STATE OF MICHIGAN

COURT OF APPEALS

DUANE H. BARLOW,

Plaintiff-Appellee/Cross-Appellant,

v

M.J. WATERMAN & ASSOCIATES, INC., and MICHAEL J. WATERMAN,

Defendants-Appellants/Cross-Appellees.

UNPUBLISHED
May 30, 2000

No. 206929
Oakland Circuit Court
LC No. 96-522879-CK

Before: Doctoroff, P.J., and Holbrook, Jr., and Kelly, JJ.

PER CURIAM.

Following a jury trial, defendant M.J. Waterman & Associates (hereinafter defendant corporation) was found liable for $136,345.31 in damages on plaintiff's breach of contract claim. Defendants appeal as of right, arguing that the trial court erred in denying their motions for summary disposition, directed verdict, and judgment notwithstanding the verdict (JNOV). Defendant Waterman (hereinafter Waterman) also appeals from the trial court's denial of his motion for actual costs pursuant to MCR 2.405. Plaintiff cross appeals from the trial court's order granting his motion for costs pursuant to MCR 2.403(O).

I

In November 1985, Waterman, then sole shareholder and president of defendant corporation, hired plaintiff to work as a sales representative for defendant corporation. At the time, defendant corporation served as sales agent for companies supplying automotive parts to various automobile manufacturers. According to the terms of his employment contract, plaintiff was to represent the interests of defendant corporation's primary customer, Bentler Industries, at Ford Truck, General Motors Truck and Bus, and Buick Oldsmobile Cadillac. The contract provided that in addition to an annual salary of $70,000 and other enumerated benefits, plaintiff would be paid a commission "for all new sales generated" at a rate of "¼ of 1% or ¼ of .75% depending on Bentler Industries level of sales and commission paid" to defendant corporation.

In October 1988, in response to a change in the contractual arrangements between defendant corporation and Bentler, defendant corporation instituted a "step-down" method of commission payment for its sales representatives. According to the new commission payment plan, plaintiff would receive one hundred percent of the first $1,000 of commissions earned, eighty percent of the second $1,000, and sixty percent of all remaining commissions. Plaintiff contended, however, that his employment contract was further modified to include a provision whereby defendant corporation was to accrue all unpaid commissions according to the terms of the 1985 contract. These unpaid commissions were to be paid to plaintiff at an unspecified later date. Defendants denied that any such modification was made.

Plaintiff's amended complaint raised five separate counts against defendants. Counts I, II, and IV raised claims against defendant corporation of breach of contract, unjust enrichment, and fraudulent misrepresentation, respectively. Count II raised a claim of promissory estoppel against both defendants. Count V raised a claim of fraudulent misrepresentation against Waterman. The case was submitted to mediation, with the panel recommending a $55,000 award in favor of plaintiff. Plaintiff accepted the mediation evaluation, but defendant rejected it. Subsequently, the jury awarded plaintiff $136,345.31 on count I of the amended complaint, and nothing on any of the other four counts.[1]

II

Defendants first argue that with respect to plaintiff's breach of contract claim, the trial court erred in failing to grant their motions for directed verdict or JNOV. Specifically, defendants assert that because plaintiff failed to present objective evidence to support his claim that unpaid commissions were to be accrued and paid at a later date, reasonable minds could not differ on the question of the terms of the contract modification. We disagree. In reviewing a trial court's decision regarding either of these motions, we view the evidence presented up to the making of the motion, and all legitimate inferences that may be drawn therefrom, in a light most favorable to the nonmoving party. *Anton v State Farm Mutual Ins Co*, ___ Mich App ___; ___ NW2d ___ (Docket No. 203260; Issued 12/03/99); *Zander v Ogihara Corp*, 213 Mich App 438, 441; 540 NW2d 702 (1995). A court should only grant a motion for a directed verdict or JNOV when no factual question exists on which reasonable minds could differ. *Zander, supra* at 441.

Plaintiff testified that Waterman told him that institution of the step-down rate was necessary due to the financial insecurity of the company, and that he would "make things right" with regard to the lost commissions when times were better. Plaintiff further testified that it was understood between the parties, that the promise to "make things right" meant that plaintiff's lost commissions would be accrued and paid when the funds were available. Plaintiff also presented copies of defendant corporation's commission reports for the years 1988 through 1996. These reports contained two columns, one indicating the commissions due sales representatives under the pre-1988 arrangements, and one indicating commissions to be paid under the step-down formula. Waterman admitted only that he may have said "I'll try to make things better for you." Deferring to the trier of facts superior ability to assess "the credibility of trial testimony," *Zeeland Farm Services, Inc v JBL Enterprises, Inc*, 219 Mich App 190, 195; 555 NW2d 733 (1996), and viewing the evidence presented at the close of plaintiff's case-in-chief in the appropriate favorable light, we conclude that reasonable minds could differ on the

terms of the oral modification. Accordingly, the trial court appropriately denied defendants' motion for a directed verdict.

We further believe that the trial court's denial of defendants' motion JNOV was also proper. During defendants' case-in-chief, Waterman denied that he had ever promised to accrue and repay plaintiff's lost commissions. He also testified that he tried to make things better for plaintiff by increasing plaintiff's base salary and by paying him additional commissions not provided for in the 1985 contract. Defendants also presented the testimony of Dale Gayeski, another of defendant's sales representatives at the time the step down was initiated. Gayeski testified that he never received any indication that the reduction was anything but permanent. Nancy Kronk, defendant's office manager from 1985 through 1995, testified that there was no way plaintiff and Waterman could have made an agreement on accrued commissions.

Viewing the evidence in a light most favorable to plaintiff, and again recognizing the jury's superior opportunity to determine witness credibility, we believe that reasonable minds could reach different conclusions regarding the terms of the contract modification. Therefore, we conclude the trial court's denial of defendants' motion JNOV does not evidence a clear abuse of discretion requiring reversal. *Anton, supra* at ___.

We also reject defendants' assertion that the trial court erred in failing to grant their motion for JNOV on the basis that plaintiff failed to present sufficient evidence regarding his damages. Plaintiff presented evidence supporting his claim that he was entitled to $233,405 plus interest, while defendants argued that plaintiff had suffered no damages at all or, alternatively, that his damages were, at most, $95,770.11. Because reasonable minds could have differed on the issue of damages, we see no error requiring reversal.

III

Next, defendants contend that the trial court erred in denying their motion for summary disposition pursuant to MCR 2.116(C)(7) on the basis that plaintiff's breach of contract claim was barred by the statute of limitations. Again, we disagree. "We review a trial court's decision to grant summary disposition pursuant to MCR 2.116(C)(7) by considering the affidavits, pleadings, and other documentary evidence and construing them in the light most favorable to the nonmoving party." *Barrow v Pritchard*, 235 Mich App 478, 480; 597 NW2d 853 (1999). "[T]he plaintiff's well-pleaded allegations are accepted as true and are construed in the plaintiff's favor, 'unless specifically contradicted by the affidavits or other appropriate documentation submitted by the movant.'" *Baks v Moroun*, 227 Mich App 472, 477 n 2; 576 NW2d 413 (1998), quoting *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

> If no facts are in dispute and reasonable minds could not differ concerning the legal effect of those facts, whether a plaintiff's claim is barred by the statute of limitations is a question for the court as a matter of law. However, if a material factual dispute exists in such a manner that factual development could provide a basis for recovery, summary disposition is inappropriate. [*Jackson Co Hog Producers v Consumers Power Co*, 234 Mich App 72, 77; 592 NW2d 112 (1999) (citation omitted).]

The parties agree that plaintiff's breach of contract claim is subject to the six-year period of limitation. MCL 600.5807(8); MSA 27A.5807(8). However, they disagree on when the six-year period would have begun running. Plaintiff initiated this cause of action on May 14, 1996. Defendants maintain that if there was any breach of contract at all, it occurred when the step-down commission plan was initiated in 1988. As a result, they argue that plaintiff was required to file his action by 1994. Conversely, plaintiff argues that the time period did not begin to run until 1995, when defendants broke their promise to pay the accrued commissions. As we have just observed, a factual dispute did exist on the issue of whether the modified employment contract included a provision regarding accrued commissions. Consequently, there was also a related factual dispute on when plaintiff's cause of action accrued. Therefore, the trial court's denial of defendants' motion was proper. *Jackson Co Hog Producers, supra* at 77.

IV

Waterman additionally argues that the trial court erred in denying his motion for actual costs pursuant to MCR 2.405. Before the trial court, plaintiff raised two arguments against Waterman's motion: (1) because Waterman's purported offer of judgment provided for installment payments of the judgment, it was not a sum certain; and (2) Waterman could not recover individually because the offer of judgment was submitted jointly by both defendants.

We agree that the trial court erred in denying the motion based on the fact that the judgment was to be paid in installments. *Central Cartage Co v Fewless*, 232 Mich App 517, 530-533; 591 NW2d 422 (1998).[2] Nevertheless, because Waterman's motion should have been denied on the alternative basis argued by plaintiff, we see no err requiring reversal. See *Lane v KinderCare Learning Centers, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998) (observing that "this Court will not reverse where the trial court reached the right result for the wrong reason"). Defendants acted in concert throughout the course of this litigation. They filed all of their pleadings, motions, and trial documents jointly, including the offer of judgment. We believe Waterman is bound by his decision to jointly present the offer of judgment. *J C Building Corp II v Parkhurst Homes, Inc*, 217 Mich App 421, 427; 552 NW2d 466 (1996). Therefore, we conclude the trial court did not abuse its discretion in denying Waterman's motion for costs and attorney fees pursuant to MCR 2.405(D). See *B & B Investment Group v Gitler*, 229 Mich App 1, 12; 581 NW2d 17 (1998).

V

Finally, plaintiff cross appeals from the order of the trial court awarding him $25,000 in attorney fees as a mediation sanction under MCR 2.403(O). Plaintiff contends that the court erred in rejecting his claim for $67,936 in two ways: (1) the court failed to address the appropriate factors when making its ruling; and (2) the requested attorney fees were reasonable under the circumstances of the case.

"'The factors to be considered when determining what constitutes reasonable attorney fees are listed in Michigan Rule of Professional Conduct 1.5(a).'" *RCO Engineering, Inc v ACR Industries, Inc*, 235 Mich App 48, 67; 597 NW2d 534 (1999), quoting *Jordan v Transnat'l Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995). Although "the trial court need not detail its findings as to

each specific factor considered" when evaluating the reasonableness of requested attorney fees, *Wood v DAIIE,* 413 Mich 573, 588; 321 NW2d 653 (1982), "the court is required to make findings of fact with regard to the attorney fee issue." *Miller v Meijer, Inc*, 219 Mich App 476, 480; 556 NW2d 890 (1996).

In the instant case, the trial court did not make any findings concerning the relevant factors. Rather, the court simply suggested that plaintiff's attorneys had engaged in duplicative billing. While it certainly was proper for the court to consider whether any portion of the fees being requested was for duplication of effort, *In re Sloan Estate*, 212 Mich App 357, 364-365; 538 NW2d 47 (1995), the court erred in that it did not make the requisite findings of fact. Accordingly, we remand for an evidentiary hearing addressing the reasonableness of plaintiff's requested attorney fees. We stress that we make no finding with respect to the reasonableness of either the amount requested or the amount rewarded.

Affirmed in part, reversed in part, and remanded for an evidentiary hearing on the issue of plaintiff's attorney fees. We do not retain jurisdiction.

/s/ Martin M. Doctoroff
/s/ Donald E. Holbrook, Jr.

[1] Although the jury found defendant corporation liable on count II (unjust enrichment), it nonetheless awarded plaintiff no damages on this claim.

[2] We note that the trial court judge did not have the benefit of the *Central Cartage* opinion at the time of her decision on Waterman's motion.