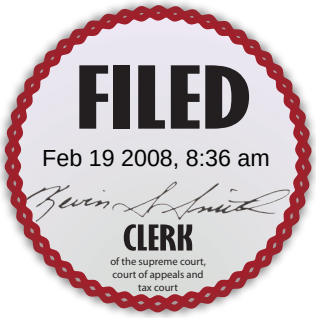

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IN THE
COURT OF APPEALS OF INDIANA

ALAN D. REED,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 02A05-0709-CV-498
	)	
EMPLOYEE PLANS, LLC,	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE ALLEN SUPERIOR COURT
The Honorable Daniel G. Heath, Judge
Cause No. 02D01-0601-PL-58

February 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Alan D. Reed appeals the trial court's order granting summary judgment in favor of appellee-defendant Employee Plans, LLC (Employee Plans), on Reed's complaint against Employee Plans for breach of contract. Reed argues that the trial court should have concluded that he is entitled to commissions for the period of time beginning with the termination of his employment as an insurance brokerage agent and ending with the provision of a written notice of termination by Employee Plans of the parties' contract. Finding that the trial court's summary judgment order was proper, we affirm.

FACTS

Reed is a licensed insurance agent operating in northeastern Indiana. He has acted as the insurance brokerage agent for Southwest Allen County Schools (SACS) since the 1970s. In 1998, SACS asked Reed to find a new third-party administrator (TPA) for its self-insured health insurance plan. With Reed's guidance, SACS eventually selected Employee Plans to act as its TPA. SACS entered into a contract with Employee Plans that was retroactively effective to March 1, 1999.

Additionally, Reed entered into a separate Broker's Commission Agreement (the Agreement) with Employee Plans that was also retroactively effective to March 1, 1999. Reed's primary obligation was to "solicit[] various employers for the purpose of assisting the employer to select a third party administrator and a reinsurer to administer and reinsure said group health plans, for which [Reed] is paid a commission . . . ." Appellant's App. p. 89. The Agreement further provided that during the term of the Agreement—which was of an "indefinite duration until terminated"—Reed would earn commissions "based on premiums

paid by an employer for the period that [Employee Plans] is hired to administer said group health plans." Id. at 89, 90. Furthermore, the Agreement contains a provision regarding the nonvested nature of the commissions:

> Payment of premiums during the term of this Agreement shall be earned and paid monthly to [Reed] and it is agreed that there shall be no vesting of commissions under this Agreement. Any and all commissions provided hereunder shall immediately cease as of the date this Agreement terminates, regardless of whether the date of termination of this Agreement coincides with the expiration of the employer's administration agreement with [Employee Plans] or reinsurance agreement. In the event that this Agreement is terminated but [Reed] continues to be agent of record for the employer, [Employee Plans] shall not retain any commissions earned by [Reed], while this agreement was in force, but shall return such commissions to employer.

Id. at 89. As for termination, the Agreement provides that "[Employee Plans] or [Reed] may terminate this Agreement without cause at any time by giving at least 30 days' written notice to the other party of such termination." Id. at 90.

During 1999 and 2000, Reed was compensated in two ways—he received a fee for each employee enrolled in the SACS medical plan, which was serviced by Employee Plans, and he was paid commissions on the reinsurance policy SACS had purchased to insulate itself from the risks associated with maintaining a self-insured health plan. In November 2000, SACS decided that Reed would no longer receive a per transaction fee; instead, he would only receive a commission on the reinsurance premiums from that point forward. At the end of 2004, SACS chose to remove Reed altogether from his position as its representative agent regarding TPA services and, beginning in 2005, SACS dealt directly with its reinsurer and interacted with Employee Plans exactly as it had for years as its TPA.

On January 19, 2006, Reed filed a complaint against Employee Plans for breach of contract based on its failure to pay him the commissions allegedly owed to him pursuant to the Agreement. On August 1, 2006, Employee Plans sent Reed a letter terminating the Agreement in writing. Reed has received no commissions since January 2005.

On May 4, 2007, Employee Plans filed a motion for summary judgment, arguing, among other things, that inasmuch as Reed had performed no work for SACS and Employee Plans after he was removed from his position as agent in December 2004, he had not earned any commissions under the Agreement. Following a hearing, on August 6, 2007, the trial court entered an order granting summary judgment in favor of Employee Plans but also finding that Employee Plans had breached the Agreement:

> . . . [Employee Plans] did breach the Agreement as it pertains to termination. [Employee Plans] did not give thirty (30) days written notice of termination to [Reed]. The Court, however, concurs with [Employee Plans] that the appropriate amount of commissions due [to Reed] are limited to the thirty (30) day notice period. . . .

Appellant's App. p. 10. Reed now appeals.

DISCUSSION AND DECISION

I. Standard of Review

Summary judgment is appropriate only if the pleadings and evidence considered by the trial court show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Owens Corning Fiberglass Corp. v. Cobb, 754 N.E.2d 905, 909 (Ind. 2001); see also Ind. Trial Rule 56(C). On a motion for summary judgment, all doubts as to the existence of material issues of fact must be resolved against the moving party. Owens Corning, 754 N.E.2d at 909. Additionally, all facts and reasonable

inferences from those facts are construed in favor of the nonmoving party. Id. If there is any doubt as to what conclusion a jury could reach, then summary judgment is improper. Id.

An appellate court faces the same issues that were before the trial court and follows the same process. Id. at 908. The party appealing from a summary judgment decision has the burden of persuading the court that the grant or denial of summary judgment was erroneous. Id. When a trial court grants summary judgment, we carefully scrutinize that determination to ensure that a party was not improperly prevented from having his or her day in court. Id.

II. Notice of Termination Provision

The Agreement provides that either Employee Plans or Reed could have terminated the contract "without cause at any time by giving at least 30 days' written notice to the other party of such termination. This Agreement shall be for indefinite duration until terminated." Appellant's App. p. 90. We infer that the purpose of this notice provision is to ensure that the parties know of the impending end of the contractual relationship and, as a result, have adequate time—thirty days—to make whatever preparations might be needed.

Here, there is no dispute that Reed knew at the end of 2004 that he was no longer acting as a broker or representative for SACS. There is also no dispute that after January 1, 2005, Reed performed no work for SACS on its TPA services and was no longer the agent of record for those services. We cannot conclude, therefore, that Reed could have had a reasonable expectation that his contractual relationship with Employee Plans, which was based on his relationship with SACS, would survive the termination of his employment with

SACS. Consequently, as of January 1, 2005, Reed was on notice that his contractual relationship with Employee Plans was terminated and that, inasmuch as he was no longer performing the work contemplated by the Agreement, he was no longer entitled to receive commissions for that work.

There is also no dispute, however, that Employee Plans did not notify Reed in writing that the Agreement was terminated until August 1, 2006. Employee Plans should have provided written notice of termination at the end of 2004, and its failure to do so constituted a breach of the Agreement's termination provision. The trial court correctly concluded that Reed's damages stemming from the breach of the termination provision are limited to the period of notice—thirty days. See Reply Br. p. 10 ("[i]f a contract provides that it may be terminated upon notice, but is terminated improperly, the contract has nevertheless been terminated and it is foreseeable that any damages from the improper termination would be limited to the notice period").

Reed's attempt to receive commissions for eighteen months in which he did no work and during which he was fully aware that his employment relationship with SACS had been terminated is an intolerable attempt to play and win "the latest version of 'Legal Gotcha'[.]" Wilson Fertilizer & Grain, Inc. v. ADM Milling Co., 654 N.E.2d 848, 856 (Ind. Ct. App. 1995) (Kirsch, J., concurring and dissenting); see also Wolfe v. Wolfe, 793 N.E.2d 1164, 1169 (Ind. Ct. App. 2003) (condemning "gotcha" litigation tactics) (Baker, J., concurring). We decline to countenance this strategy.

The judgment of the trial court is affirmed.

RILEY, J., and MAY, J., concur.