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C O U R T   O F   A P P E A L S

WILLIAMS DISTRIBUTING COMPANY, Plaintiff/Counterdefendant-Appellee,	UNPUBLISHED August 4, 2000
v KARL R. SALDANA, Defendant/Counterplaintiff-Appellant.	No. 211009 Oakland Circuit Court LC No. 97-416949-AV

Before: Hood, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

Defendant appeals by leave granted from a circuit court order reversing the district court's judgment in favor of defendant and remanding for entry of judgment in favor of plaintiff. We reverse.

Defendant was an employee of plaintiff from November 1991 to August 1993. At the beginning of defendant's second year of employment with plaintiff, defendant and plaintiff entered into a compensation agreement. According to the terms of the agreement, plaintiff would pay defendant a set amount for fourteen months, as a draw against his commissions. At the end of the fourteen months, defendant's commissions would be calculated and compared with the amount defendant was paid. If defendant's commissions were less than the amount defendant was paid over the fourteen months, defendant would pay plaintiff the difference.

Defendant ended his employment with plaintiff prior to the expiration of the compensation agreement. Plaintiff sued defendant for breach of the compensation agreement, claiming that defendant was paid $12,771 in excess of his commissions and seeking recovery of that amount. Defendant countersued plaintiff, claiming that plaintiff provided false information, which defendant relied upon in deciding to work for plaintiff, and plaintiff fraudulently induced defendant to sign the compensation agreement by representing to defendant that a new product line would be available for sale in the beginning of 1993.

Following a bench trial, the district court concluded that plaintiff was not entitled to recover any money and the compensation agreement was void. The district court also determined that plaintiff misrepresented the territory that defendant was to be assigned, defendant relied on the misrepresentation when he decided to accept employment with plaintiff, a written policy statement was distributed to employees, and the compensation agreement was fraudulently entered into. Plaintiff filed an appeal in the circuit court, claiming errors in the district court's findings of fact and conclusions of law. The circuit court reversed the district court's judgment and remanded for the entry of a judgment in favor of plaintiff.

Defendant argues that the circuit court erred when it determined that the district court's finding, that plaintiff fraudulently induced defendant to accept employment with plaintiff, was clearly erroneous. We agree.

Findings of fact made by a trial court are reviewed for clear error. *Arco Industries Corp v American Motorists Ins Co*, 448 Mich 395, 410; 531 NW2d 168 (1995), overruled *Frankenmuth Mutual Ins Co v Masters*, 460 Mich 105, 117 (1999); *Walters v Snyder*, 239 Mich App 453, 456; 608 NW2d 97 (2000). Reversal is permitted only where the trial court's findings of fact are clearly erroneous. *Arco Industries Corp, supra* at 410-411. "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." *Walters, supra* at 456. Special deference is given to the trial court's findings that are based on the credibility of the witnesses. *Draggoo v Draggoo,* 223 Mich App 415, 429; 566 NW2d 642 (1997); MCR 2.613(C).

The standard of proof necessary to establish fraud is clear and convincing evidence. *Foodland Distributors v Al-Naimi*, 220 Mich App 453, 459; 559 NW2d 379 (1996).

> The general rule is that to constitute actionable fraud it must appear: (1) that defendant made a material representation; (2) that it was false; (3) that when he made it he knew it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. [*US Fidelity & Guaranty Co v Black*, 412 Mich 99, 114; 313 NW2d 77 (1981) (quotations omitted).]

The evidence showed that a material representation was made concerning the Detroit territory. Defendant testified that Don Buckley, plaintiff's sales manager, told him that the territory generated $1,000,000 in sales and had a gross margin of twenty-one to twenty-three percent. During defendant's telephone conversation with Buckley, defendant's wife heard defendant repeat that it was a $1,000,000 territory with twenty to twenty-three percent gross margin and a sixteen percent commission. According to defendant, the gross margin percentage was important because commissions were based on it.

Additionally, Buckley did not tell defendant that the territory had been without an assigned salesperson for three months. James Williams ("Jim"), plaintiff's president, testified that if defendant's territory was uncovered, the sales volume would have been affected because customers that were not regularly called on went to other businesses. Buckley also failed to indicate that the territory did not include all of Oakland County. Scott Gormley, defendant's current boss, testified that Oakland Country generated approximately forty-eight percent of Potter Distributing's overall sales in the territory that included Oakland, Macomb, and St. Clair Counties, and Detroit.

Although Buckley denied telling defendant that the territory generated $1,000,000 in sales, had a gross margin of twenty-one to twenty-three percent, and included all of Oakland County, the district court noted that Buckley's memory of times, places, and subjects of conversations was fragmentary. The district court's observation was supported by Buckley's testimony that he could not remember if he discussed the territory's gross margin percentages with defendant. The district court also stated that it inferred from Buckley's demeanor on the stand that Buckley led defendant to believe that the territory was generating $1,000,000 in sales. Special deference is given to the trial court's findings that are based on the credibility of the witnesses. *Draggoo, supra* at 429.

The evidence established that Buckley's material representation regarding the Detroit territory was false. Michael Koster, plaintiff's vice president/treasurer, testified that the Detroit territory had sales of $708,000 in 1991. From 1986 until defendant's employment, the gross margin for the territory was sixteen to seventeen percent. Tom Williams ("Tom"), plaintiff's vice president in 1991, testified that if defendant was told that the gross margins for the territory were twenty percent, that would have been a lie. Koster stated that the territory was not covered during January and February 1991. Buckley testified that the territory included a larger portion of Oakland County when it was assigned to a previous salesman.

The evidence showed that Buckley made the material representation knowing that it was false or without any knowledge of its truth and as a positive assertion. Defendant testified that Buckley did not express any uncertainty or vagueness regarding the territory's past performance or potential in terms of sales or gross margin percentages.

The evidence also showed that Buckley made the material representations with the intention that defendant would act upon them. Buckley testified that defendant was his first choice for the sales position. Buckley and Jim believed that defendant would develop the territory. Defendant told Buckley that he needed at least $42,000 per year to support his family. Buckley told defendant that plaintiff's program and defendant's experience as a salesman would result in more money than what defendant was making with his previous employer. Defendant reviewed the numbers and determined that the territory generated $32,000 in commissions. However, assuming that the Detroit territory had sales of $740,000 and generated commissions of $18,000 during the year proceeding defendant's employment, defendant would have had to sell $1,640,000 at a sixteen percent gross margin to cover his first-year guarantee. The inference from this evidence is that plaintiff wanted defendant on its sales team and presented numbers to defendant that would induce defendant to accept the position.

The evidence further showed that defendant acted in reliance on the information provided by Buckley. Defendant testified that he believed Buckley's representations regarding the gross margin percentage and thought, based on Buckley's statements, that his earning potential would increase with plaintiff. Defendant's wife testified that she and defendant used the figures that were provided by Buckley to arrive at a commission of $32,000. Had defendant known the amount of the commissions, he would not have been interested in pursuing a position with plaintiff.

Defendant also established that he suffered injury. In 1990, defendant's income with his previous employer was $45,428. Defendant's first-year guarantee with plaintiff was $42,000. During his second year in plaintiff's employ, defendant generated commissions of $19,536.

In light of the above evidence, the district court's finding of fraud was not clearly erroneous. The district court applied a clear and convincing standard and concluded that defendant established his counterclaim that he relied on false information that was provided by plaintiff when he decided to accept employment with plaintiff. The evidence produced during trial supported the district court's conclusion. It cannot be said that a review of the record results in a definite and firm conviction that a mistake was committed by the district court. The circuit court erred when it determined that the district court's finding of fraud was clearly erroneous.

Defendant's next argument is that the circuit court erred when it determined that the district court's finding, that plaintiff adopted a written policy regarding compensation, was clearly erroneous. We disagree. Koster testified that plaintiff's policy was to pay salespersons based solely on commissions after the first year of employment. Plaintiff did not allow salespersons to choose the method of compensation unless plaintiff changed the territory of an established salesperson, in which case, the salesperson was guaranteed a salary equivalent to the salary the salesperson was earning in the previous territory.

Koster's testimony was supported by the testimony of Buckley, Jim, and Tom. Buckley stated that plaintiff did not allow sales personnel to choose the method of compensation during the second year of employment. Jim testified that plaintiff did not have a policy that second-year salespersons could choose the method of compensation. Jim stated that plaintiff only gave guarantees after the first year of employment where a salesperson changed territories. Tom testified that the document entitled, "policies affecting sales personnel," was prepared by Koster at Tom's request. The purpose of the document was to ascertain whether it made sense to submit policies in writing rather than just having them orally exist. Tom testified that the document was not adopted as policy or disseminated to plaintiff's employees and the only access defendant would have had to the document would have been as a result of discovery for the lawsuit.

Defendant's testimony also supports a conclusion that the policy was not adopted by plaintiff. Defendant testified that he did not remember reading the sentence of the policy statement that states that sales personnel can choose commission or salary after the first year of employment. Defendant also stated that, when he asked Buckley for a continuation of his salary, Buckley said that the salary could not be continued and they would have to agree to something else.

Based on the above evidence, we are left with the definite and firm conviction that a mistake was made. The district court's finding that the written policy had been distributed to plaintiff's employees was clearly erroneous. However, the district court's finding regarding the written policy is not necessary to the district court's ultimate disposition of the case. Therefore, while the circuit court correctly determined that the district court's finding regarding the policy was clearly erroneous, the fact that the policy was not adopted or distributed does not require a reversal of the district court's finding of fraud.

Defendant's next argument is that the evidence introduced at trial supports the district court's finding that defendant was fraudulently induced to sign the compensation agreement. We agree. Buckley testified that he expected that defendant would be able to generate enough commissions to cover the draw. However, defendant's sales for 1992, which totaled $975,000, were significantly short of the $1,640,000 in sales that defendant was required to generate in order to cover his draw under the compensation agreement. This evidence supports the district court's conclusion that defendant would have known prior to signing the compensation agreement that he could not sell enough of the old product line to generate the necessary commissions. Additionally, defendant's forecast for 1993 was submitted prior to the compensation agreement and projected sales of the new product line beginning the first of the year. The inference from this evidence is that Buckley represented the availability of the new product, which induced defendant to sign the compensation agreement.

Although Buckley denied that he told defendant that a new product would be available in January 1993, the district court noted Buckley's fragmentary memory and the fact that he was in a difficult position due to his affiliation with plaintiff. Special deference is given to the trial court's findings that are based on the credibility of the witnesses. *Draggoo, supra* at 429; MCR 2.613(C). The district court's finding that Buckley represented that the new product would be available was not clearly erroneous.

Defendant's final argument is that the district court did not err in concluding that Buckley's representations concerning the new product constituted fraud. Defendant contends that Buckley's statements about the availability of the new product were not future promises, but affirmative statements that the new product line was a "done deal." We agree. Actionable fraud must generally be "predicated on a statement relating to a past or an existing fact." *Samuel D Begola Services, Inc v Wild Bros*, 210 Mich App 636, 639; 534 NW2d 217 (1995).

We conclude that Buckley's statements were not intended as future promises, but representations of existing fact. Defendant signed the compensation agreement on November 20, 1992. On that day, prior to signing the agreement, defendant conveyed his concern about signing the compensation agreement to Buckley. Buckley told defendant that the new product line would be available the first of the year, which was right around the corner. Buckley also said that the compensation was not going to be an issue because the new product had a commercial line and a more competitive residential line. The district court's finding that defendant was fraudulently induced to sign the compensation agreement was not an erroneous conclusion of law.

Reversed and remanded for reinstatement of the district court's judgment in favor of defendant. We do not retain jurisdiction.

/s/ Harold Hood
/s/ David H. Sawyer
/s/ Mark J. Cavanagh