IN THE COURT OF APPEALS OF IOWA

No. 2-1098 / 12-1047
Filed February 13, 2013

PAUL SCHULTE,
Plaintiff-Appellee,

vs.

DAVE CARLSON,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison, Judge.

Defendant appeals the district court's judgment for plaintiff on a breach of contract claim. **AFFIRMED.**

Gary D. Dickey of Dickey & Campbell Law Firm, P.L.C., Des Moines, for appellant.

Kenneth Robert Munro of Munro Law Office, P.C., Des Moines, for appellee.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

DANILSON, J.

Defendant Dave Carlson appeals the district court's judgment for Paul Schulte on a breach of contract claim. Carlson claims Schulte was not a party to the agreement, and was not an intended third-party beneficiary, meaning he did not have standing to bring this action. He also claimed Schulte had not proven the following elements of a breach of contract action: (1) mutual assent to the terms of the contract; (2) breach of the contract by Carlson; and (3) damages. We affirm the decision of the district court entering judgment for Schulte.

I. Background Facts & Proceedings

Bearance Management Group, formerly known as TrueNorth Companies, L.C., is an insurance and financial services agency. Bearance had a working relationship with the financial services group, a separate entity, although the group shared office space with Bearance. The financial services group solicited business on behalf of Bearance, and received commissions from financial services it generated. The financial services group was operated by Schulte. Schulte and other members of his group were not employees of Bearance, but rather served as independent contractors.[1] Because Schulte had an oral agreement with Bearance, he was charged by Bearance for the expenses of the entire financial services group.[2]

In 2007, a representative of Bearance and Schulte discussed adding a 401(k) specialist to the financial services group. Schulte approached Carlson,

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[1] All of the members of the financial services group were independent contractors. Their income was received solely through commissions.

[2] Of the commissions received by the financial services group, a certain amount was retained by Schulte to pay these expenses.

who stated he needed a base income of $4000 per month, plus commissions, to become a member of the financial services group. On August 23, 2007, Bearance entered into a written agreement with Carlson as follows:

> Status: You will be a 1099 sub-contractor/consultant.
> Compensation: We are prepared to offer you a "draw" against your revenue production of $4000 per month. We could effectively begin our relationship on August 6, 2007, or later if you choose. All commission income written by you will be used to reduce this "draw" compensation. If you write commission income in excess of the "draw," you will be entitled to a portion of that commission income as agreed upon. We will review this program with you in December 2007 to determine the specifics of our relationship moving forward as of January 1, 2008.

A written notation on the agreement shows it was extended effective December 1, 2007.

Carlson was the only member of the financial services group that received a draw. He received $4000 per month from Bearance. Bearance in turn added $4000 each month to the expenses it charged Schulte. In addition to his draw of $4000 each month, Carlson received commissions. In some months his commissions exceeded $4000 and in other months his commissions were less than that amount. The payment to Carlson of $4000 per month was never reduced by the amount of commissions he received.

The financial services group operated on a team approach, so that each member of the team who worked on a project that generated commissions received a portion of those commissions. When commissions were to be received from the broker dealer, Schulte called a meeting, and all of the members who worked on that project signed off on the division of commissions. Schulte then contacted the broker dealer, and checks were sent to each team

member in the amount designated by Schulte. Thus, all of the commissions received by Carlson were authorized by Schulte.

Carlson terminated his relationship with the financial services group to procure other employment in February 2010, after working with the group for about thirty months. Schulte subsequently filed this action against Carlson, claiming he was a third-party beneficiary of the written agreement between Bearance and Carlson. Schulte claimed that under the agreement, in the months that Carlson's commissions exceeded $4000, Carlson was required to pay back the $4000 draw he had received. Also, in months Carlson's commissions were less than $4000, he was required to pay back the amount of those commissions. Schulte claimed he should receive these payments because he was required to repay Bearance the $4000 each month it had paid Carlson. Schulte claimed Carlson had been overpaid $65,551.47.

The case was tried before the court. Daniel Seemuth, the Des Moines office leader for Bearance, testified Carlson did not have an obligation to repay Bearance for the draw or commissions Carlson received, and that any such arrangement would have been a separate agreement between Schulte and Carlson. He testified he was unaware of any separate agreement between the two of them.

Schulte testified that while Carlson was working with the financial services group the monthly payment of $4000 was never reduced by the commissions he received. When questioned about deducting the amount of the draw from Carlson's commissions, Schulte testified:

> No, we didn't, because initially it was to help him get on his feet. I mean, if we all of a sudden started—if he is not writing the commission and we are beating him up for it, the idea was, let's get him on his feet, let's get him up and running. This is a long-term relationship. It's a big part of our business, so we were patient as far as funding and investing and him getting up and running.

Schulte also testified to a conversation he had with Carlson about this matter:

> I distinctly remember a conversation on or about the middle of December 2007 where I approached Dave and said, hey, don't—what are you doing with those commissions that were paid to you from the broker dealer? And his response is, you know, I'm not spending them. I've got them there. And I said, great. Because again, we didn't want to beat him up. We were doing the draw to help him get on his feet. I said, don't spend them until we figure out how we are going to work this out, whether it's a change in commissions or he writes a check to me, and in turn I pay Bearance.

On cross-examination, Schulte asserted his claims were based on the written agreement between Bearance and Carlson, and he was not claiming there was a breach of a separate oral agreement. Schulte agreed that even if Carlson never received any commissions, Schulte was obligated to pay Bearance $4000 per month while Carlson received that amount from Bearance.

At the close of plaintiff's case, Carlson made an oral motion for a directed verdict, asserting Schulte was not a party to the written agreement, and he was not a third-party beneficiary. Carlson also asserted there was insufficient evidence of a breach of contract, there was no meeting of the minds to create an enforceable contract, and Schulte had failed to show any damages. The district court took the motion under advisement.

Carlson testified he believed he would be paid $4000 per month, plus commissions. He stated he had no recollection of the conversation Schulte

claimed they had in December 2007. He also stated Schulte's testimony was contrary to his understanding of his relationship with Bearance. At the close of Carlson's testimony he renewed his motion for directed verdict. The court again took the matter under advisement.

The district court entered a decision on May 8, 2012. The court found Schulte was a third-party beneficiary of the contract between Bearance and Carlson, and in fact, "[t]he very purpose of the arrangement was for Carlson to provide assistance to Schulte." The court did not find credible Carlson's claim that he was entitled to keep the draw of $4000 per month plus all of the commissions he earned, as this was contrary to the terms of the written agreement. The court found, "Carlson was to earn commissions to charge back against the draw, thus relieving Schulte of the obligation of paying the draw back to Bearance." The court also found Schulte's testimony about the conversation in December 2007 to be more credible than that of Carlson. The court entered judgment against Carlson for $68,466.91, plus interest.[3] Carlson appeals the decision of the district court.

II. Standard of Review

This case was tried at law, and our review is for the correction of errors at law. Iowa R. App. P. 6.907. The district court's factual findings are binding on appeal if they are supported by substantial evidence. Iowa R. App. P.

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[3] The court awarded Schulte the amount of damages he requested in his answers to interrogatories. Schulte initially requested $65,551.44 in damages but corrected this sum during the trial to the sum of $69,552.98. However, the court concluded that Schulte was limited to the amount set forth in his answer to pretrial discovery, $68,466.91.

6.904(3)(a). "Evidence is substantial 'when reasonable minds would accept the evidence as adequate to reach the same findings.'" *Pavone v. Kirke*, 801 N.W.2d 477, 487 (Iowa 2011) (citation omitted).

III. Standing

Carlson contends Schulte did not have standing to bring this action because he was not a party to the agreement between himself and Bearance, and he was not an intended third-party beneficiary of the agreement. The written agreement at issue in this case was between Carlson and Bearance, and Schulte was not a party to that agreement. Carlson contends that Schulte was an incidental beneficiary at best. A third-party beneficiary, however, may have standing to bring a breach of contract claim. *See Tredea v. Anesthesia & Analgesia, P.C.*, 584 N.W.2d 276, 281 (Iowa 1998).

On the issue of third-party beneficiaries, Iowa has adopted Restatement (Second) of Contracts section 302, at 439-40 (1981), which provides:

> (1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either
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> (a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or
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> (b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.
>
> (2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

See Midwest Dredging Co. v. McAninch Corp., 424 N.W.2d 216, 224 (Iowa 1988).

"The test to be applied under this section is whether the contract manifests an 'intent to benefit' the third party claiming enforceable rights under the

contract." *Id*. Generally, the intent of the promisee is controlling. *RPC Liquidation v. Iowa Dep't of Transp.*, 717 N.W.2d 317, 320 (Iowa 2006). "In determining such intent, we look to the language of the contract and to the circumstances surrounding it." *Id*. There is no requirement that the parties intended to benefit a third party directly. *Vogan v. Hayes Appraisal Assoc., Inc.*, 588 N.W.2d 420, 423 (Iowa 1999).

We find no error in the district court's conclusion that the purpose of the contract between Carlson and Bearance was to provide services for the financial services group. It is clear that Carlson intended to give Schulte the benefit of his performance under the contract, that is, to provide services for the financial services group, in exchange for the payment of $4000 each month, plus commissions but less the reductions against his draw. Although Carlson was paid $4000 each month by Bearance, Bearance in turn charged Schulte $4000 each month as additional expenses. As observed by the district court,

> [Carlson's] version of the contract and of the arrangement between Bearance, Schulte and Carlson ignores the realty of the arrangement. The very purpose of the arrangement was for Carlson to provide assistance to Schulte, who had reached his limit in handling group retirement and group insurance programs on his own. Bearance was involved only to provide financial security to both Schulte and Carlson, as Schulte was not in a position to provide a $4000 per month draw to Carlson. Carlson was to earn commissions to charge back against that draw, thus relieving Schulte of the obligation of paying the draw back to Bearance.

We agree with the district court's conclusions. Furthermore, Schulte's inability to pay the $4000 a month draw appears substantiated by the fact that although Bearance charged Schulte an additional $4000 a month in expenses to gain reimbursement for the draw to Carlson, Schulte has been unable to fully pay

Bearance the monthly expenses.[4] We conclude Schulte was a third-party beneficiary of the contract between Carlson and Bearance, and therefore, he has standing to bring this breach of contract action.

IV. Breach of Contract

In order to succeed in a claim for breach of contract a party must prove: (1) the existence of a contract, (2) the terms and conditions of the contract, (3) the plaintiff has performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) that plaintiff has suffered damages as a result of defendant's breach of the contract. *Royal Indem. Co. v. Factory Mut. Ins. Co*., 786 N.W.2d 839, 846 (Iowa 2010).

A. Mutual Assent

Carlson contends there was no mutual assent by the parties as to the nature of his compensation. He asserts that he always understood he would be paid $4000 each month as a salary, and that he would receive commissions in addition to that amount. He claims that if Schulte or Bearance believed he needed to repay a portion of the $4000 or his commissions, this was contrary to his understanding and shows there was no meeting of the minds as to his compensation.

"For a contract to be valid, the parties must express mutual assent to the terms of the contract." *Schaer v. Webster County*, 644 N.W.2d 327, 338 (Iowa 2002). A determination of mutual assent is based on objective evidence, not on

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[4] Schulte testified that he owed Bearance somewhere between $150,000 to $200,000 for unpaid monthly expenses.

the hidden intent of the parties. *Id*. "Mutual assent is present when it is clear from the objective evidence that there has been a meeting of the minds." *Royal Indem.*, 786 N.W.2d at 846. "To meet this standard, the contract terms must be sufficiently definite for the court to determine the duty of each party and the conditions of performance." *Id*.

The mode of showing assent to a contract is through the offer and acceptance. *Blackford v. Prairie Meadows Racetrack & Casino, Inc.*, 788 N.W.2d 184, 189 (Iowa 2010). "An offer is a 'manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.'" *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277, 285 (Iowa 1995) (quoting Restatement (Second) of Contracts §24, at 71 (1981)). The acceptance of an offer must strictly conform to the offer in all its conditions, without any deviation or conditions whatsoever. *Rick v. Sprague*, 706 N.W.2d 717, 724 (Iowa 2005).

The letter of August 23, 2007, from Seemuth, on behalf of Bearance, to Carlson setting forth the terms of compensation for Carlson can be considered as an offer. Carlson came to work for the financial services group, which showed his acceptance of the offer. *See Anderson*, 540 N.W.2d at 283 (noting that a party's rendering of performance in response to an offer may be considered acceptance of the offer).

Notwithstanding, Carlson claims there was no meeting of the minds regarding the nature of Carlson's compensation. He claims the evidence reflects that although the term "draw" was used in the agreement, everyone performed as

if it was a salary and he understood the $4000 payment to be a salary. Carlson acknowledges that the term "draw" ordinarily refers to a prepaid commission, the interpretation upon which Schulte relies. Moreover, the premise of the employment arrangement as determined by the district court, "was to provide Carlson with sufficient financial security to start with [the financial services group] and gradually to build up his commissions to the point the draw would no longer be necessary." Schulte explained that he did not want to pressure Carlson for the reimbursements until Carlson had reached that status although he reminded him in December 2007 to not spend the commission checks. Schulte was also given some forebearance on the monies he owed to Bearance for the reimbursement of expenses which included the $4000 monthly sum. We conclude the manner in which the parties proceeded or performed is not indicative of their original intent.

In fact, the agreement was extended by the mutual consent of the parties effective December 1, 2007. We conclude there was an offer of a business relationship under the terms set forth in the letter, an acceptance by Carlson, and a meeting of minds that the $4000 "draw" was intended to be a prepaid commission. We find no error in the district court's conclusion that a binding contract existed.

B. Breach of Agreement

Carlson contends Schulte did not produce sufficient evidence to show that he breached the terms of the written agreement. Carlson asserts the written agreement did not require him to repay any income he received in excess of

what he was to receive under the terms of the agreement. He points to the testimony of Seemuth that there would have needed to be a separate agreement for Carlson to be liable for any excess payments he received in the form of draws or commissions.

A similar factual situation arose in *Condon Auto Sales & Service, Inc. v. Crick*, 604 N.W.2d 587, 591 (Iowa 1999), where under the parties' written contract, a sales manager was to be paid a percentage of quarterly profits, less the amount of a weekly draw. After the sales manager left his job, the employer claimed he had breached his employment contract by failing to reimburse it for overpaid draws. *Condon Auto Sales*, 604 N.W.2d at 592. A jury awarded the employer damages in the amount of the overpaid draws. *Id.* at 593. On appeal, the sales manager argued "the draw was actually a salary and there was no agreement between the parties which required any repayment." *Id*. at 598. The court upheld the verdict against the sales manager for the amount of the overpaid draws, finding there was substantial evidence in the record to support the verdict.[5] *Id*. Thus, the court did not accept the sales manager's argument that he should not be required to repay the amount he was overpaid unless there was a separate agreement that required repayment. *See id*.

We conclude that, like in *Condon*, a separate agreement is not needed in order to require Carlson to pay back any draws or commissions that were paid to

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[5] The supreme court noted, "Although Crick may have been responsible to Condon for the excessive draw, there was no evidence Crick was contractually bound to pay Condon for the excessive draw from his wages." *Condon Auto Sales*, 604 N.W.2d at 597. Based on the Wage Payment Collection Act, Iowa Code chapter 91A (1997), the employer could not withhold defendant's overpaid draws from his wages. *Id.* The present case does not present an attempt to offset overpaid draws against wages.

him in excess of the parties' written agreement. If Carlson was overpaid under the terms of the parties' written agreement, then through a breach of contract action he may be required to pay back the amount he was overpaid.

Carlson also asserts that he was not overpaid any commissions. He points out that the written agreement states, "If you write commission income in excess of the 'draw,' you will be entitled to a portion of that commission income as agreed upon." Carlson contends that because Schulte approved all of the commissions he received, all of the commissions were "agreed upon." He also points out that Schulte knowingly permitted him to keep all of his commissions during the period of his employment.

A somewhat analogous situation occurred in *Audus v. Sabre Communications Corp.*, 554 N.W.2d 868, 870 (Iowa 1996), where the parties entered into an oral agreement to pay plaintiff a yearly salary, plus commissions. From time to time the plaintiff would request a draw against his commissions, but for the most part he had not been paid the commissions he had earned. *Audus*, 554 N.W.2d at 870. After plaintiff quit his job he asked for his outstanding commissions, and the defendant disputed whether he was entitled to commissions, or how commissions would be calculated. *Id.* The Iowa Supreme Court found the jury's verdict in favor of the plaintiff should be affirmed because it was supported by substantial evidence. *Id*. at 872. The court found, "Such evidence is sufficient to support the jury's resolution of the factual question concerning the basis for the commissions." *Id.* The defendant was required to

pay the commissions that were due to the plaintiff under the parties' oral agreement. *Id.*

Similarly, in *Schnabel v. Display Sign Services, Inc.*, 219 N.W.2d 546, 548-49 (Iowa 1974), an employee was paid a draw for several years, but not any commissions, although the parties had entered into an oral agreement that he would be paid a weekly draw plus commissions. During his period of employment, the plaintiff had not demanded payment of the commissions above his weekly draw. *Schnabel*, 219 N.W.2d at 549. The Iowa Supreme Court determined the defendant would be required to pay the amount of commissions that were due under the parties' agreement. *Id.*

In *Audus* and *Schnabel*, despite the parties' actual practice of paying or not paying commissions in addition to a draw or salary, the court determined the parties were bound by the terms of their agreement. *Audus*, 554 N.W.2d at 872; *Schnabel*, 219 N.W.2d at 549. Likewise, in the present case, we find no error in the district court's determination that the fact no one had demanded a repayment of commissions during the time Carlson worked for the financial service group did not mean he was entitled to keep all of those commissions, because this practice was contrary to the terms of the written agreement.

A determination by the fact-finder as to the terms of the parties' agreement should be upheld on appeal if supported by substantial evidence. *See Audus*, 554 N.W.2d at 872. The written agreement specifically states, "All commission income written by you will be used to reduce this 'draw' compensation." Seemuth testified that in general, when a person received a draw, it would be

reduced by commissions the person earned. Schulte testified that in months when Carlson received more than $4000 in commissions, Carlson was required to pay back the $4000 he received. He testified that in months Carlson received less than $4000 in commissions, he was required to pay back the amount of commissions he received. Additionally, Schulte testified to a conversation he had with Carlson in December 2007 about paying back the commissions. We conclude there is substantial evidence in the record to support the district court's conclusions about the terms of the parties' agreement.

C. Damages

Carlson contends Schulte did not establish he was entitled to receive any damages. He points out Schulte was required to pay Bearance $4000 per month under a separate oral agreement Schulte had with Bearance. Carlson claims Schulte's responsibility to pay this $4000 each month was independent of the amount of commissions he earned. He states that even if he had earned no commissions during his time with the financial services group, Schulte would still have been required to pay Bearance $4000 each month.

Seemuth and Schulte testified the unique method of paying Carlson arose because Carlson wanted to receive a draw, but the financial services group did not have the income to pay him the amount he was requesting. Bearance had the funds to pay Carlson, but Carlson was working with the financial services group, not Bearance. As we have noted, Bearance agreed to pay Carlson the draw of $4000 each month with the understanding that Schulte would repay Bearance. The monthly expenses owed to Bearance by Schulte were

accordingly increased by $4000 when Carlson began working for the group. Although the contract does not recite that Carlson must repay the commissions to Schulte, the surrounding circumstances reflect that Schulte is an intended beneficiary who was obligated to pay $4000 in additional monthly expenses to reimburse Bearance for its payments of Carlson's draw, and the commissions earned were requried to reduce the prepaid draw. The failure to reduce the draw, or reimburse the monthly commissions that did not exceed $4000 was the cause of damages to Schulte.[6]

We find no error in the district court's conclusion that Schulte adequately showed damages as a third-party beneficiary to the written agreement between Carlson and Bearance.

We affirm the decision of the district court.

AFFIRMED.

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[6] Carlson also claims the agreement provides that "all commissions" not just Carlson's share of the commissions were to be used to reduce his draw and the total commissions his contract work earned exceeded his total draw. However, this issue was never addressed by the district court and we conclude error was not preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).