

STATE OF MICHIGAN
COURT OF APPEALS

WODIKA DEVINE, INC.,

Plaintiff-Appellant,

v

CALICO LABORATORIES, INC.,

Defendant-Appellee.

UNPUBLISHED
February 14, 2012

No. 301144
Oakland Circuit Court
LC No. 2010-107415-CK

Before: SERVITTO, P.J., and TALBOT and K. F. KELLY, JJ.

PER CURIAM.

Wodika Devine, Inc. (“Wodika”) appeals the trial court’s November 16, 2010, judgment in its favor for \$15,033.41 following the trial court’s October 28, 2010, order partially granting and partially denying Wodika’s motion for entry of default against Calico Laboratories, Inc. (“Calico”). We reverse in part the trial court’s November 16, 2010 judgment and remand for further proceedings consistent with this opinion.

Wodika and Calico entered into a representative agreement on June 23, 2004. Wodika was to sell products manufactured or marketed by Calico in the territory of “[a]ll Independent, Food, Drug and Mass Headquarter Accounts within the states of Michigan.” In return, Calico was to pay Wodika commissions on net sales. Calico failed to pay commissions when due, so Wodika terminated the contract.

On February 1, 2010, Wodika filed a complaint against Calico for breach of contract, violation of MCL 600.2961 (Michigan Sales Representative Commission Act (SRCA)), and unjust enrichment. Calico failed to respond to the complaint so Wodika filed a motion for default judgment on March 12, 2010. Wodika asserted that in addition to actual damages, it was entitled to two times the amount of commissions due but not paid or \$100,000, whichever was less, pursuant to MCL 600.2961(5)(b). Wodika argued that it was entitled to such damages because liability for violation of MCL 600.2961 required that Calico intentionally fail “to pay commissions when due” to Wodika. Because default was entered and default settles the question of liability of “well-pleaded allegations,” whether Calico intentionally failed to pay commissions to Wodika was established.

Wodika also claimed that the only defenses Calico could raise to violation of MCL 600.2961(5)(b) were “inadvertence or oversight,” both of which it was precluded from raising

because of the default. Wodika further contended that it was entitled to reasonable attorney fees, interest, and costs as the prevailing party.

Calico filed a motion to set aside default and a response and brief in opposition to Wodika's motion for entry of default on March 24, 2010, the date set for the hearing on Wodika's motion for default judgment. The court denied Calico's motion to set aside default and granted Wodika's motion for default judgment. The trial court, however, ordered that the parties return for an evidentiary hearing to determine the amount of damages.

The trial court held an evidentiary hearing on June 29, 2010. The court requested that the parties submit briefs regarding their positions on damages, as the court would be reserving its opinion. The parties submitted briefs on July 9, 2010. Calico claimed that Wodika was only entitled to commissions owed on the Meijer sales, as Kmart was outside of Wodika's territory based on the representative agreement. Calico also asserted that Wodika was not entitled to attorney fees and assuming that Wodika was so entitled, 33.33% of the damages recovered as requested by Wodika was not reasonable. Calico further contended that the commissions owed to Wodika should be reduced because commissions were paid to Wodika prior to Calico receiving payment from the vendor and such advance payments demonstrated that it did not intentionally fail to pay commissions.

The trial court issued an opinion and order on October 28, 2010, indicating that Wodika's motion for entry of default judgment was partially granted and partially denied. The court awarded Wodika commissions due on both the Kmart and Meijer accounts, but found that Wodika was not entitled to two times the amount of commissions due pursuant to MCL 600.2961(5)(b). The court explained that Calico did not intentionally fail to pay commissions when due, as it "made payments to [Wodika] on some accounts, advanced payment to [Wodika] on some accounts, and failed to pay [Wodika] on other accounts." The court also found that Wodika was entitled to attorney fees, interest and costs as the prevailing party.

The court entered default judgment of \$15,033.41 in favor of Wodika on November 16, 2010, which included \$11,323.41 for Calico's failure to pay commissions when due and \$3,710 in attorney fees, plus interest and costs.

On appeal, Wodika argues that it is entitled to two times the amount of the commissions due from Calico because entry of default demonstrated that Calico intentionally failed to pay commissions when due thereby violating MCL 600.2961(5)(b). We agree that Wodika is entitled to two times the amount of the commissions due as damages, but not by virtue of the default.

This Court reviews questions of law de novo.¹ While an award of damages, as with other findings of fact, is reviewed for clear error.² "A finding of fact is clearly erroneous when,

¹ *Traxler v Ford Motor Co*, 227 Mich App 276, 280; 576 NW2d 398 (1998).

² *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 177; 530 NW2d 772 (1995).

although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been made.”³

It is well-settled that “default settles the question of liability as to well-pleaded allegations and precludes the defaulting party from litigating that issue.”⁴ Thus, “where a trial court has entered a default judgment against a defendant, the defendant’s liability is admitted and the defendant is estopped from litigating issues of liability.”⁵ A default judgment, however, “is not an admission regarding damages.”⁶ As such, a defaulted party “has a right to participate where further proceedings are necessary to determine the amount of damages.”⁷

Wodika’s assertion that it is entitled to damages of two times the amount of the commissions due pursuant to MCL 600.2961(5)(b) by virtue of default must fail, as default does not determine damages⁸ and MCL 600.2961(5)(b) is a punitive damage provision of the SRCA.⁹

In determining the damages that Wodika is entitled to, the trial court must consider MCL 600.2961, which provides that:

(5) A principal who fails to comply with this section is liable to the sales representative for both of the following:

(a) Actual damages caused by the failure to pay the commissions when due.

(b) If the principal is found to have intentionally failed to pay the commission when due, an amount equal to 2 times the amount of commissions due but not paid as required by this section or \$100,000.00, whichever is less.

(6) If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs.

³ *Id.* at 171.

⁴ *Kalamazoo Oil Co v Boerman*, 242 Mich App 75, 78-79; 618 NW2d 66 (2000), citing *Wood v Detroit Auto Inter-Ins Exch*, 413 Mich 573, 578; 321 NW2d 653 (1982).

⁵ *Kalamazoo Oil Co*, 242 Mich App at 79.

⁶ *Id.*

⁷ *Midwest Mental Health Clinic, PC v Blue Cross and Blue Shield of Mich*, 119 Mich App 671, 675; 326 NW2d 599 (1982).

⁸ *Kalamazoo Oil Co*, 242 Mich App at 79.

⁹ *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich 109, 118; 659 NW2d 597 (2003).

In defining the word “intentionally” as used in the statute, our Supreme Court held that:

[U]nder the clear language of the statute, if a principal deliberately fails to pay a commission when due, it is liable for a double-damages penalty . . . even if the principal did not believe, reasonably or otherwise, that the commission was owed. There is no textual indication that a principal’s good faith belief is relevant in making the determination that double damages are payable under the statute.¹⁰

Bad faith is not required before a plaintiff can recover double damages nor is a defense of good faith permitted.¹¹ As such, “the plain language of the double-damages penalty provision of the statute requires only that the principal purposefully fail to pay a commission when the commission becomes due.”¹² “[T]he only cognizable defense to a double-damages claim is if the failure to pay the commission were based on inadvertence or oversight.”¹³

Here, Calico’s failure to pay commissions when due was established by the entry of default.¹⁴ In calculating Wodika’s damages pursuant to MCL 600.2961, it was necessary for the trial court to determine whether Calico’s failure to pay the commissions was intentional.¹⁵ The defenses that Calico was entitled to raise to intentional failure to pay were inadvertence or oversight.¹⁶ Calico asserted that it failed to pay commissions when due because Wodika was not entitled to commissions for its Kmart sales as Kmart moved outside of Wodika’s territory. Calico also argued that because it paid commissions of \$738.69 before receiving payment from the vendor, its failure to pay was not intentional and any damages awarded should be reduced by that amount. While the trial court’s findings suggest that Calico failed to pay due to oversight, Calico did not assert that their failure to pay was due to either oversight or inadvertence. As such, we find that the trial court clearly erred when it found that Calico “did not intentionally fail to pay commission when due” and we remand the matter to the trial court for an award of damages of two times the amount of commissions due,¹⁷ which the trial court found was \$11,323,41.

Wodika also contends that because it is entitled to damages of two times the amount of commissions due, the trial court’s award of reasonable attorney fees should consider such additional damages and should total 33.33% of the total damages awarded. We agree that Wodika may be entitled to additional attorney fees pursuant to MCL 600.2961(6), however, the

¹⁰ *Id.* at 114.

¹¹ *Id.* at 114-117.

¹² *Id.* at 119.

¹³ *Id.* at 118.

¹⁴ *Kalamazoo Oil Co*, 242 Mich App at 78-79.

¹⁵ MCL 600.2961(5)(b).

¹⁶ *In re Certified Question from U.S. Court of Appeals for Sixth Circuit*, 468 Mich at 118.

¹⁷ MCL 600.2961(5)(b).

amount of attorney fees is to be determined by the trial court and is not mandated to be 33.33% of the total damages awarded. A trial court's award of attorney fees is reviewed for an abuse of discretion.¹⁸

In the trial court, Wodika requested attorney fees of 33.33% of all monies collected based on its attorney-client fee contract and history of representing Wodika. Wodika asserts that it is entitled to additional attorney fees of \$7,613.41, which would provide Wodika with total attorney fees of 33.33% of the total damages awarded.¹⁹ While Wodika is entitled to reasonable attorney fees based on MCL 600.2961(6), it is not necessarily entitled to 33.33% of the total damages awarded. In determining the reasonableness of an attorney fee, the trial court should consider “[1] the professional standing and experience of the attorney; [2] the skill, time and labor involved; [3] the amount in question and the results achieved; [4] the difficulty of the case; [5] the expenses incurred; [6] and the nature and length of the professional relationship with the client.”²⁰ A contingency fee agreement can be used to support a reasonable fee, but it is not determinative.²¹ Thus, we reverse the trial court's award of attorney fees and remand the case to the trial court for a hearing to determine a reasonable attorney fee based on all of the damages awarded.

Reverse in part the trial court's November 16, 2010, judgment and remand to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Deborah A. Servitto
/s/ Michael J. Talbot
/s/ Kirsten Frank Kelly

¹⁸ *Farmers Ins Exch v Kurzmann*, 257 Mich App 412, 422; 668 NW2d 199 (2003).

¹⁹ \$7,613.41 is 33.33% of the additional damages requested on appeal, plus the difference between the \$3,710 that the trial court awarded Wodika for attorney fees and 33.33% of the trial court's award for actual damages.

²⁰ *Zdrojewski v Murphy*, 254 Mich App 50, 72; 657 NW2d 721 (2002), citing *Temple v Kelel Distrib Co, Inc*, 183 Mich App 326, 333; 454 NW2d 610 (1990).

²¹ *Univ Rehab Alliance, Inc v Farm Bureau Gen Ins Co of Mich*, 279 Mich App 691, 699; 760 NW2d 574 (2008).