NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2013 CA 0534

SHANTRY MCKENZIE D.B.A. ARMSTRONG TRUCKING

VERSUS

CHEETAH TRANSPORTATION SYSTEMS, L.P.

Judgment Rendered: DEC 18 2013

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APPEALED FROM THE EIGHTEENTH JUDICIAL DISTRICT COURT
IN AND FOR THE PARISH OF WEST BATON ROUGE
STATE OF LOUISIANA
DOCKET NUMBER 36482

HONORABLE ALVIN J. BATISTE, JR., JUDGE

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Roy H. Maughan, Jr.
Namisha D. Patel
Joshua D. Roy
Baton Rouge, Louisiana

Attorneys for Plaintiff/Appellant
Mildred Armstrong as Provisional Administratrix for the Succession of Shantray McKenzie

John B. Davis
Andrew C. Kolb
Dan P. Guillory
Baton Rouge, Louisiana
And
Admitted Pro Hac Vice
Ronald L. Bair
Houston, Texas

Attorneys for Defendant/Appellee
Cheetah Transportation Systems, Inc.

BEFORE: PETTIGREW, McDONALD, AND McCLENDON, JJ.

McClendon, J. concurs with the result reached by the majority

McDONALD, J.

Shantray McKenzie,[1] d/b/a Armstrong Trucking, filed a petition for damages on August 6, 2007, naming as defendant Cheetah Transportation Systems, Inc. (hereafter CTS). Mr. McKenzie asserted that he entered into a contract with CTS on July 21, 2003, providing that Mr. McKenzie would render transportation delivery services for CTS as an independent contractor for a period of one year, with an automatic one-year renewal unless written notice to the contrary was given. Mr. McKenzie maintained that CTS agreed to pay him 80 percent of the amount that CTS charged to the customers for each delivery made by Mr. McKenzie. Mr. McKenzie made claims for damages for breach of contract, unfair trade practices, underpayments under the contract, and sales commissions due to Mr. McKenzie for revenues on accounts he acquired for CTS with BASF, BP/Castrol, and Exxon.

On May 9, 2011, Mr. McKenzie filed a motion for summary judgment against CTS on his claims for damages. On June 20, 2011, CTS filed a cross motion for summary judgment seeking dismissal of all of Mr. McKenzie's claims. The motions for summary judgment were heard, and the trial court denied the motions on August 24, 2011. Thereafter, the matter went to trial on the merits.[2]

After the trial, the trial court rendered judgment in favor of CTS in part, denying Mr. McKenzie's claims for breach of contract and unlawful termination, for underpayment under the contract by CTS, for sales commissions for the BASF and BP/Castrol accounts, and unfair trade practices under Louisiana law. Further, the trial court ruled in favor of Mr. McKenzie and against CTS in part, awarding Mr. McKenzie a 1 ½ percent commission on the Exxon account. Mr. McKenzie filed a devolutive appeal from the judgment, asserting that the trial court erred in

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[1] Mr. McKenzie's first name is erroneously spelled "Shantry" in some portions of the record.
[2] Mr. McKenzie died on May 14, 2011, and his mother, Mildred Armstrong, provisional administratrix of Mr. McKenzie's succession, was substituted as the party plaintiff.

failing to award him damages for breach of contract, unfair trade practices, unlawful termination, underpayments under the contract, and unpaid sales commissions.

In its reasons for judgment, the trial court found:

> Plaintiff has the burden of proving his case by a preponderance of the evidence. Plaintiff failed to prove that there was a breach of contract. To the contrary, the evidence and testimony submitted at trial showed that there was a mutual termination of the contract between the parties. Plaintiff began using some of his trucks to carry loads for a competitor of defendant, Axion, because he was dissatisfied with the contract rate of seventy-five (75%) percent that he was being paid on most of his trucks except for the initial trucks that he signed on with defendant at eighty(80%) percent. Despite being told numerous times that the contract rate on the other trucks would only be 75%, plaintiff continued to complain but continued to carry loads for the defendant at that rate. Near the end of the contractual relationship, plaintiff began to refuse to haul loads for defendant in what was considered an untimely manner and subsequently began pulling some of his trucks for a competitor of defendant, Axion. Although he was told by defendant that he could only work for one or the other companies the plaintiff continued to haul loads for Axion. Testimony at trial indicated that at least one of plaintiff's trucks had two placards on it, one for defendant and one for Axion, which is contrary to federal law, and that an invoice for payment received by plaintiff in the name of the defendant was scratched out and replaced with Axion. The contract between these parties did not contain a no compete clause but it did contain [a] "loyalty" clause which defendant claims gave it grounds to terminate the contract without written notice. While the information that the defendant had before it at the time it decided to terminate the contract with plaintiff may not have been sufficient enough evidence in a court of law to do the same, the circumstances cited above indicate that both parties wanted to terminate their contractual relationship. Therefore, the plaintiff cannot now claim a breach of contract when that is in fact what he sought to do.
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> Assuming arguendo that the defendant did breach the contract, the plaintiff failed to prove any damages. Testimony at trial indicated that plaintiff owned nearly a dozen trucks which were leased to the defendant. However, a separate contract was done on each of these trucks in the name of the individuals who were driving the trucks. Some of the contracts contained the name of Shantray McKenzie along with the name of the driver of the truck. Although the suit is entitled "...d/b/a Armstrong Trucking" none of the contracts contained this nomenclature. The testimony at trial also indicated that the plaintiff paid the other drivers a salary or wage but he also was paid a salary or wage. Furthermore the plaintiff's mother filed the tax return for Armstrong Trucking as part of her personal tax returns during the relevant time period. Therefore, plaintiff could not prove

his claim as to lost profits and could not use the tax returns of his mother, a nonparty to this suit, to do the same.

As alluded to above, the evidence and documents submitted at trial show that there were separate contracts entered into for each truck, rather than addendums to a master lease or even a master lease. These separate contracts provided for varying percentages of 75% to 80% of the amount charged by Cheetah to its customers. It is undisputed that percentage payments for each of the trucks were made in accordance with the specific percentages of each contract. Further, the fact that for years the plaintiff accepted separate payments for each truck in accordance with the percentages specified by the individual driver agreements without objection is persuasive evidence of the fact that these payments correctly reflected the contract amounts. Thus, Plaintiff['s] prayer for relief on the alleged underpayment assigned, is denied.

Plaintiff failed to prove his claim for a commission for bringing on the BASF and Castrol accounts as new business for the defendant. Louisiana Civil Code article 1846 requires the testimony of at least one witness and other corroborating circumstances to prove a contract where the value is greater than $500.00. The evidence submitted at trial indicates that there was no agreement to pay a bonus to plaintiff for these two customers.

However, this Court does find that plaintiff proved that there was an agreement to pay him a commission of 1 ½% for the Exxon account. The testimony of Art Burst, the then terminal manager of the Louisiana facility of the defendant, and Carla [Elder], who worked at the Louisiana terminal and handled the payments to plaintiff, along with the accounting ledger of the defendant showing payments of 1 ½ % to Carla Elder on the Exxon account, proves the agreement to pay plaintiff a commission of 1 ½ percent commission on the Exxon account. The evidence submitted at trial indicates that the plaintiff told Art Burst immediately following Hurricane Katrina that Exxon was looking for a company to move its products. As a result, and at plaintiff's urging, Art Burst had Carla Elder to immediately begin submitting the paperwork and making the contacts to secure the contract with Exxon which was subsequently obtained. As a result, Art Burst agreed to split the commission of 3% equally between Carla [Elder] and the plaintiff. Carla [Elder] received her commission payments but the plaintiff did not. As the manager of the Louisiana operations of the defendant, Art Burst had the apparent authority to bind the defendant for the payment of the commission. There was no formal procedure in place to request the commission or any written criteria for the award of a commission. According to the evidence submitted at trial, Art Burst just had to make the request to the defendant's Texas headquarters for processing to have the commission paid which he did. However, while Carla [Elder] was paid her portion of the commission the plaintiff was not. Accordingly, this Court awards the plaintiff the commission on the Exxon account to be paid by defendant in an amount equal to the total

> commission previously paid to Carla [Elder] on this account. This amount shall include legal interest from the date of judicial demand.
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> This court further finds that plaintiff's claim for damages for unfair trade practices on the part of defendant prior to and following plaintiff['s] termination is without merit.

The parties had a two-day trial on the merits, during which time fourteen witnesses testified and numerous exhibits were admitted into evidence. After rendering judgment, the trial court issued well-reasoned and extensive reasons for its judgment.

For the reversal of a factfinder's determinations, the appellate court must find from the record that a reasonable factual basis does not exist for the finding of the trial court, and the appellate court must further determine that the record establishes that the finding is clearly wrong (manifestly erroneous). The issue to be resolved by a reviewing court is not whether the trier of fact was right or wrong, but whether the factfinder's conclusion was a reasonable one. Even though an appellate court may feel its own evaluations and inferences are more reasonable than the factfinder's, reasonable evaluations of credibility and reasonable inferences of fact should not be disturbed upon review where conflict exists in the testimony. The reason for this well-settled principle of review is based not only upon the trial court's better capacity to evaluate live witnesses (as compared with the appellate court's access only to a cold record), but also upon the proper allocation of trial and appellate functions between the respective courts. Thus, where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong. **Stobart v. State through Dept. of Transp. and Development**, 617 So.2d 880, 882-883 (La. 1993).

After a thorough review of the record, we find no manifest or legal error by the trial court. For the foregoing reasons, the trial court judgment is affirmed. This memorandum opinion is issued in compliance with the Uniform Rules-Courts

of Appeal, Rule 2-16.1(B). Costs are assessed against the Mildred Armstrong, as Provisional Adminstratrix for the Succession of Shantray McKenzie.

AFFIRMED.