

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED
EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24**

**IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE**

FREDERICK F. TAYLOR,

)

)

Plaintiff/Appellant,) 1 CA-CV 09-0721

)

v.

) DEPARTMENT A

)

PHILLIP BROWN and AMBER BROWN,
husband and wife; THE QUANTUM
GROUP, INC., an Arizona
corporation; and QUANTUM GROUP,
LLC, a Kansas limited liability
company,

) **MEMORANDUM DECISION**

) Not for Publication

) (Rule 28, Arizona

) Rules of Civil

) Appellate Procedure)

)

Defendants/Appellees.)

)



DIVISION ONE
FILED: 02/17/11
RUTH WILLINGHAM,
ACTING CLERK
BY: DLL

Appeal from the Superior Court of Maricopa County

Cause No. CV2007-005438

The Honorable L. Grant, Judge

AFFIRMED

Law Office of Frederick Taylor, PC
By Frederick Taylor
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Phoenix

Lewis and Roca LLP
By Kimberly A. Demarchi
Attorney for Defendants/Appellees

Phoenix

T H O M P S O N, Judge

¶1 Frederick Taylor (plaintiff) appeals the trial court's judgment on his claims against Phillip and Amber Brown, the Quantum

Group, Inc., and Quantum Group, LLC, (collectively, Quantum) for unpaid commissions and personal loans. Finding no error, we affirm.

BACKGROUND

¶2 Plaintiff was an independent contractor doing sales prospecting for Quantum from approximately September 2002 to February 2007. Plaintiff was to be paid on commission. Neither the specific commission structure nor the terms under which commissions were to be paid were agreed upon in writing at the outset of the relationship. The commission agreement between the parties was oral and the actual percentage of commissions available to be paid to plaintiff varied over time. The parties disagree on when a commission was "earned." Plaintiff asserts that at some point after being hired, Mr. Brown promised "him ten percent of the commission received by the business on any transaction for which Plaintiff had not generated the business lead, in addition to the twenty percent commission on leads he generated." The trial court found plaintiff was paid between \$200-300,000 from 2005-2007. From time to time, plaintiff also made personal loans ranging from \$150 to \$2500 to the Browns; these loans are evidenced by promissory notes. The Browns testified that they had repaid the disputed loans from 2003 and 2004 but they no longer had supporting documentation.

¶3 Plaintiff brought suit alleging numerous unpaid

commissions¹ and unpaid personal loans equaling \$9,964 in principal and interest. The matter was tried to the bench. The trial court found for Quantum and declined to award attorneys' fees. Plaintiff's motion for new trial was denied. Plaintiff timely appealed.

ISSUES

¶4 Plaintiff asserts the trial court erred in the following ways:

1. In applying the burden of proof in his claims for compensation under the commission contract;
2. In failing to treat Quantum's admission as an allegation regarding commissions from the Krutchen deals as an undisputed fact;
3. In determining the burden of proof for the promissory notes;
4. In denying a motion for new trial based on discovery violations.

DISCUSSION

A. Commissions

¶5 In a contract case, the burden of proof is on the plaintiff to plead and prove a breach. *Yeazell v. Copins*, 98 Ariz. 109, 116, 402 P.2d 541, 546 (1965). The question of whether a

¹ Plaintiff seeks, for example, \$71,678.79 in commissions on deals with Mr. Michaels. Plaintiff made two phone calls and sent one email to Michaels in approximately April 2005. Michaels' first sale involving Quantum was in June of 2007, after plaintiff had quit. Plaintiff did not secure a signed engagement letter directly from Michaels and admits that Mr. Brown was involved with this prospect. Mr. Brown's records show that he engaged Mr. Michaels. Mrs. Brown further testified that no salesperson was entitled to a commission for a sale after he left Quantum.

contract has been breached is a question for the finder of fact. See *Matson v. Bradbury*, 40 Ariz. 140, 144, 10 P.2d 376, 378 (1932). We will sustain the trial court's factual findings made after a bench trial unless the findings "are clearly erroneous or unsupported by any credible evidence." *Federoff v. Pioneer Title & Trust Co. of Ariz.*, 166 Ariz. 383, 388, 803 P.2d 104, 109 (1990). We review the trial court's application of the law de novo. *City of Phoenix v. Mangum*, 185 Ariz. 31, 34, 912 P.2d 35, 38 (App. 1996).

¶6 After hearing the evidence, the trial court found that there was a contract but plaintiff was not owed any additional commissions. The evidence supports that conclusion. Plaintiff himself testified that although he signed up a handful of individuals via engagement letters, to the best of his knowledge none of those clients ever closed deals resulting in Quantum receiving a commission. Both Mr. and Mrs. Brown testified that plaintiff had a couple of signed engagements with no earned commissions. The trial court concluded that plaintiff was paid commissions on several clients with whom he had no involvement. Testimony was taken and the trial court concluded:

It is well settled that [plaintiff] has the burden of persuasion. The Court further finds that [plaintiff] has failed to sustain his burden of proof. It is clear to the Court, that the contract, as such, required that [plaintiff] do more than merely contact prospective clients. None of [plaintiff's] prospective clients signed a contract with The Quantum Group. Mr. Taylor's claims for current commissions and future commissions

under the contract after his termination of his relationship with The Quantum Group are without merit.

Id. The evidence supports the trial court's conclusions.

¶7 Citing Rule 8, Arizona Rule of Civil Procedure, plaintiff next asserts that the trial court erred in failing to accept what he deems to be an admission to a claim in the complaint. Specifically, two sections of the complaint pertain to a Mr. Krutchen. In the "common allegations" section, plaintiff asserted:

In July, 2005, Plaintiff generated a lead from a tower owner named Jed Krutchen. Defendant Philip Brown decided that he wanted to fly to Texas to meet personally with Mr. Krutchen, however he claimed that he did not have the funds to pay for the flight, and asked Plaintiff to purchase the ticket at a cost of \$914. In exchange, Defendant Philip Brown offered to boost Plaintiff's commission on any transactions involving Mr. Krutchen's communication towers to 25%, which Plaintiff accepted, paying for the ticket.

Plaintiff also claimed Quantum received commissions from Krutchen sales on numerous dates ranging from March 2006 to April 2007. Quantum admitted, without reservation, the common allegation in their answer. In the fraud count, Quantum admitted that plaintiff was promised commission payments for sales occurring during his time with Quantum. Plaintiff's trial testimony shows that on or around June 2005 he received a 25 percent commission on a sale or sales related to Krutchen. Mr. Brown testified that plaintiff was due 25 percent on the first deal but not any subsequent deals. Quantum asserts that the admission in their answer was "very

limited" and applied only to the Krutchens deal at hand. Quantum asserts that it never made a blanket admission that plaintiff was entitled to 25 percent on every Krutchens deal and the Browns actively disputed that allegation at trial. We further note that the answer was not verified by the Browns and, thus, does not present conflicting sworn testimony.

¶18 Because plaintiff's use of the term "any" in paragraph 10 of the complaint was ambiguous, the trial court did not err in taking evidence on the Krutchens matter. The trial court was entitled to flesh out the terms and surrounding circumstances to determine the scope of Quantum's "admission." See *Miles v. Franz Lumber Co.*, 14 Ariz. 455, 455, 130 P. 1112, 1113 (1913) (in a contract matter, finding no error in allowing judge to determine weight of credibility when an answer admission conflicts with later testimony or evidence); *Dons Club v. Anderson*, 83 Ariz. 94, 98, 317 P.2d 534, 536 (1957) (holding where portions of verified answer contradicted complaint allegations it raised issues of fact sufficient to withstand summary judgment).

B. Personal Loans

¶19 Plaintiff contends that the trial court erred in its application of the burden of proof because he provided copies of three promissory notes to evidence personal loans he made to the Browns and they failed to provide contrary documentary evidence. This is a sufficiency of the evidence matter. We view the facts in

a light most favorable to upholding the judgment and make all reasonable inferences from the evidence in favor of Quantum and the Browns. See *McFarlin v. Hall*, 127 Ariz. 220, 224, 619 P.2d 729, 733 (1980). The trial court found that the evidence presented at trial in the form of testimony by the Browns and an email from March 2007 showed no debt owed on the personal loans. We will not re-weigh the evidence; the credibility of witnesses and weight of the evidence are within the province of the finder of fact. *Estate of Reinen v. N. Ariz. Orthopedics, Ltd.*, 198 Ariz. 283, 287, ¶ 12, 9 P.3d 314, 318 (2000). The trial court is affirmed.

C. Discovery Violations

¶10 Likewise, we find no error in the trial court's denial of a new trial for discovery violations. The trial court allowed certain testimony by the Browns which plaintiff claims was undisclosed. A discovery ruling will not be overturned absent an abuse of discretion. *Miller v. Superior Court*, 154 Ariz. 363, 365, 742 P.2d 864, 866 (App. 1987). All exhibits were exchanged prior to trial. We have reviewed the exhibits and the related testimony. The record does not support an abuse of discretion and there was no prejudice.

ATTORNEYS' FEES ON APPEAL

¶11 Quantum requests attorneys' fees on appeal pursuant to Arizona Revised Statutes (A.R.S.) § 12-341.01(A) (2010). We award fees and costs to Quantum in an amount to be determined after

compliance with Rule 21, Arizona Rule of Civil Appellate Procedure.

CONCLUSION

¶12 For the foregoing reasons, the trial court is affirmed.

JON W. THOMPSON, Judge

CONCURRING:

DONN KESSLER, Presiding Judge

DANIEL A. BARKER, Judge