

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
TRIAL DIVISION - CIVIL**

MAR-DRU, INC.,	:	MAY TERM, 2005
	:	
Plaintiff,	:	NO. 01476
	:	
v.	:	COMMERCE PROGRAM
	:	
HUTAMAKI FOOD SERVICES, INC.,	:	Control No. 10072401
	:	
Defendant.	:	

ORDER

AND NOW, this 1st day of December, 2010, upon consideration of defendant's Motion for Summary Judgment, the response thereto, and all other matters of record, and in accord with the Opinion issued simultaneously, it is **ORDERED** that the Motion is **GRANTED in part**.

Plaintiff may not recover as damages any commissions it would have earned on or after April 11, 2009. The remainder of the Motion is **DENIED**.

BY THE COURT:

ARNOLD L. NEW, J.

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Defendant.	:	

OPINION

The parties to this litigation had a business relationship for many years. Plaintiff acted as a sales agent, or broker, for defendant within a certain territory and received monthly commission payments from defendant. The parties’ relationship was formalized in a Broker Sales Representation Agreement dated December 9, 2005 (the “2005 Agreement”).¹ The 2005 Agreement provided the following with respect to its term and termination (the “Term Provision”):

Term. . . . This Agreement shall be effective December 9, 2005 and shall remain in effect for twelve (12) months until notice by [defendant] is given in writing that Term shall be extended. Either party may terminate this agreement at the end of the eleventh (11th) month. This Agreement may be amended and extended upon agreement of both parties. Thirty days notice shall be given by either party of an impending Agreement change.²

There is no dispute that defendant did not give written notice extending the 2005 Agreement past December, 2006, as contemplated in the first sentence of the Term Provision.

¹There were prior written agreements between the parties, which are not at issue here.

² Complaint, Ex. 1, p. 2 (ellipsis in original). The 2005 Agreement states that it is to be construed under the laws of Kansas, although both parties cite Pennsylvania caselaw in their motion papers. It appears the relevant law of Kansas is the same as that of Pennsylvania, so there is no true conflict of law in this case.

If a written instrument has clear language and can be carried out as written, rules of construction are not necessary. If the [contract] language is clear and unambiguous, it must be construed in its plain, ordinary, and popular sense and according to the sense and meaning of the terms used.

Nat'l Bank of Andover v. Kan. Bankers Sur. Co., 225 P.3d 707, 719 (Kan. 2010).

There is also no dispute that neither party formally terminated the Agreement in the 11th month, November, 2006, as contemplated in the second sentence. The parties continued their business relationship past December, 2006.

In February, 2007, the terms of the parties' arrangement were changed by agreement. Defendant hired another broker to service the same territory as plaintiff, and plaintiff began receiving its commission payments from or through that new broker rather than directly from defendant. Plaintiff entered into a commission contract with the other broker, and defendant entered into a separate broker contract with the other broker (collectively the "2007 Contracts").

On March 11, 2009, defendant sent plaintiff a letter (the "2009 Letter") in which defendant stated the 2005 Agreement had expired on December 9, 2006. The 2009 Letter also provided:

In any event and without waiver of any rights or remedies available to [defendant], [defendant] hereby notifies [plaintiff] that its services are no longer required and hereby provides this 30 day notice of termination of the [2005] Agreement, given this date. The [2005] Agreement shall be deemed as [sic] terminated as of April 11, 2009 and [defendant] shall have no further obligation or duties under the [2005] Agreement after April 11, 2009.

As a result of receiving the 2009 Letter, plaintiff filed this action for breach of the 2005 Agreement. Plaintiff alleges the 2005 Agreement was automatically extended through December, 2009, so it is entitled to damages equal to its commissions from March 1, 2009 through December 30, 2009.

Defendant moved for summary judgment on plaintiff's claim on the following bases: 1) the 2005 Agreement terminated in December 2006, when no written extension was given by defendant; or 2) it terminated in February, 2007, when the parties entered into the 2007 Contracts with the new broker. In response, plaintiff argues: 1) the 2005 Agreement continued in effect after December 2006; 2) it automatically renewed each year, in December, for another 12 month

term unless notice of termination was given in November; and 3) it continued in effect even after the parties entered into the 2007 Contracts with the other broker.

There are disputed issues of fact as to the parties' intent regarding the continued validity of the 2005 Agreement after the 2007 Contracts were signed. The court cannot resolve such factual issues at this stage in the proceeding since they involve determinations as to the credibility of the parties' various witnesses. However, even if plaintiff is correct and the 2005 Agreement was still in effect in 2009, plaintiff is not entitled to all the damages it claims for that year.

Plaintiff claims the 2005 Agreement was extended through December, 2009, because defendant failed to give plaintiff notice of termination of the 2005 Agreement in November 2008. This interpretation of the Term Provision of the 2005 Agreement is not supported by a plain reading of the Provision's language.

No automatic 12 month extensions are provided for in the Term Provision. Only one 12 month term is referenced in, and contemplated by, that Provision, namely the term from December, 2005 through December, 2006. Defendant could have extended the term in writing and with plaintiff's consent beyond December, 2006.³ Defendant did not do so. Instead, the parties' agreed by their conduct to continue their relationship. This agreement comports with the language of the third sentence of the Term Provision, which allows "amend[ment] and exten[sion] upon agreement of both parties."⁴ The 2005 Agreement does not contain any language to suggest the agreed upon extension could only be for additional full year terms.⁵

³ The Term Provision does not specify that any such extension must be for a full year, so an extension could be for any amount of time, *e.g.*, one month, 6 months, an additional 12 months, *etc.*

⁴ Again, the Term Provision does not specify that any such extension must be for a full year, so an extension could be for any amount of time.

⁵ The 2005 Agreement is not an employment contract, so the employment cases cited by plaintiff are

If the court were to imply automatic 12 month extensions into the Term Provision, it would render the final sentence of the Provision meaningless. Pursuant to that sentence, “an impending Agreement change,” which necessarily includes termination of the Agreement, can be accomplished by “either party” upon “thirty days notice” to the other party. In other words, after the expiration of the initial one year term, the parties’ relationship continued on a month-to-month basis, terminable upon one month’s notice. Plaintiff has not produced any evidence regarding the parties’ course of performance or course of dealing that conflicts with or modifies this interpretation of the Term Provision of the 2005 Agreement.⁶

Defendant gave thirty days notice of termination in its 2009 Letter and terminated the parties’ relationship as of April 11, 2009. To the extent the 2005 Agreement was still in effect at that time, defendant properly terminated it. Plaintiff is not entitled to recover any commissions after the termination date of April 11, 2009. Since plaintiff claims commissions due to it from March 1, 2009, it may recover any such unpaid commissions that accrued between March 1st and April 11th of 2009.⁷

inapposite. *See Smith v. Shallcross*, 69 A.2d 156, 158 (Pa. Super. 1949) (“Where a contract of employment for a definite time is made and the employee’s services are continued after the expiration of the time, without objection, the inference is that the parties have assented to another contract for a term of the same length with the same salary and conditions of service.”) The 2005 Agreement is, instead, a commercial contract all of the terms of which must be construed together and given full effect.

⁶ Plaintiff claims the parties had “a continuing relationship” over the 16 and a half years the parties were doing business, with several written contracts reflecting changes in the commission structure under which plaintiff was compensated. *See* Plaintiff’s Memorandum in Opposition to Motion, pp. 2, 10.

⁷The parties failed to inform the court what commissions, if any, are due and unpaid for that period.

For all the foregoing reasons, defendant's Motion for Summary Judgment on plaintiff's claim for breach of contract must be granted in part and denied in part.

BY THE COURT:

ARNOLD L. NEW, J.