

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DON MAYHEW,)	
TD2 & ASSOCIATES,)	
(DDT SALES),)	
)	
Plaintiffs,)	
vs.)	NO. 1:04-cv-01248-LJM-WTL
)	
EIKENBERRY & ASSOCIATES, INC.,)	
BMJ MOLD & ENGINEERING CO., INC,)	
TOUCHSTONE MEASUREMENT SERVICE,)	
ADEPT CUSTOM MOLDERS, INC.,)	
)	
Defendants.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

DON MAYHEW d/b/a TD2 &)
ASSOCIATES (f/k/a DDT SALES),)
Plaintiff,)
)
vs.)
)
EIKENBERRY & ASSOCIATES, INC.,)
BMJ MOLD & ENGINEERING CO.,)
INC., TOUCHSTONE MEASUREMENT)
SERVICE, and ADEPT CUSTOM)
MOLDERS, INC., jointly and severally,)
Defendants.)

1:04-CV-1248-LJM-WTL

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on defendants', Eikenberry & Associates, Inc., BMJ Mold & Engineering Co., Inc., Touchstone Measurement Service, and Adept Custom Molders, Inc., (collectively "Defendants"), Motion for Summary Judgment. Plaintiff Don Mayhew, d/b/a TD2 & Associates, f/k/a DDT Sales ("Plaintiff"), frames his causes of action as breach of contract, breach of brokerage contract, tortious interference with business relations, wrongful interference with contractual relations, quantum meruit, and interpleader or other injunctive relief. Plaintiff alleges that Defendants wrongfully withheld or disbursed commissions when a contract between the parties was cancelled by Defendants. The Court finds that all of Plaintiff's claims are time-barred, and Defendants are entitled to judgment as a matter of law; the Court **GRANTS** Defendants' Motion for Summary Judgment.

I. BACKGROUND¹

On February 17, 1998, DDT Sales and Defendants entered into a representative agreement whereby Defendants agreed that Plaintiff would be their representative for the purpose of soliciting sales to Delphi Packard Electric Systems (the “Delphi Agreement”). Comp. ¶ 9, Exh. A; Mayhew Dep. at 80-81, 83; Exh. 20. The Delphi agreement provided that if the parties wished to add additional sales targets in addition to Delphi they could only do so by amending the Delphi Agreement in a writing signed by both parties. *Id.* at 83; Exh. 20. The Delphi Agreement provided that it “shall be interpreted and construed in accordance with the laws of the State of Georgia. *Id.*

On or about June 4, 1998, DDT Sales and Defendants entered into an additional agreement whereby Defendants agreed that DDT Sales would be their representative for the purpose of soliciting sales to Lincare, Inc. (the “Lincare Agreement”). The Lincare Agreement was not set forth in a written contract signed by both parties but was, instead, based on a verbal agreement. Mayhew Dep. at 83-87. Throughout the period in which DDT Sales entered into the Delphi and Lincare Agreements, DDT Sales claimed to be a partnership consisting of Don Mayhew (“Mayhew”) and Tom Lyons (“Lyons”), organized under Georgia law. Comp. ¶ 8. DDT Sales subsequently changed its name to TD2 & Associates (“TD2”). Mayhew Dep. at 59.

On or about May 25, 1999, Lyons withdrew from the DDT Sales / TD2 partnership. Comp.

¹ Plaintiff failed to support his factual assertions in his “Statement of Material Facts in Dispute” by reference to admissible evidence as required by Federal Rule of Civil Procedure 56 and Local Rule 56.1. Plaintiff only designated admissible evidence in support of one of the nine statements of material facts in dispute cited in Plaintiff’s response. Plaintiff’s remaining statements are either assertions without citation to admissible evidence (Statements of Fact Nos. 2, 4, 5), or legal conclusions (Statements of Fact Nos. 3, 6, 7, 8, 9). The sole statement of fact that Plaintiff did provide a reference to potentially admissible evidence (Statement of Fact No. 1) is consistent with Defendants’ statement of facts. As a result, Plaintiff has not provided the Court with any admissible evidence contradicting Defendants’ statement of material facts.

¶ 23; Mayhew Dep. at 99. On May 26, 1999, upon learning of Lyons' withdrawal from DDT Sales, Defendants informed Plaintiff that it was their understanding that their agreements with DDT Sales were now terminated because of the dissolution of DDT Sales. Comp. ¶ 32; Exh. 5; Mayhew Dep. at 101; Exh. 13. On May 27, 1999, Plaintiff objected to Defendants' position that Lyons' withdrawal from DDT Sales / TD2 resulted in termination of the Lincare Agreement and maintained that notwithstanding the withdrawal of Lyons, DDT Sales / TD2's agreement with Defendants was still in force. Mayhew Dep. at 103; Exh. 16. After May 26, 1999, Plaintiff took no further action for the benefit of Defendants. Mayhew Dep. at 123.

On October 14, 1999, Plaintiff filed a lawsuit against Defendants in Fulton County Superior Court 1, Atlanta, Georgia (the "Georgia Lawsuit"). The Georgia Lawsuit included causes of action for breach of contract, interpleader or other injunctive relief, tortious interference with business relations, and wrongful interference with contractual relations, arising out of Plaintiff's allegations that Defendants wrongfully terminated the Lincare Agreement and failed to pay commissions due under said agreement. Def.'s Appx., Tab 1. On or about June 19, 2001, Plaintiff amended his complaint to add additional causes of action for quantum meruit and breach of brokerage contract. These causes of action were not supported by additional factual allegations in the Georgia Lawsuit. Def.'s Appx., Tab 2.

On August 29, 2001, the Superior Court of Fulton County dismissed the Georgia Lawsuit on the basis that the court did not have personal jurisdiction over Defendants and that venue was improper in Fulton County. Def.'s Appx., Tab 3. Plaintiff appealed the dismissal of the Georgia Lawsuit to the Georgia Court of Appeals, which denied Plaintiff's appeal in an unpublished decision on April 5, 2002. Def.'s Appx., Tab 4. The Georgia Court of Appeals subsequently denied Plaintiff's Motion for Reconsideration on April 25, 2002. Def.'s Appx., Tab 5. Plaintiff initiated

the above-captioned lawsuit on July 29, 2004.

II. SUMMARY JUDGMENT STANDARD

As stated by the Supreme Court, summary judgment is not a disfavored procedural shortcut, but rather is an integral part of the federal rules as a whole, which are designed to secure the just, speedy, and inexpensive determination of every action. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). *See also United Ass'n of Black Landscapers v. City of Milwaukee*, 916 F.2d 1261, 1267-68 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 1317 (1991). Motions for summary judgment are governed by Rule 56(c) of the Federal Rules of Civil Procedure, which provides in relevant part:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Once a party has made a properly-supported motion for summary judgment, the opposing party may not simply rest upon the pleadings but must instead submit evidentiary materials which “set forth specific facts showing that there is a genuine issue for trial.” Fed. R. Civ. P. 56(e). A genuine issue of material fact exists whenever “there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). The nonmoving party bears the burden of demonstrating that such a genuine issue of material fact exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Oliver v. Oshkosh Truck Corp.*, 96 F.3d 992, 997 (7th Cir. 1996), *cert. denied*, 520 U.S. 1116 (1997). It is not the duty of the court to scour the record in search of evidence to defeat a motion for summary judgment; rather, the nonmoving party bears the responsibility of identifying the evidence upon which he relies. *See Bombard v. Fort Wayne Newspapers, Inc.*, 92 F.3d 560, 562

(7th Cir. 1996). When the moving party has met the standard of Rule 56, summary judgment is mandatory. *Celotex*, 477 U.S. at 322-23; *Shields Enters., Inc. v. First Chicago Corp.*, 975 F.2d 1290, 1294 (7th Cir. 1992).

In evaluating a motion for summary judgment, a court should draw all reasonable inferences from undisputed facts in favor of the nonmoving party and should view the disputed evidence in the light most favorable to the nonmoving party. *See Estate of Cole v. Fromm*, 94 F.3d 254, 257 (7th Cir. 1996), *cert. denied*, 519 U.S. 1109 (1997). The mere existence of a factual dispute, by itself, is not sufficient to bar summary judgment. Only factual disputes that might affect the outcome of the suit in light of the substantive law will preclude summary judgment. *See Anderson*, 477 U.S. at 248; *JPM Inc. v. John Deere Indus. Equip. Co.*, 94 F.3d 270, 273 (7th Cir. 1996). Irrelevant or unnecessary facts do not deter summary judgment, even when in dispute. *See Clifton v. Schafer*, 969 F.2d 278, 281 (7th Cir. 1992). “If the nonmoving party fails to establish the existence of an element essential to his case, one on which he would bear the burden of proof at trial, summary judgment must be granted to the moving party.” *Ortiz v. John O. Butler Co.*, 94 F.3d 1121, 1124 (7th Cir. 1996), *cert. denied*, 519 U.S. 1115 (1997).

On certain occasions, the Seventh Circuit has suggested that a court approach a motion for summary judgment in an employment discrimination case with a particular degree of caution. *See e.g., Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993); *Holland v. Jefferson Nat’l Life Ins. Co.*, 883 F.2d 1307, 1312 (7th Cir. 1989). The language implied that summary judgment might be less appropriate in this context based upon the presence of issues of motive and intent. *Holland*, 883 F.2d at 1312. As the Seventh Circuit has emphasized, however, these cases do not establish a heightened summary judgment standard for employment-related cases. Instead, the language from the prior cases simply means “that courts should be careful in a discrimination case

as in any case not to grant summary judgment if there is an issue of material fact that is genuinely contestable, which an issue of intent often though not always will be.” *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). Even when discriminatory intent is at issue, summary judgment is appropriate when the nonmovant presents no evidence to indicate motive or intent in support of her position. *See Holland*, 883 F.2d at 1312. Further, the nonmovant will not defeat summary judgment merely by pointing to self-serving allegations without evidentiary support. *See Cliff v. Bd. of Sch. Comm’rs*, 42 F.3d 403, 408 (7th Cir. 1994).

III. DISCUSSION

A. Breach of Contract & Breach of Brokerage Contract Claims

Georgia law provides that an action upon a written contract be brought within six years after the contract becomes due and payable under Georgia Code § 9-3-24, whereas an action upon an oral contract must be brought within four years under § 9-3-25. *See, e.g., Kueffer Crane & Hoist Serv., Inc. v. Passarella*, 543 S.E.2d 113, 116 (Ga. Ct. App. 2000). The parties agree that the Delphi Agreement was in writing, and Plaintiff admits that there was no written agreement concerning Lincare. *See Mayhew Dep.* at 84, 86.

Plaintiff advances several arguments to support his position that the oral Lincare Agreement was incorporated into the written Delphi Agreement, and therefore the Lincare Agreement constitutes a written contract subject to the six-year statute of limitations under Georgia Code § 9-3-24. Plaintiff alleges that parties waived the requirement of a signed writing for modification of the Delphi Contract through their conduct, and alternatively, that the Delphi Agreement, by its own terms, does not require a signed writing for modification. *See Exh. 20*. However, the Court need

not address the merit of Plaintiff's arguments, because even if the Court accepted his contention that the oral Lincare Agreement was incorporated into the Delphi Agreement, thereby modifying it, Plaintiff's argument is still fatally flawed. Georgia law makes clear that contracts that are partly written and partly in parol must be considered as in parol and are governed by the four-year statute of limitations applicable to oral contracts under Georgia Code § 9-3-25. *See King Indus. Realty, Inc. v. Rich*, 481 S.E.2d 861, 866 (Ga. Ct. App. 1997). Again, there is no dispute that the Delphi Agreement was in writing and the Lincare Agreement was oral. *See Mayhew Dep.* at 80-81, 83-87; Exh. 20. Whether the Lincare Agreement was a completely oral contract or an oral modification of the written Delphi Agreement is of no consequence – Georgia's four-year statute of limitations applies.

Under Georgia law, the statute of limitations “runs from the time the contract is broken and not the time actual damages are ascertained.” *Leather v. Timex Corp.*, 330 S.E.2d 102, 104 (Ga. Ct. App. 1985) (internal citation omitted). The statute of limitations began to run against Plaintiff's claims on May 26, 1999, when “Defendants informed Plaintiff that it was terminating commission payments to Plaintiff.” Complaint, ¶ 32, Exh. G. As a result, Plaintiff's breach of contract and breach of brokerage contract claims expired on May 26, 2003, and are time-barred.

Plaintiff also argues that, pursuant to Georgia Code § 13-1-8, the contract could be construed as a divisible contract, and Plaintiff's claims for breach of contract and breach of brokerage contract would not be time-barred for all events and transactions arising after July 28, 1999. This argument is based on a faulty premise. It is undisputed that the Lincare Agreement was terminated on May 26, 1999. *See Comp.*, Exh. 5; *Mayhew Dep.* at 101; Exh. 13. It also is undisputed that Plaintiff did not arrange for any additional sales by Defendants to Lincare after May 26, 1999. *See Mayhew Dep.* at 103; Exh. 16. Plaintiff's position, therefore, is based on the notion that he is entitled to

commissions on sales that Defendants made to Lincare, after Plaintiff's services were terminated.

Indeed, “[i]f a contract is found to be strictly divisible, the statute will run separately as to each payment or performance when it comes due, either as an independent obligation or as a return for an installment of the counter-performance.” *Carswell v. Oconee Regional Med. Ctr., Inc.*, 605 S.E.2d 879, 881 (Ga. Ct. App. 2004). However, Plaintiff overlooks the fact that after termination of the Lincare Agreement, he engaged in no counter-performance for which payment would come due. Plaintiff has admitted to soliciting no sales after termination of the Lincare Agreement “because he ha[d] been told [he] would not get paid for it.” Mayhew Dep. at 123. Plaintiff, in essence, argues that he was continually entitled to commissions for sales after termination of the agreement, which he did not solicit, in which he took no part, and for which he rendered no service. The Court cannot agree with Plaintiff's argument providing for potentially perpetual commission payments after the agreement was terminated. Defendants incurred no further obligations to pay commissions after May 26, 1999.

B. Tortious Interference with Business Relationship, Wrongful Interference with Contractual Relations, and Quantum Meruit

Plaintiff, without citation to authority, argues that the running of the statute of limitations regarding his claims for tortious interference with business relationship, wrongful interference with contractual relations, and quantum meruit, should be tolled for the period that his claims were pending in Georgia. However, Plaintiff's contention involves an unwarranted tolling of the statute of limitations, contrary to Georgia law. As held by the Georgia Court of Appeals:

The statute of limitation begins to run on the date of the tortious conduct. It continues to run until its running effects a bar to any action based upon that misconduct. Logically, if a complaint is filed within the time allotted by statute . . . any limitation on the action is thrust into a legal limbo, in that the statute continues

to run but has no tolling effect upon the pending action. . . . Thus so long as the case is pending the statute of limitation[s] has no tolling effect.

Rakestraw v. Berenson, 266 S.E.2d 249, 250-51 (Ga. Ct. App. 1980) (internal citation omitted). *See also Brown v. Pearson*, 320 S.E.2d 570, 570 (Ga. Ct. App. 1984) (holding that running of statute of limitations in action was not tolled by filing of previous suit in federal court to recover for the same alleged injury) (internal citations omitted).

A four-year statute of limitations applies to claims of tortious interference with a business relationship and wrongful interference with contractual relations under Georgia Code § 9-3-31. *See, e.g., Kidd v. First Commerce Bank*, 591 S.E.2d 369, 372 (Ga. Ct. App. 2003) (observing that the four-year statute of limitations period applies to actions for tortious interference with business relationships); *Cole v. Smith*, 354 S.E.2d 835, 838 (Ga. Ct. App. 2003) (observing that the four-year statute of limitations period applies to tort actions for intentional interference with contractual relationships). Plaintiff waited more than four years after May 26, 1999, the date that the Lincare Agreement was terminated, to file the instant suit. As a result, Plaintiff's claims for tortious interference with business relations and wrongful interference with contractual relations are time-barred.

Plaintiff's claim for quantum meruit is also time-barred. Georgia law recognizes that when a party receives services from another, a promise can be implied to pay the reasonable value of those services. *See, e.g., Smallwood v. Conner*, 162 S.E.2d 747, 748 (Ga. Ct. App. 1968). However, any such claim must be brought within four years of the accrual of the cause of action pursuant to Georgia Code §§ 9-3-25 and 9-3-26. *See id.; Parks v. Brissey*, 151 S.E.2d 896, 898 (Ga. Ct. App. 1966). Any services rendered by Plaintiff to Defendants pursuant to the Lincare Agreement ceased on May 26, 1999, when Defendants terminated the Lincare Agreement. Again, Plaintiff has

admitted that he did not make any further efforts on Defendants' behalf after receiving notice that they had terminated the Lincare Agreement. *See* Mayhew Dep. at 123. *Cf. Troutman v. S. Ry. Co.*, 296 F. Supp. 963, 969 (D. Ga. 1968) (holding that claim against railway for services rendered was barred by Georgia's four-year statute of limitations where services were concluded on November 8, 1962, and suit was not filed until September 15, 1967). As a result, the four-year statute of limitations applicable to Plaintiff's claim for quantum meruit expired in May 2003.

C. Interpleader and Injunctive Relief

Because the Court has concluded that Plaintiff's claims are time-barred, he may not seek an equitable remedy.² As stated by the Supreme Court, "equity will withhold its relief in such a case where the applicable statute of limitations would bar the concurrent legal remedy." *Cope v. Anderson*, 331 U.S. 461, 464 (1947) (internal citations omitted). Accordingly, Plaintiff's claim for interpleader and injunctive relief fails.

² An injunction is distinctly an equitable remedy. *See Strozso v. Sea Island Bank*, 521 S.E.2d 392, 395 (Ga. Ct. App. 1999) (internal citations omitted).

IV. CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants', Eikenberry & Associates, Inc., BMJ Mold & Engineering Co., Inc., Touchstone Measurement Service, and Adept Custom Molders, Inc., Motion for Summary Judgment.

IT IS SO ORDERED this 2nd day of February, 2005.

LARRY J. MCKINNEY, CHIEF JUDGE
United States District Court
Southern District of Indiana

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