STATE OF MICHIGAN

COURT OF APPEALS

FRANK W. LYNCH & CO.,

Plaintiff-Appellant/Cross-Appellee,

v

FLEX TECHNOLOGIES, INC. and FLEX TECHNOLOGIES, LTD.,

Defendants-Appellees/Cross Appellants,

and

ONTARIO, INC.,

Defendant.

UNPUBLISHED
May 14, 1999

No. 203326
Oakland Circuit Court
LC No. 90-393782 CK

Before: Neff, P.J., and Kelly and Hood, JJ.

PER CURIAM.

This matter is before us for the second time.[1] Following a bench trial on remand, the trial court entered a verdict of no cause of action against plaintiff Frank W. Lynch & Co. Plaintiff now appeals as of right. Defendants Flex Technologies, Inc. and Flex Technologies, Ltd. have filed a cross-appeal. We affirm in part, reverse in part, and remand for further proceedings.

I

Plaintiff sought payment of commissions claimed due on alternative theories of breach of express contract and quantum meruit/unjust enrichment.[2] For approximately thirty months, during the initial trial court proceedings, throughout discovery and at a special mediation, defendants maintained that they were not bound by the parties' agreement and that they were unaware of its existence. After the mediation proceeding defendants filed a motion in limine arguing, for the first time, that they were bound by the written contract. Defendants did not move to amend their answer.

In the prior appeal, this Court ruled that the circuit court did not abuse its discretion in permitting defendants to essentially amend their answer to assert that the agreement applied and limited damages to $115,101, but that the circuit court should have conditioned the amendment on a requirement that defendants reimburse plaintiff for the additional expenses under MCR 2.118(A)(3), such as attorney fees, that would have been unnecessary had a request for amendment been filed earlier. This Court remanded with directions to the circuit court to again address the sanctions issue.

Plaintiff also argued in the prior appeal that the circuit court erred in failing to consider the parties' intent in interpreting the agreement. This Court remanded this matter to the circuit court to allow for the presentation of evidence regarding the parties' intent in entering into the agreement.

Plaintiff further argued in the prior appeal that the circuit court erred in failing to apply the original written agreement's provision for a 5% commission on sales of parts to all General Motors divisions. This Court rejected plaintiff's claim, finding that a genuine issue of fact remained as to what percentage rate of commissions should apply.

Next, plaintiff argued that the circuit court erred in refusing to apply MCL 600.2961; MSA 27A.2961 retroactively. A retroactive application of the statute would have allowed plaintiff "to obtain actual damages [in] an amount equal to two times the amount of commissions, if Flex, as principal, [was] found to have intentionally failed to pay FWL&Co the sales representatives' commission when due." *Frank W. Lynch & Co, supra*, p 14. This Court concluded that the statute could not be applied retroactively:

> We conclude that MCL 600.2961; MSA 27A.2961 is punitive in nature, as it allows, in addition to the recovery of actual damages, recovery in the amount of two times the commissions due for a principal's intentional failure to pay commissions when due . . . . Thus, we conclude the circuit court correctly denied plaintiff leave to amend its complaint to seek damages under MCL 600.2961; MSA 27A.2961. [*Frank W. Lynch & Co, supra*, p 14.]

In conclusion, this Court affirmed the circuit court's grant of immediate judgment to plaintiff in the amount of $115,101 and remanded for further proceedings.

II

On remand, a bench trial was conducted. Testimony was taken on the issues as required by the opinion of this Court which remanded the case to the trial court. Those issues included determining the intent of the parties to the agreement and its amendments, and whether commissions were payable at 5% or 2-1/2%.

At the conclusion of the hearing, the trial court found that plaintiff was not entitled to further post-termination commissions and that the commission rate to be applied to post-termination sales was 2-1/2%. It then entered a judgment of no cause of action in favor of defendants.

Subsequently, a hearing was held on the issue of sanctions. Defense counsel explained at the hearing that, after mediation, defendants reevaluated the case and

> decided to concede the applicability of the contract. And that decision, frankly, was one borne of minimizing exposure to liability. The reality is, if the contract applied, then there was a finite exposure to liability, and that's proven to be the case.

Based on this explanation for defendants' change in position, counsel for defendants argued that "sanctions [were] not appropriate."[3]

At the conclusion of the hearing, the trial court, based on the fact that plaintiff did not prevail in this matter, denied plaintiff's request for sanctions. As a fallback position, however, the trial court determined that, if plaintiff had prevailed, it would have been appropriate to award $30,000 in attorney fees and costs in the amount of $4,870.

III

On appeal, plaintiff first claims that the trial court's ruling regarding the term of the contract, which resulted in a verdict of no cause of action in favor of defendants, violated the remand directions given to the trial court by this Court.

The original trial court ruling, in the context of a motion for summary disposition, was that the 1983 amendment rendered the contract ambiguous. The ambiguity was resolved against plaintiff because it drafted the 1983 amendment. Plaintiff's motion for immediate judgment was granted, requiring defendants to pay $115,101; defendants' motion for summary disposition was granted as to all other claims pursuant to MCR 2.116(C)(10).

On appeal, this Court agreed that the trial court erred in failing to consider the parties' intent in interpreting the agreement and remanded this matter to the trial court to allow the presentation of evidence regarding the parties' intent in entering into the agreement. After hearing evidence, the trial court interpreted the contract in the manner advanced by plaintiff, finding that the 1983 amendment was intended to supersede the sixty-day notice provision in the original agreement. However, the trial court also ruled that, because plaintiff essentially misled defendants about the nature of the agreement between plaintiff and MCL, defendants were not bound by the agreement.

It is clear to us after reviewing the testimony presented at the bench trial on remand that, as the trial court found, the intent of plaintiff and MCL in entering into the 1983 amendment was that the 1983 amendment would supersede the sixty-day notice provision contained in paragraph 11 of the original agreement. The testimony of plaintiff's president Peter Smith and Harry Kearney of MCL supports this finding. Therefore, on the specific question on which this court remanded this matter to the trial court -- the parties' intent in entering into the 1983 amendment -- the trial court correctly ruled in favor of plaintiff by finding that the parties intended the 1983 amendment to supersede the sixty-day notice provision.

However, to the extent that the trial court found that plaintiff misled defendants regarding the term of the contract,[4] we believe that this finding was clearly erroneous and must be set aside. See *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). There is nothing in the record to indicate, as defendants claimed during oral argument, that plaintiff "deliberately deceived" defendants regarding the existence of the written contract. In fact, both sides admit that the subject of the written contract was never discussed at the luncheon meeting and defendants never attempted to ascertain from plaintiff whether a written contract existed. This is not a situation where defendants asked about the existence of a written contract and plaintiff refused to answer or gave an evasive answer or where plaintiff deliberately sought to hide the existence of the contract. The subject was just simply never broached. In fact, the real focus of the luncheon meeting was the commission rate that defendants would be willing to pay plaintiff if they bought MCL.

Moreover, at the bench trial, Smith gave the following credible explanation for failing to raise the existence of the written contract at the luncheon meeting:

> Well, I felt that Mr. Burket being a very thorough and true guy in doing business and so on would certainly have investigated the matter with Harry Kearney. And I was still working for Harry Kearney so I was [a] little reluctant to get into things that were between Kearney and myself. And the thought never entered my mind that Mr. Burket didn't know about the contract.

In light of the evidence presented below, the fact that Smith assumed that Don Burket, an experienced businessman, had investigated this matter during the purchase negotiations with MCL and was fully aware of the contract between plaintiff and MCL appears to be a more likely explanation for Smith's silence about the existence of the written contract than that Smith was attempting to deliberately deceive Burket. Burket's failure to ask Smith about the possible existence of a written contract can easily be explained in light of the fact that Kearney told Burket that MCL only had a "handshake deal" with plaintiff. Hence, although it appears that Kearney's conduct was deceptive, our review of the record discloses nothing to indicate deliberate deception on the part of plaintiff with regard to the existence or term of the contract.

Even if plaintiff did attempt to mislead defendants regarding the existence of the contract, defendants admitted the existence and applicability of the contract below. Defendants did so, as defense counsel admitted during oral argument, to minimize their potential liability in this case. Defendants cannot have it both ways. Once defendants admitted the applicability of the contract and once the trial court found, based on the evidence presented below, that the sixty-day notice provision contained in the original agreement was superseded by the 1983 amendment, defendants were stuck with the contract. Essentially, defendants want the economic protection the contract provides but do not want to abide by its terms. Defendants cannot accept and reject the same instrument. Defendant admitted to being bound by the contract. Accordingly, they are bound by all the contract terms, not just those that they choose.

Additionally, assuming plaintiff did essentially mislead defendants regarding the existence of the written contract, defendants' conduct leaves something to be desired. In fact, it could be argued that

defendants "deliberately deceived" plaintiff for thirty months during the pendency of this matter when they denied the existence of the contract after having ample evidence that a contract did exist. We note that defendants' president eventually admitted to knowing of the existence of the contract even before the complaint was filed in this matter. Under these circumstances, defendants have unclean hands, and we thus refuse to grant defendants equitable relief. See *Isbell v Brighton Schools*, 199 Mich App 188, 189; 500 NW2d 7487 (1993) ("One who seeks the aid of equity must come in with clean hands").

In sum, we believe that the trial court erred in ruling that defendants were not bound by the written agreement. This matter must now be remanded to the trial court for a determination of the additional commissions due under the contract.[5]

IV

Next, plaintiff argues that the trial court erred in its determination that the commission rate to be applied to post-termination sales was 2-1/2% instead of 5%. We disagree.

Findings of fact by the trial court may not be set aside unless clearly erroneous. *Webb v Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994). A finding is clearly erroneous when, although there is evidence to support it, this Court is left with a definite and firm conviction that a mistake has been made. *Berry v State Farm Automobile Ins Co*, 219 Mich App 340, 345; 556 NW2d 207 (1996).

The evidence presented at trial indicated that there was an oral agreement to lower the commission rate on sales from 5% (as provided in the original agreement) to 2-1/2%. Beginning in April of 1988, MCL began paying plaintiff commissions at a rate of 2-1/2%. The commission rate was reduced because MCL was having serious financial difficulties. Subsequently, the parties never agreed to an increase in the commission rate and the commission rate remained at 2-1/2% at the time defendants bought MCL. Thereafter, there was never any agreement between plaintiff and defendants to increase the commission rate. In fact, the parties never had any further discussions regarding increasing the commission rate and Smith admitted at trial that he never sought an increase in the commission rate.

In sum, the evidence indicates that plaintiff and MCL orally agreed to reduce the commission rate to 2-1/2%. Although there were some discussions about the reduced rate being temporary in nature, there was no agreement between Smith and Kearney to increase the rate in the future. Even if that were not true, it is clear that when defendants sought to purchase MCL, Smith and Burket orally agreed to a commission rate of 2-1/2% and there was never a subsequent agreement to increase the commission rate. Under these circumstances, the trial court's finding that the applicable post-termination commission rate was 2-1/2% is not clearly erroneous.

V

Next, plaintiff argues that the trial court abused its discretion in failing to award it $30,000 in attorney fees and $4,870 in costs incurred by defendants' admission that the written contract applied in this case, after first denying that the written contract applied for thirty months. We agree.

The decision whether to award attorney fees is within the trial court's discretion, and will be reviewed on appeal for an abuse of discretion. *Phinney v Perlmutter*, 222 Mich App 513, 560; 564 NW2d 532 (1997). An abuse of discretion exists if an unprejudiced person, considering the facts upon which the trial court acted, would say there is no justification or excuse for the ruling. *Auto Club Ins Ass'n v State Farm Ins Co*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

In the prior appeal in this matter, this Court ruled that the trial court did not abuse its discretion in permitting defendants to essentially amend their answer to assert that the agreement applied, but that the trial court should have conditioned the amendment on a requirement that defendants reimburse plaintiff for the additional expenses under MCR 2.118(A)(3), such as attorney fees, that would have been unnecessary had a request for amendment been filed earlier. On remand, plaintiff moved for an award of attorney fees and costs necessitated by the fact that, for thirty months, defendant denied that the written contract applied and then, following mediation, changed their position and admitted the applicability of the written contract.

The trial court ruled that, because plaintiff had not prevailed in this matter, it was not entitled to attorney fees and costs.

MCR 2.118(A)(3) provides as follows:

> On a finding that inexcusable delay in requesting an amendment has caused or will cause the adverse party additional expense that would have been unnecessary had the request for amendment been filed earlier, the court may condition the order allowing amendment on the offending party's reimbursing the adverse party for the additional expense, including reasonable attorney fees. [MCR 2.118(A)(3).]

Thus, subrule (A)(3) authorizes a trial court to "order the amending party to compensate the opposing party for the additional expense caused by the late amendment, including reasonable attorney fees." *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997).

On remand, the trial court did not focus on the question whether inexcusable delay in requesting the amendment caused plaintiff to incur unnecessary expenses. Instead, it denied plaintiff's request for attorney fees and costs solely on the basis that plaintiff had not prevailed on appeal. While "results achieved" is a factor to be considered in determining the "reasonableness" of an attorney fee award, *Schellenberg v Rochester Elks*, 228 Mich App 20, 45; 577 NW2d 163 (1998), it is not a factor in determining whether sanctions are appropriate under MCR 2.118(A)(3). The court rule under which this Court previously directed the trial court to revisit the issue of sanctions deals not with the results obtained, but with whether the delay in requesting amendment was inexcusable and caused the adverse party additional expense that would have been unnecessary had the amendment been requested earlier. MCR 2.118(A)(3).

It is clear from the record that defendants' delay in admitting the applicability of the written contract was inexcusable and that the inexcusable delay resulted in additional expense for plaintiff that would have been unnecessary had the amendment been filed earlier. There is no dispute that defendants did not amend their position to admit liability under the contract until thirty months after the complaint had been filed in this matter. Originally, defendants claimed that they did not know of the existence of the contract. However, the contract was attached to plaintiff's complaint and served on defendants at the outset of these proceedings. Moreover, defendants' president, Glen Burket, admitted at the bench trial that he knew of the existence of the written contract in June of 1990, several weeks before the complaint was even filed on July 25, 1990. Defendants did not decide to concede the applicability of the written contract until March of 1993, some thirty months after the complaint was served on Flex. The reason for this change in position, according to defense counsel, was that defendants reevaluated the case and

> decided to concede the applicability of the contract. And that decision, frankly, was one borne of minimizing exposure to liability. The reality is, if the contract applied, then there was a finite exposure to liability[.]

Obviously, because defendants had the contract in their possession no later than July or August of 1990, there was nothing to prevent defendants from discovering that, if the contract applied, there was a finite exposure to liability. The delay in raising this claim was inexcusable and resulted in additional expense to plaintiff. At the hearing on plaintiff's request for sanctions, counsel for plaintiff testified that his total attorney fees during the thirty-month period before defendants admitted the applicability of the contract were $160,000. Of that amount, $82,630 was "dedicated to the preparation of the enforcement of the written contract." Under these circumstances, an award of $30,000 in attorney fees and $4,870 in costs is not unreasonable.

VI

Lastly, plaintiff requests that we revisit the issue whether the sales representatives' commissions act (SRCA), MCL 600.2961; MSA 27A.2961, should be applied retroactively in light of this Court's recent decision in *Flynn v Flint Coatings, Inc*, 230 Mich App 633; 584 NW2d 627 (1998). In *Flynn*, this Court held that, because the SRCA did not create a new obligation or impose a new duty, "and because it simply alters the remedy available to plaintiffs who have been denied their justly earned commissions, it is properly applied retroactively." *Flynn, supra* at 638. However, because this Court previously ruled that the SRCA should not be applied retroactively to this case, we must determine whether the law of the case doctrine prevents us from now deciding this issue differently. We hold that it does not.

Under the law of the case doctrine, "if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same." *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981). The rule applies without regard to the correctness of the prior determination. *Driver v Hanley (After Remand)*, 226 Mich App 558, 565; 575 NW2d 31 (1997). However, an exception to the law

of the case doctrine applies where there has been an intervening change in the law. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 138; 580 NW2d 475 (1998); *Freeman v DEC Int'l, Inc*, 212 Mich App 34, 38; 536 NW2d 815 (1995). For the exception to apply, the change of law must occur after the initial decision of the appellate court. *Id*.

In this case, this Court issued its original, unpublished opinion in this matter on October 22, 1996. This Court's decision in *Flynn* was issued on July 10, 1998. Hence, the exception to the law of the case doctrine applies in this case because of the intervening change in the law, and we are not prevented from reaching a different conclusion on the issue whether the SRCA can be applied retroactively in this case. Therefore, in accordance with the holding in *Flynn, supra* at 633, we hold that the SRCA shall be applied retroactively to this case. Because this issue was not addressed below, we remand this case to the trial court to allow plaintiff to amend its complaint and direct the trial court to determine whether defendants intentionally failed to pay commissions due at the time of termination.

Affirmed in part, reversed in part and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Janet T. Neff
/s/ Michael J. Kelly
/s/ Harold Hood

[1] The underlying facts are set forth, in pertinent part, in our earlier opinion in *Frank W. Lynch & Co v Flex Technologies, Inc*, unpublished per curiam opinion of the Court of Appeals, issued October 22, 1996 (Docket No. 169747).

[2] Plaintiff's contract was with Mechanical Cables, Ltd (MCL), a company subsequently purchased by defendants.

[3] Defendants filed their answer in September of 1990. The change in position occurred in March of 1993. At the hearing, counsel for plaintiff testified that his total attorney fees during the thirty-month period before defendant admitted the applicability of the contract were $160,000. Of that, $82,630 was "dedicated to the preparation of the enforcement of the written contract" plus costs in the amount of $4,870, for a total of $87,500.

[4] We note that a review of the trial court's opinion in this regard reveals that although the trial court found that Smith was deceitful with regard to the applicable commission rate, there is really no specific finding that plaintiff attempted to deceive defendants with regard to the existence of the contract or the term of the contract. The trial court did specifically find that Kearney deceived defendants regarding the existence of the contract. Obviously, any deception by Kearney should not be attributed to plaintiff.

[5] Under the 1983 amendment, which we have already indicated superseded the sixty-day notice provision contained in the original agreement, the contract term commenced on July 31, 1989 and expired on July 31, 1991. Pursuant to ¶ 12 of the contract, commissions are due on sales through July

1992, one year after the expiration of the contract term. We further note that defendant has already paid post-termination commissions in the amount of $115,101.