaint, Count III, Breach of Implied Covenant of Good Faith and Fair Dealing, and on Count IV, Promissory Estoppel, is granted and those counts are dismissed from Plaintiff's First Amended Complaint.

IT IS SO ORDERED.

November 4, 2024

HON. T.J. ACKERT
Kent County Circuit Court Judge

4 Plaintiff also argues that the Court must permit Plaintiff to pursue his promissory estoppel claim as an alternative claim under MCR 2.111(A)(2). Acrisure properly outlines the error in Plaintiff's argument at pp. 3-4 of its Reply Brief, and the Court adopts this reasoning. Additionally, Plaintiff also posits the "Schrodinger's Contract" defense theory precludes Acrisure from arguing the Agreement was in full force and effect to foreclose quasi-contract claims but was expired to preclude payment of referral fees after the Separation Period. In reply, for the reasons outlined herein, this Court states: "that dog won't hunt."