STATE OF MICHIGAN

COURT OF APPEALS

JOHN H. FLIEHMAN d/b/a J.H. FLIEHMAN SALES COMPANY,

Plaintiff-Appellee,

v

PLASTECH MANUFACTURING CORPORATION,

Defendant-Appellant.

UNPUBLISHED
July 12, 1996

No. 169559
LC No. 91-11162-CK

Before: Jansen, P.J., and Taylor and J. P. Noecker,* JJ.

PER CURIAM.

Defendant appeals as of right from an order entering judgment in plaintiff's favor. We affirm in part and reverse in part.

This action arises from a contract dispute surrounding the payment of commissions to plaintiff. After holding a bench trial, the court issued an opinion and subsequent judgment awarding plaintiff $75,622.18. The court awarded $14,899.18 as a result of plaintiff obtaining the armature parts business and further awarded $60,723 on the basis that defendant had prevented new sales by not securing an acceptable paint source. We affirm the armature award of $14,899.18, but reverse the $60,723 award.

Defendant contends on appeal that the trial court erred as a matter of law in interpreting the parties' contract. We agree in part.

Factual findings by a trial court may not be set aside unless they are clearly erroneous. MCR 2.613(C). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire record is left with the definite and firm conviction that a mistake has been committed. *Tuttle v Highway Department*, 397 Mich 44, 46; 243 NW2d 244 (1976). A trial court's conclusions

---

* Circuit judge, sitting on the Court of Appeals by assignment.

of law are not, however, subject to the clearly erroneous standard of review. *Beason v Beason*, 435 Mich 791, 804; 460 NW2d 207 (1990). Where a finding is derived from an erroneous application of law to facts, or may have been influenced by an incorrect view of the law, the reviewing court is not limited to review for clear error. *Id.*

When presented with a dispute over the interpretation of a contract, courts must determine what the parties' agreement is and enforce it. *G&H, Inc v Nahra*, 204 Mich App 329, 330; 514 NW2d 255 (1994). Contractual language is to be given its plain and ordinary meaning. *Id.* at 330-331. Where the provisions of the contract are open to interpretation, it is the duty of the court to determine, if possible, the intent of the parties after taking into consideration the language in the contract, the circumstances surrounding the making of the contract, and the subject matter contained in the contract. *Remes v Holland*, 147 Mich App 550, 555; 382 NW2d 819 (1985).

The first issue concerns whether Thompson International (TI) was covered by this contract or, said more simply, was plaintiff, as defendant by implication suggests, a mere volunteer.

Defendant correctly notes that TI was not on the list required by paragraph 1 of the contract and that the non-modifiability clause of the contract precluded addition of TI except upon execution of a new written agreement. However, the failure to add TI as a customer in a new writing did not preclude making an award to plaintiff where the evidence shows the parties did reach an agreement that plaintiff act as a salesman to TI and plaintiff had pled a quantum meruit claim. Plaintiff's trial exhibit 6 shows defendant considered plaintiff the salesman to TI and this was also stated in paragraph 7(c) of defendant's motion for summary disposition. Under such circumstances, it is clear there was a new agreement. The trial court characterized this, perhaps maladroitly, as an estoppel situation, but in any event, the result which was reached; namely, that TI was an approved account and that plaintiff secured the armature parts business thereby entitling plaintiff to a commission, was not clearly erroneous.

As to the amount of commission due, the court was justified in looking to the old contract for guidance absent any other proffered explanation. Thus, $14,899.18 was justified as an award to plaintiff for obtaining the armature parts business.

The second issue concerns the award of $60,723. This award was based on application and interpretation of paragraph 7b of the contract which provides:

> [7]b. An account will be established equal to three percent of the net sales of all such parts from May 3, 1988 until December 31, 1988. When Representative generates sales of new parts covered by this agreement, he shall receive, in addition to the established commission on such parts, an additional commission (up to five percent total commission on each part). Such additional commission will be paid until this past account is fully paid off.
>
> If new sales are not generated for the period July 31, 1989 until July 31, 1991 and such lack of new sales is attributed to an inability of PLASTECH to secure an

> acceptable paint source, PLASTECH will pay a minimum of 1/24 of the account [$60,723.81] still owing each month for that period of time.

The parties are contesting the applicability of paragraph 7b, including the term "an acceptable paint source." The court found defendant did not secure an acceptable paint source and breached this provision of the contract entitling plaintiff to payment of $60,723.

There was not a lack of sales attributable to defendant's failure to secure an acceptable paint source. TI's Director of Quality testified that defendant had an acceptable paint source. Defendant admitted evidence showing it had spent over five million dollars to acquire an acceptable paint source in May of 1989. Defendant also presented testimony to the effect that it was never unable to fill a job due to the lack of an acceptable paint source. The trial court's finding to the contrary was clearly erroneous.

We have given serious consideration to the dissent's suggestion that we are, in making this decision, merely substituting our opinion for that of the trial court. This is not the case as we have concluded, with a definite and firm conviction after review of the entire record, that a mistake was committed as to the $60,723 award. It is well to recall that the testimony of the only disinterested party was unabashedly to the effect that defendant had an acceptable paint source. Accordingly, the trial court's finding that defendant did not secure an acceptable paint source was clearly erroneous.

Reversed and remanded for entry of a revised judgment.

/s/ Clifford W. Taylor
/s/ James P. Noecker