COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

BRUCE MEADOWS	:	
Plaintiff	:	**CASE NO. 2011 CVH 01516**
vs.	:	**Judge McBride**
PRO-TOUCH, INC.	:	**DECISION/ENTRY**
Defendant	:	

Croskery Law Offices, Robert F. Croskery, attorney for the plaintiff Bruce Meadows, 810 Sycamore Street, 2nd Floor, Cincinnati, Ohio 45202.

Calderhead, Lockemeyer & Peschke Law Office, Joel L. Peschke and Joshua F. DeBra, attorneys for the defendant Pro-Touch, Inc., 5405 DuPont Circle, Suite E, Milford, Ohio 45150.

This cause is before the court for consideration of a motion for summary judgment and for declaratory judgment filed by the defendant Pro-Touch, Inc.

The court scheduled and held a hearing on the motion on January 2, 2013. At the conclusion of that hearing, the court took the issues raised by the motion under advisement.

Upon consideration of the motion, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of counsel, and the applicable law, the court now renders this written decision.

WHAT IS THE STANDARD FOR REVIEW ON A MOTION FOR SUMMARY JUDGMENT?

The court must grant summary judgment, as requested by a moving party, if "(1) no genuine issue of material fact remains to be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) the evidence demonstrates that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party opposing the motion."[1]

The court must view all of the evidence, and the reasonable inferences to be drawn therefrom, in a light most favorable to the non-moving party.[2] Furthermore, the court must not lose sight of the fact that all evidence must be construed in favor of the nonmoving party, including all inferences which can be drawn from the underlying facts contained in affidavits, depositions, etc.[3]

Determination of the materiality of facts is discussed in *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211:

> "As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the

[1] Civ. R. 56(C); *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267; *Davis v. Loopco Indus., Inc.* (1993), 66 Ohio St.3d 64, 65-66, 609 N.E.2d 144.
[2] *Engel v. Corrigan* (1983), 12 Ohio App.3d 34, 35, 465 N.E.2d 932; *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7, 12-13, 467 N.E.2d 1378; *Welco Indus. Inc. v. Applied Cas.* (1993), 67 Ohio St.3d 344, 356, 617 N.E.2d 1129; *Willis v. Frank Hoover Supply* (1986), 26 Ohio St.3d 186, 188, 497 N.E.2d 1118; *Williams v. First United Church of Christ* (1974), 37 Ohio St.2d 150, 152, 309 N.E.2d 924.
[3] *Hannah v. Dayton Power & Light Co.* (1998), 82 Ohio St.3d 482, 485, 696 N.E.2d 1044, citing *Turner v. Turner* (1993), 67 Ohio St.3d 337, 341, 617 N.E.2d 1123.

> outcome of the suit under the governing law will properly preclude the entry of summary judgment."[4]

Whether a genuine issue exists meanwhile is answered by the following inquiry: Does the evidence present "a sufficient disagreement to require submission to a jury" or is it "so one-sided that the party must prevail as a matter of law[?]"[5] "The inquiry performed is the threshold inquiry of determining whether there is the need for a trial–whether, in other words, there are any genuine factual issues that can properly be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[6]

The burden is on the moving party to show that no genuine issue exists as to any material fact, and that the moving party is entitled to judgment as a matter of law.[7] This burden requires the moving party to "specifically delineate the basis upon which summary judgment is sought in order to allow the opposing party a meaningful opportunity to respond."[8]

A party seeking summary judgment, on the ground that the nonmoving party cannot prove its case, bears the initial burden of informing the trial court of the basis for the motion, and identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims.[9] The moving party cannot discharge its initial burden under Civ.R. 56 simply by

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[4] *Anderson v. Liberty-Lobby Inc.* (1986), 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211.
[5] Id. at 251-52, 106, S.Ct. at 2512, 91 L.Ed.2d at 214.
[6] Id. at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213.
[7] *AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp.* (1990), 50 Ohio St.3fd 157, 161, 553 N.E.2d 597; *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 375 N.E.2d 46.
[8] *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 526 N.E.2d 798, syllabus.
[9] *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, 674 N.E.2d 1164.

making a conclusory assertion that the nonmoving party has no evidence to prove its case.[10] Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims.[11]

If the moving party fails to satisfy its initial burden, the motion for summary judgment must be denied.[12] However, if the moving party satisfies this burden, then the nonmoving party has a "reciprocal burden" to set forth specific facts, beyond the allegations and denials in his pleadings, demonstrating that a "triable issue of fact" remains in the case.[13] The duty of a party resisting a motion for summary judgment is more than that of resisting the allegations in the motion.[14] Instead, this burden requires the nonmoving party to "produce evidence on any issue for which that (the nonmoving) party bears the burden of production at trial."[15]

The nonmovant must present documentary evidence of specific facts showing that there is a genuine issue for trial and may not rely on the pleadings or unsupported allegations.[16] Opposing affidavits, as well as supporting affidavits, must be based on personal knowledge, must set forth facts as would be admissible into evidence, and must show affirmatively that the affiant is competent to testify on the matters stated therein.[17]

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[10] Id.
[11] Id.
[12] Id.
[13] Id.
[14] *Baughn v. Reynoldsburg* (1992), 78 Ohio App.3d 561, 563, 605 N.E.2d 478.
[15] *Wing v. Anchor Media Ltd. Of Texas* (1991), 59 Ohio St.3d 108, 570 N.E.2d 1095, paragraph three of the syllabus; *Welco Indus., Inc. v. Applied Companies* (1993), 67 Ohio St.3d 344, 346, 617 N.E.2d 1129; *Gockel v. Ebel* (1994), 98 Ohio App.3d 281, 292, 648 N.E.2d 539.
[16] *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 659, 612 N.E.2d 1295.
[17] Civ.R.56(E); *Carlton v. Davisson* (1995), 104 Ohio App.3d 636, 646, 662 N.E.2d 1112; *Smith v. A-Best Products Co.* (Feb. 20, 1996), 4th Dist. No 94 CA 2309, unreported.

"Personal knowledge" is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original and does not depend on information or hearsay."[18]

Accordingly, affidavits which merely set forth legal conclusions or opinions without stating supporting facts are insufficient to meet the requirements of Civ.R.56(E), which sets forth the types of evidence which may be considered in support of or in opposition to a summary judgment motion.[19]

Under Civ.R.56(C), the only evidence which may be considered when ruling on a motion for summary judgment are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact, if any, timely filed in the action." These evidentiary restrictions exist with respect to materials which are submitted both in support of and in opposition to a motion for summary judgment.

Where the copy of a document falls outside the rule, the correct method for introducing such items is to incorporate them by reference into a properly framed affidavit.[20] Thus, Civil Rule 56(E) also states that "[s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith."

Because summary judgment is a procedural device designed to terminate litigation where there is nothing to try, it must be awarded with caution, and doubts must

[18] *Carlton v. Davisson*, 104 Ohio App.3d at 646, 662 N.E.2d at 1119; *Brannon v. Rinzler* (1991), 77 Ohio App.3d 749, 756, 603 N.E.2d 1049.
[19] *Stamper v. Middletown Hosp. Assn.* (1989), 65 Ohio App.3d 65, 69, 582 N.E.2d 1040.
[20] *Martin v. Central Ohio Transit Auth.* (1990), 70 Ohio App.3d 83, 89, 590 N.E.2d 411; *Biskupich v. Westbay Manor Nursing Home* (1986), 33 Ohio App.3d 220, 222, 515 N.E.2d 632.

be resolved in favor of the nonmoving party.[21] Summary judgment is not appropriate where the facts are subject to reasonable dispute when viewed in a light favorable to the nonmoving party.[22]

However, the summary judgment procedure is appropriate where a nonmoving party fails to respond with evidence supporting his claim(s). While a summary judgment must be awarded with caution, and while a court in reviewing a summary judgment motion may not substitute its own judgment for the trier of fact in weighing the value of evidence, a claim to survive a summary judgment motion must be more than merely colorable.[23]

In deciding a summary judgment motion, the court may, even if summary judgment is not appropriate upon the whole case, or for all the relief demanded, and a trial is necessary, grant a partial summary judgment, such that a trial will remain necessary as to the remaining controverted facts.[24]

FACTS OF THE CASE

The plaintiff Bruce Meadows entered into a written "Contract for Sales Executive" with the defendant Pro-Touch, Inc. ("Pro-Touch"), which became effective on November 1, 2006.[25] That contract sets forth the services to be performed by Meadows as a sales executive, as well as other details such as confidentiality, and an instruction that, if Meadows dies prior to the completion of the agreement, any monies due to him were to

[21] *Davis v. Loopco Indus., Inc.*, 66 Ohio St.3d at 66, 609 N.E.2d at 145.
[22] *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, 105-06, 483 N.E.2d 150.
[23] *Wing v. Anchor Media Ltd. Of Texas*, 59 Ohio St.3d at 111, 570 N.E.2d at 1099.
[24] Civ.R.56(D); *Holeski v. Lawrence* (1993), 85 Ohio App.3d 824, 834, 621 N.E.2d 802.
[25] Defendant Pro Touch's Motion for Declaratory Judgment and Motion for Summary Judgment, Exhibit A.

be paid to his executors, administrators, heirs or personal representatives. The compensation provision of that contract states as follows:

> "4. Compensation: Sales Executive will receive a base salary of $1,930 per pay for the first 6 months and $1,250 per pay thereafter. Sales Executive will receive commission of twenty five (25) percent of the first two (2) month's (*sic*) contract billing. Commission payments will be made in three (3) equal payments over a 90 day period. Sales Executive will receive five (5) percent of all project sales and receive twenty (20) percent of gross profit on all chemical sales and sanitary sales. Sales Executive will receive two (2) percent residual on gross sale of existing accounts sold by Sales Executive. All residuals will be paid on a quarterly basis. Sales Executive will be reimbursed for those expenses incurred in the course of conducting business for CSS, LLC/Pro-Touch, Inc. when said expenses are necessitated by CSS, LLC/Pro-Touch, Inc. Such expenses include, but not limited to, mileage reimbursement, certain telecommunications cost, training session attendance and CSS, LLC/Pro-Touch, Inc. associated conferences. Sales executive will receive two (2) weeks paid vacation for the first 5 years and three (3) weeks vacation there after. Sales Executive will have the opportunity to participate in the CSS, LLC/Pro-Touch, Inc. health insurance plan after 90 days of service. CSS, LLC/Pro-Touch, Inc. will pay fifty (50) percent of the single plan rate. All other insurance cost will be the responsibility of the Sales Executive."[26]

The sales executive contract also states that the written agreement contains all the agreements between the parties and that "[a]ny modification of [the] Agreement will be effective only if it is in writing signed by the party to be charged."[27]

In February 2008, Meadows and Douglas Brugler, on behalf of Pro-Touch, signed an untitled document which stated in its entirety as follows:

> "Director of Sales will receive 100% of the 1st month's revenue on new contract accounts. 50% of the Commission will be paid the first month. The other 50% will be paid equally starting the second month over the next six months.

[26] Id.
[27] Id.

> Director of Sales will receive 10% of all project sales. Commission will be paid on receipt of revenue.
>
> Director of Sales will receive 20% commission on the gross profit on all chemical, paper and equipment sales. Commission will be paid on receipt of revenue.
>
> Director of Sales will receive $400.00 per month for automobile expenses. When sales exceed $500,000 this will be increased to $500.00 per month. In addition business expenses will be reimbursed (e.g. client lunches, printing, copies, ink for printer, paper).
>
> Director of Sales will be paid two weeks vacation based on the previous year's income. A bonus week will be given when sales exceed $750,000. Another bonus week will be given when sales exceed $1,500,000.
>
> A Draw against commissions in the amount of $1,500 per month will be paid, 'non-recoverable for the first 6 months."
>
> In the event of death or total disability any monies due to the Director of Sales shall be paid to the (*sic*) "The Meadows Family Living Trust."
>
> This compensation plan shall be non-cancelable for two years. It may be continued thereafter as long as both parties agree. This plan to take effect February 1, 2008."[28]

Meadows' employment with Pro-Touch was terminated via a letter sent to him by Douglas Brugler on April 10, 2008.[29]

On August 26, 2011, Meadows filed the present action alleging breach of contract by Pro-Touch, arguing that he is owed monies for residuals, salary, and commissions that were not paid by Pro-Touch.

Meadows testified at his deposition that it was his understanding that the February 2008 compensation plan was not a modification of Paragraph Four of the

[28] Id, Exhibit C.
[29] Id., Exhibit D.

sales executive contract and that he believes he should be paid under the provisions of both contracts.[30] For instance, Meadows believes that he is entitled to residuals on accounts because, although the 2008 agreement does not mention residuals, the 2006 contract states that he was to receive a two percent residual on gross sales of existing accounts sold by him.[31] He does not recall a conversation between himself and Douglas Brugler regarding whether or not the two compensation plans were both in effect.[32]

Pro-Touch now moves for summary judgment and declaratory judgment, requesting that the court find as a matter of law that the 2008 agreement replaced Paragraph Four of the 2006 contract in its entirety and that the 2008 agreement is, therefore incorporated into that 2006 agreement and able to be cancelled upon termination of Meadows' employment with Pro-Touch.

LEGAL ANALYSIS

"Contracts are to be interpreted so as to carry out the intent of the parties, as that intent is evidenced by the contractual language."[33] "Where the terms of a contract are clear and unambiguous, a court cannot find a different intent from that expressed in the contract."[34]

[30] Deposition of Bruce Meadows at pgs. 39-40.
[31] Id. at 68.
[32] Id. at 63.
[33] *Walter v. Agoston* (May 17, 2004), 12th Dist. No. CA2003-03-039, 2004-Ohio-2488, ¶ 12, citing *Skivolocki v. E. Ohio Gas Co.* (1974), 38 Ohio St.2d 244, 313 N.E.2d 374.
[34] Id., citing *E.S. Preston Assoc., Inc. v. Preston* (1986), 24 Ohio St.3d 7, 10, 492 N.E.2d 441.

"It is a fundamental principle of contract interpretation in Ohio that unclear language in a contract will be interpreted against the drafter[;]"[35] however, this rule is "merely a guiding principle the court uses in determining the parties' intent after viewing the extrinsic evidence presented by the parties.[36]

"The meaning of terms used in a contract, if ambiguous, is a question of fact * * *."[37] "Contract terms are ambiguous where the language is susceptible to two or more reasonable interpretations."[38]

"In interpreting a contract, courts are to examine the contract as a whole and presume that the intent of the parties is reflected in the language of the contract."[39] "The court's construction of a contract should attempt to harmonize all the provisions of the document rather than to produce conflict in them."[40] "A contract should also be construed so as to give effect to all of its provisions."[41] " 'Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument.' "[42]

In the case at bar, Pro-Touch asks the court to find that the 2008 agreement replaced Paragraph Four of the 2006 contract in its entirety. However, the 2008 document says nothing about the 2006 contract; it does not indicate on the face of the

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[35] Id., citing *McKay Machine Co. v. Rodman* (1967), 11 Ohio St.2d 77, 80, 228 N.E.2d 304.
[36] *7 Med. Sys., LLC v. Open MRI of Steubenville* (June 18, 2012), 7th Dist. No. 11-JE-23, 2012-Ohio-3009, ¶ 20.
[37] *Walter* at ¶ 12, citing *Ohio Historical Society v. General Maintenance & Engineering Co.* (1989), 65 Ohio App.3d 139, 583 N.E.2d 340.
[38] Id., citing, *U.S. Fidelity and Guaranty Co. v. St. Elizabeth Med. Ctr.* (1998), 129 Ohio App.3d 45, 716 N.E.2d 1201.
[39] *Pierce Point Cinema 10, LLC v. Perin-Tyler Family Found., LLC* (Oct. 29, 2012), 12th Dist. No. CA2012-02-014, 2012-Ohio-5008, ¶ 11, citing *Sunoco, Inc. v. Toledo Edison Co.*, 129 Ohio St.3d 397, 2011–Ohio–2720, ¶ 37.
[40] Id., citing, *Farmers Natl. Bank v. Delaware Ins. Co.*, 83 Ohio St. 309, 337 (1911).
[41] Id.
[42] *Celina Ins. Group v. Yoder & Frey, Inc.* (Sept. 18, 2009), 6th Dist. No. F-09-008, 2009-Ohio-4926, ¶ 9, quoting *Alexander v. Buckeye Pipe Line Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus.

2008 agreement that it is intended to be a replacement for the entirety of the prior compensation agreement. There are certain items in the 2006 agreement, such as a base salary and residuals, that are not referenced or specifically mentioned in the 2008 agreement.

There is clearly an ambiguity as to how the 2008 agreement relates to the 2006 contract. Pro-Touch's argument that the 2008 compensation plan was intended to completely replace Paragraph Four of the 2006 contract is a reasonable interpretation of these two agreements. However, the court cannot say as a matter of law that Meadows' contention that portions of Paragraph Four were intended to co-exist with the 2008 compensation plan is not also a reasonable interpretation of the contractual language. There is no language at all in the 2008 agreement which sets forth how it was intended to affect the 2006 contract. This being a summary judgment motion, it is not for the court to decide which interpretation it believes to be correct or true; instead, given the ambiguities at issue in the contract, that is a question of fact to be resolved by the jury.[43] For this same reason, declaratory judgment is also not appropriate.

[43] See, e.g., *Rejas Invest. v. Natl. City Bank* (Oct. 22, 2010), 2nd Dist. No. 23349, 2010-Ohio-5163, ¶ 24, citing *Westfield Ins. Co. v. Galatis*, 100 Ohio St.3d 216, 797 N.E.2d 1256, 2003-Ohio-5849, at ¶ 13; and *Indiana Ins. Co. v. Carnegie Constr. ., Inc.* (1995), 104 Ohio App.3d 219, 222, 661 N.E.2d 776.

CONCLUSION

Based on the above analysis, the motion for summary judgment and declaratory judgment filed by the defendant Pro-Touch, Inc. is not well-taken and is hereby denied.

IT IS SO ORDERED.

DATED:_____ _____
Judge Jerry R. McBride

CERTIFICATE OF SERVICE

The undersigned certifies that copies of the within Decision/Entry were sent via Facsimile/E-Mail/Regular U.S. Mail this 24th day of January 2013 to all counsel of record and unrepresented parties.

_____
Administrative Assistant to Judge McBride