UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

CIVIL ACTION NO. 3:97-CV-343H

AMC OF LOUISVILLE, INC.
f/k/a ADVANCED MACHINERY
COMPANY, INC. PLAINTIFF

V.

CINCINNATI MILACRON INC., ET AL. DEFENDANTS

MEMORANDUM OPINION

Plaintiff, AMC of Louisville, Inc. ("AMC") has filed a motion for summary judgment on its claim in Count VIII of the Complaint for breach of contract based on the failure of Cincinnati Milacron, Inc. ("Milacron") and Cincinnati Milacron Marketing, Inc.("Milacron Marketing") to pay service fees to AMC pursuant to the Sales Representative Agreement ("Agreement").[1] Plaintiff argues that it is entitled to receive a service fee of 5% of the sale price of any machine for which it provided service. The contract defines service as demonstration, customer training, application, set-up and/or warranty field service. The jury would determine the precise amount owed, if any.

Defendants respond that Milacron has no liability because it never entered a Sales Representative Agreement with AMC, although Milacron Marketing did. AMC seems to concede

[1] After discovery, Plaintiff modified its original request for summary judgment to a motion for partial summary judgment. AMC admits that a question of fact remains regarding which machines AMC serviced, and based on the number of machines serviced, how much money AMC is entitled to collect.

this point.[2] Milacron Marketing claims to have paid AMC all service fees owed under the Agreement and contests AMC's standing. Moreover, Milacron Marketing argues that the proper interpretation of the contract is a fact question since the contract is capable of two reasonable interpretations and AMC never protested not being paid the fees due until after the Sales Representative Agreement was terminated.

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. Proc. 56 (c). For purposes of summary judgment, any factual dispute must be resolved in favor of the non-moving party, in this case Defendants, unless the evidence presented is so one-sided that reasonable people could not find for the non-moving party. *See Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1479-80 (6th Cir. 1989); *Betkerur v. Aultman Hospital Ass'n.*, 78 F.2d 1079, 1087-88 (6th Cir. 1996).

This inquiry properly begins with a brief review of the relevant facts. AMC and Milacron Marketing entered into a Sales Representative Agreement on March 19, 1991. Paragraph 18 of that Agreement stated: "As compensation for Filed Service rendered pursuant to this agreement, a demonstration, customer training, application, set-up and or warranty field service commission will be paid as set forth in exhibit "E"." Schedule "E" provides for service compensation of 5%. The Sales Representative Agreement concludes, "The failure of either party to require the performance of any term or condition of this Agreement or the waiver by either party of any breach of this Agreement shall not prevent a later enforcement of such term or condition or be

[2] As the facts make clear, there is no argument for liability against Milacron. Milacron was not a party to the Sales Representative Agreement, and therefore, could not have breached it. Plaintiff never responded to this argument in its reply. The court assumes, therefore, that Plaintiff concedes its claim against Milacron. Even if Plaintiff does not concede its claim, the Court would find no grounds for holding Milacron liable.

deemed a waiver of any later breach." The parties disagree to what extent, if any, AMC attempted to enforce the terms of Paragraph 18 as written during the course of the Sales Representative Agreement. For purposes of Plaintiff's motion for summary judgment, the Court assumes that AMC did not complain of a contract violation.

The terms of the contract govern the rights and obligations of the parties unless the contract itself is unclear. If the contract is ambiguous, the past practices of the parties as well as other parol evidence becomes relevant. *See Kenton County Fiscal Court v. Elfers*, Ky. App., 981 S.W.2d 553, 559 (1998).

Milacron Marketing argues that the Agreement is capable of more than one reasonable interpretation. Therefore, evidence beyond the contract is necessary for contract interpretation. Milacron Marketing claims that the proper interpretation of the contract would recognize that Milacron's service department serviced all large machines; AMC serviced only small machines and has already been paid for that service. To support the position that no further fees are due, Milacron Marketing cites a letter from the President of AMC written in September of 1996 stating that AMC had no outstanding commission disputes with Milacron. Milacron Marketing also points to the fact that AMC did not list over a million dollars in overdue service fees as accounts receivable in its Asset Purchase Agreement with GE and that AMC never protested their interpretation of the Agreement prior to its termination. Finally, Milacron Marketing claims that some of the machines AMC claims to have serviced were serviced, if at all, after the Agreement expired. Under the contract, AMC is not entitled to service fees for work performed on products shipped after November 31, 1996.

AMC counters that the contract clearly requires that the service fee be paid on all

machines AMC serviced, regardless of size. No parol evidence can be considered because the language of the contract itself is not ambiguous. Moreover, AMC claims that its President's letter is being used out of context and that all accounts receivable were considered excluded assets under its deal with GE. AMC also contends that it has protested Milacron Marketing's failure to pay service fees on numerous occasions prior to the termination of the Agreement, but even if AMC had made no such protests, the Agreement expressly states that a failure to protest breach is not a waiver of any rights. AMC is not seeking service fees for work performed on any machines shipped after November 31, 1996.

The Court concludes that Paragraph 18 of the Agreement is not ambiguous. It clearly defines what services will create an obligation to pay AMC a service fee and the amount of that fee. AMC is entitled to a service fee of 5% of the sale price for all machines that it can establish it provided "demonstration, customer training, application, set-up and/or warranty field service". Neither AMC's President's letter nor AMC's Asset Purchase Agreement are relevant in determining the number of machines serviced. The jury will determine how many, if any, machines AMC serviced without receiving a service fee.[3]

[3] AMC has standing to bring this claim because it listed accounts receivable as excluded assets under its Asset Purchase Agreement with GE.

The Court will enter an order consistent with this Memorandum Opinion.

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JOHN G. HEYBURN, II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record

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ORDER

Plaintiff, AMC of Louisville, Inc. ("AMC") has filed a motion for partial summary judgment. Having read both parties' memoranda and being otherwise sufficiently advised,

IT IS HEREBY ORDERED that Plaintiff's motion for partial summary judgment is SUSTAINED as to Count VIII of the Complaint to the extent that AMC is entitled to payment for services based upon the Court's interpretation of the Agreement.

This ____ day of January, 2000.

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JOHN G. HEYBURN, II
JUDGE, U.S. DISTRICT COURT

cc: Counsel of Record