

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL A. HYLAND,

Plaintiff-Appellee/Cross-Appellant,

v

A.L. BELROSE COMPANY, INC.,

Defendant-Appellant/Cross-
Appellee.

UNPUBLISHED

May 27, 2004

No. 245831

Kent Circuit Court

LC No. 00-010187-CK

Before: White, P.J., and Markey and Owens, JJ.

WHITE, P.J. (*concurring in part and dissenting in part.*)

I agree with the majority's disposition of defendant's claims in the principal appeal.

I respectfully dissent from the majority's disposition of plaintiff's cross-appeal. I conclude that the trial court did not err in excluding from plaintiff's commission award the \$25,423.14 in commission plaintiff claimed was due on a 1999 sale to Textron that Textron canceled after plaintiff booked it, and did not err in failing to award attorney fees under the Sales Representatives' Commissions Act (SRCA).

First, plaintiff did not preserve for appellate review the issue whether he was entitled to commission on canceled sales.¹ Plaintiff asserted that he was entitled to commissions on a number of sales. Defendant defended that plaintiff had breached the agreement, and that, in any event, he was not entitled to commission on "destination commissions" paid after follow-up services performed after plaintiff's departure. As to the single sale at issue in the cross-appeal, defendant defended on the basis that the sale was canceled. Plaintiff asserted that the sale was not really cancelled, but rather the purchase order was modified. Plaintiff never argued below that commission should be paid on the sale even if it was, in fact, canceled.² The arguments

¹ Plaintiff's brief on cross-appeal does not assert that the issue was preserved and cites to only one transcript page from the record in regard to this issue, and that citation is to Michael Belrose's testimony that the sale was indeed canceled.

² Defendant's trial brief, filed the same day as plaintiff's trial brief, states that commission is not paid on canceled sales.

made in plaintiff's brief on cross appeal were never made below, and the cases cited in support of those arguments were not cited below. The trial court was never asked to decide whether commissions were payable on canceled sales, and certainly never had the benefit of the arguments made here in support of plaintiff's position that the trial court erred.

Although plaintiff testified at trial that he doubted whether the sale at issue was really canceled, he did not testify or otherwise assert that he was entitled to a commission even if the sale was canceled. Plaintiff's brief on cross-appeal cites no trial testimony, nor did the trial transcript reveal any, to the effect that a sale is binding when booked, i.e., that a sale could be enforced by defendant or the manufacturer against the buyer once booked, regardless of whether it was later canceled.³ Nor was there testimony that defendant received a commission on this sale from the manufacturer. The only testimony was that a cancellation charge was paid regarding the canceled sale.⁴ Further, plaintiff's brief does not cite any testimony, nor did the trial transcript reveal any, to support that the parties' customary course of dealing was that commissions were paid on booked sales, regardless of whether they were later canceled and/or defendant was not itself paid commissions, or the manufacturer was not paid for the product.

Notwithstanding that plaintiff did not preserve the issue below or present proofs at trial to support that commissions were paid on sales, regardless of whether they were later canceled, plaintiff's brief on cross-appeal argues, and the majority agrees, that under the contract's provisions quoted below, plaintiff was entitled to commission on booked sales, not just completed sales. I disagree.

The contract states in pertinent part:

Commission to sales representatives on all lines represented by the A.L. Belrose Company. Sales bookings will be totaled from May 1 to April 30 of each year. Total will be reset for each twelve (12) month period. Reviewed by mutual agreement:

Mike Hyland – 60% up to \$5MM

65% over \$5MM

This contractual language addresses the process of keeping track of the volume of bookings plaintiff made, for purposes of determining the percentage rate of plaintiff's potential

³ There was testimony that the buyer paid a cancellation charge. If this is the case, it is likely that the contract for sale was not subject to specific enforcement and that the buyer was only obligated to pay a cancellation charge.

⁴ Defendant's contract with the manufacturer states that no commissions will be paid on certain charges, including cancellation charges.

commissions (i.e., 60% or 65%).⁵ This language does not unambiguously declare that commission will be paid on all booked sales, even if the sale is later canceled by the buyer.

This was a bench trial. The trial court's opinion states that "while plaintiff seems to doubt that the sale was truly cancelled, he has no evidence to rebut that contention--suspicions are not enough--*and he does not dispute that commissions are not to be paid on cancelled sales.*" (Emphasis added.) See also n 1, *supra*. I agree with the trial court's determination.

I would affirm the trial court's denial of plaintiff's claim for a commission on the Textron sale that was canceled. Thus, I do not agree that plaintiff prevailed "on all the allegations of the complaint," and that the court should have awarded fees under the SRCA.

/s/ Helene N. White

⁵ I note that plaintiff's brief on cross-appeal states, immediately after quoting the above contractual language, "Thus, every twelve months, the amount of sales booked is reset to zero for determining the percentage of commission paid to Hyland."