

**STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND
BUSINESS COURT**

**CASEAN, INC.,
Plaintiff,**

v.

**Case No. 19-173983-CB
Hon. James M. Alexander**

**BECKY KRUPA, ET AL,
Defendants.**

OPINION AND ORDER RE: SUMMARY DISPOSITION

This matter is before the Court on Plaintiff's motion for partial summary disposition. The Court dispenses with oral argument pursuant to MCR 2.119(F)(2).

According to its Amended Complaint, Plaintiff is in the business of providing commercial cleaning services. On March 3, 2014, Plaintiff and Defendant Becky Krupa executed an Employment Agreement, which contained (among other things) non-solicitation and non-compete clauses.

Plaintiff claims that Defendant Krupa was terminated on November 6, 2018. Plaintiff further claims that on August 29, 2018, more than two months before she was terminated, Krupa formed a competing entity, Defendant A&C Property Services, Inc. Since her termination, Plaintiff claims they have learned that Krupa has serviced at of at least five of Plaintiff's customers in direct violation of her Employment Agreement.

On these general allegations, Plaintiff filed its Amended Complaint on claims titled: (Count I) breach of contract; (Count II) theft of trade secrets; (Count III) breach of fiduciary duties; and

(Count IV) tortious interference with contract.

In response, Defendants Krupa and A&C Property Services, Inc., filed an Amended Counterclaim alleging that Plaintiff breached Krupa's Employment Agreement and failed to pay commissions for jobs she sold or jobs that she procured while she was employed with Plaintiff. Further, Krupa alleges that Plaintiff made false statements regarding her termination to coworkers, customers, and the Unemployment Insurance Agency.

On these general allegations, Defendants Krupa and A&C Property Services, Inc. filed an Amended Counterclaim on claims titled: (Count I) breach of contract; (Count II) violation of the Michigan Sales Representatives Act MCL 600.2921; (Count III) slander and libel; (Count IV) abuse of process; and (Count V) tortious interference.

Plaintiff now moves for summary disposition of Defendants' Count II of the Amended Counterclaim under MCR 2.116 (C)(10) – claiming that the same must be dismissed because MCL 600.2961 only applies to the sale of goods, and Defendant earned commissions for selling Plaintiff's services. A (C)(10) motion tests the factual support for a plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999).¹

Under MCL 600.2961(1)(e) (emphasis added), Michigan's Sales Representatives Act applies to sales representatives "who contracts with or is employed by a principal for the solicitation of orders or sale **of goods** and is paid, in whole or in part, by commission."

In its motion, Plaintiff claims that it "is in the business of providing commercial cleaning services." Further, Plaintiff claims that Krupa was employed to sell the cleaning and janitorial

¹ In such a motion, the moving party must specifically identify the issues that he believes present no genuine issue of material fact. *Maiden*, 461 Mich at 120. The opposing party may not rest on mere allegations or denials in his pleadings, but must, by affidavits or as otherwise provided in the rule, set forth specific facts showing a genuine issue for trial. *Id.* at 120-121. Where the evidence fails to establish a genuine issue regarding any material fact, the

services. Plaintiff argues that since the Michigan Sales Representative Act only applies to the sale of goods and products, Defendants' Counterclaim for violation of the same must be dismissed since Plaintiff provides services, not goods.

In support of its claim that Plaintiff attaches the affidavit of its owner, Daniel Flynn. Flynn avers that although Plaintiff occasional provides cleaning supplies, Krupa was not responsible for selling the items and never requested a commission for selling the same. (Plaintiff's Reply Exhibit 1). Further, Flynn states that the bulk of their business is to keep facilities clean, and that the sale of products was a minor aspect of the business – accounting for only 2.3% of Plaintiff's revenue. *Id.*

In response to Plaintiff's motion, Defendants argue that Krupa sold both goods and services and was paid commissions for the same. Defendant argues that she sold goods with nearly every contract. And Defendants argue that generally, the question whether goods or services predominate in a hybrid contact is one of fact. *Higgins v Lauritzen*, 209 Mich App 266, 269; 530 NW2d 171 (1995).

Michigan courts have addressed the goods versus services distinction in the context of the Sales Representatives Commissions Act, in part, by looking to the definition provided in the UCC.

In *Klapp v United Ins Group Agency, Inc*, 259 Mich App 467; 674 NW2d 736 (2003), the Court of Appeals reasoned: "'Goods' means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (article 8) and things in action." *Klapp*, 259 Mich App at 471; quoting MCL 440.2105(1).

In *Neibarger v Universal Coops*, 439 Mich 512; 486 NW2d 612 (1992), our Supreme Court

noted the difficulty sometimes facing courts when determining whether a transaction constituted a sale of goods or services, reasoning “[i]t is difficult to imagine a commercial product which does not require some type of service prior to its purchase, whether design, assembly, installation, or manufacture.” *Neibarger*, 439 Mich at 536.

As a result, the *Neibarger* Court proposed the following approach:

A court faced with this issue should examine the purpose of the dealings between the parties. If the purchaser’s ultimate goal is to acquire a product, the contract should be considered a transaction in goods, even though service is incidentally required. Conversely, if the purchaser’s ultimate goal is to procure a service, the contract is not governed by the UCC, even though goods are incidentally required in the provision of this service. *Neibarger*, 439 Mich at 536.

Plaintiff also relies on *Mahnick v Bell Co*, 256 Mich App 154; 662 NW2d 830 (2003). In *Mahnick*, the plaintiff was the chief project estimator for the defendant general contractor. In his role, the plaintiff would “estimate the cost of completing a construction project on which defendant intended to bid.” *Id.* at 155. The defendant would then, in turn, base its bid on projects on said estimate. The parties later had a dispute about the plaintiff’s commission structure, which resulted in the plaintiff leaving the defendant’s employ. The plaintiff then sued, in part, on a claim under the Sales Representatives Commissions Act.

In order to determine the validity of this claim, the Court of Appeals examined whether the plaintiff sold “goods” or services and reasoned:

as a general contractor, defendant principally provides services to project owners. The fact that the end result of those services may be a product such as a building or a building addition does not change the essential character of defendant’s work as a service provider, or change the character of plaintiff’s work to estimate jobs for defendant into a sale of a good. Thus, for the reasons discussed herein, we conclude that the trial court correctly granted defendant’s motion for summary disposition of plaintiff’s claims under the SRCA. *Mahnick*, 256 Mich App at 164.

In this case, Plaintiff claims that the essential purpose of its business is to provide commercial cleaning and janitorial services, with goods being incidental to the service contract. Defendants, on the other hand, claim that the the services sold require the use of products. Defendants claim that the services portion of the contracts are so “intertwined with goods” that the services would not be possible without the purchase of goods.

While the parties dispute the conclusion on the essential character of Plaintiff’s business, they don’t dispute the general process employed by Plaintiffs. As stated in Plaintiff’s Amended Complaint, Plaintiff provides commercial cleaning services. Further, in her Amended Counterclaim, Defendant claims that Plaintiff failed to timely pay her for “jobs that she sold.” (Amended Counterclaim, at ¶12). Additionally, Defendant alleges that “Plaintiff failed to contact the client as per his practices and arrange a crew to begin the work quoted.” *Id.* at ¶31. Notably, Defendant does not mention that she was denied commissions on goods she sold in her Amended Counterclaim.

For purposes of this motion, the Court will assume that every customer receives incidental goods with their contracts – as Defendants argue. But simply because a customer receives a physical item does not mean that the predominate purpose of the contract was to supply goods.

As stated in *Neibarger*, 439 Mich 512, the Court must look to the purpose of the dealings between the parties. In this case, the purpose of the dealings appears to be providing commercial cleaning and janitorial services to customers.

Similar to *Mahnick*, the fact that Plaintiff’s services include some goods does not change the essential character of Plaintiff’s work as a service provider. It would appear that customers seek Defendant out based on its cleaning and janitorial skills and not simply because they want cleaning products. This is further evident by Defendants’ emails attached to their response. In said emails,

Defendant explains the staffing needs for four locations under contract with Plaintiff, specifically the amount of staff needed and the hours per week. (Defendants' Exhibit 2). Concluding her email, Defendant asks, "Would we include supplies for cleaning with the day porter rate." *Id.* Based on Defendant's email, it is evident to the Court that the primary purpose of Plaintiff's business is to provide a service, any good are ancillary to that service.

Additionally, although Defendant claims she was paid commissions on these sales, Defendant provides no evidence that she actually received commissions for goods sold. Defendant claims that the emails attached to her response are "merely an example of several instances" she sold goods, the emails themselves do not provide any evidence that goods were sold. (*See* Defendants' Exhibit 2). The emails only ask if goods would be provided and ask for prices of the same. *Id.*

For all of the above reasons and viewing all evidence in the light most favorable to Defendants, the Court concludes that there are no material questions of fact in dispute, and Plaintiff is entitled to judgment as a matter of law as to Defendants' Count II of the Amended Counterclaim. Plaintiff is in the business of selling services, and as a result, Plaintiff's motion for partial summary disposition is GRANTED, and Defendants' Count II based on the Sales Representatives Act is DISMISSED under (C)(10).

IT IS SO ORDERED.

October 29, 2019
Date

/s/ James M. Alexander
Hon. James M. Alexander, Circuit Court Judge