NO. COA01-988

NORTH CAROLINA COURT OF APPEALS

Filed: 3 December 2002

JOHN H. ICARDI,
Plaintiff-Appellant,

v.

Wake County
No. 00-CVS-00936

CELERIS CORPORATION, f/k/a SUMMIT MEDICAL SYSTEMS, INC., and C.L. McINTOSH & ASSOCIATES, f/k/a C.L. McINTOSH & ASSOCIATES, INC.
Defendants-Appellees.

Appeal by plaintiff from order entered 30 April 2001 by Judge David Q. LeBarre in Superior Court, Wake County. Heard in the Court of Appeals 24 April 2002.

Wyrick Robbins Yates & Ponton LLP, by L. Diane Tindall and Kathleen A. Naggs, for plaintiff-appellant.

Kilpatrick Stockton LLP, by Sharon L. McConnell and Emily A. Moseley, for defendants-appellees.

McGEE, Judge.

John H. Icardi (plaintiff) was employed by Celeris Corporation and C.L. McIntosh & Associates (defendants). Defendants provide consulting services and clinical project management services to companies in the medical device, biotechnology and pharmaceutical industry. Plaintiff was employed as director of sales from June 1998 through 5 December 1999. Plaintiff's duties were to sell defendants' consulting and clinical trial services to new and existing clients. Once plaintiff had sold a service and created an account with a client, he had no additional responsibilities with the development of that particular account. Plaintiff's written employment agreement stated that plaintiff was to receive as compensation for his work a yearly salary, plus a two percent commission on all billed work stemming from accounts secured by plaintiff. This commission was to be paid monthly.

Plaintiff's employment agreement provided for termination of plaintiff's employment by defendants at any time, for any reason, with or without cause, upon thirty days' written notice of defendants' intent to terminate the employment relationship. In a letter dated 5 November 1999, defendants gave plaintiff a thirty day notice that his employment would be terminated on 5 December 1999. Plaintiff was in fact terminated on 5 December 1999. Defendants paid plaintiff his salary through 5 December 1999, and also paid plaintiff for all commissions which were to be paid prior to 5 December 1999. Defendants paid no commissions to plaintiff resulting from accounts secured by him which were billed after 5 December 1999.

Plaintiff filed a complaint on 1 February 2000 seeking: commissions from accounts secured by him which accrued after 5 December 1999, namely commissions due for the months of November and December 1999; three times the amount of commissions owed to him, reasonable counsel fees, costs, and interest allowable under Maryland law; cellular telephone contract charges; and an accounting of all billings for November and December 1999 in order to determine the amounts of commissions due and owing to plaintiff. Plaintiff's complaint also included alternative claims for unpaid wages under the North Carolina Wage and Hour Act, breach of contract, and quantum meruit.

Plaintiff filed a supplemental complaint on 24 August 2000 in which he sought recovery for unpaid commissions alleged to be due from January through May of 2000. Plaintiff filed a second supplemental complaint on 29 March 2001 seeking to recover unpaid commissions alleged to be due from June 2000 through January 2001. Plaintiff filed an amended complaint on the same date which sought recovery of an unpaid two percent salary increase for the period of 15 June 1999 through 5 December 1999, three times the amount of salary increase owed to him, plus reasonable counsel fees, costs, and interest under Maryland law.

Plaintiff filed a motion for summary judgment or in the alternative a motion for partial summary judgment on 9 February 2001. Defendants filed a motion for summary judgment on 16 March 2001. On 30 April 2001, the trial court granted plaintiff's motion for partial summary judgment and awarded plaintiff cellular telephone fees and a two percent salary increase from 15 June 1999 until the date of his termination. However, the trial court also granted defendants' motion for summary judgment and dismissed plaintiff's remaining claims, including all of plaintiff's claims for unpaid commissions, his claim under Maryland law for three times the amount of commissions owed, and his request for an accounting. Plaintiff appeals from this order.

Plaintiff first argues the trial court erred in denying his motion for summary judgment and granting defendants' motion for summary judgment as to plaintiff's claim that under Maryland law he was entitled to sales commissions he earned during his employment with defendants. We agree.

North Carolina law states that "where parties to a contract have agreed that a given jurisdiction's substantive law shall govern the interpretation of the contract, such a contractual provision will be given effect." *Land Co. v. Byrd*, 299 N.C. 260, 262, 261 S.E.2d 655, 656 (1980). The employment agreement signed by both parties in this case states: "This Agreement shall be governed by the laws of Maryland." We therefore decide this case based on applicable laws from the State of Maryland.

Maryland statutes set out the procedure for payment of compensation due an employee after that employee is terminated.

> Each employer shall pay an employee or the authorized representative of an employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if the employment had not been terminated.

Md. Code Ann., Lab. and Empl. § 3-505 (1991). Under Maryland law, wage is defined as "all compensation that is due to an employee for employment." Md. Code Ann., Lab and Empl. § 3-501(c) (1) (1991). The definition of wage includes "(i) A bonus; (ii) *A commission*, (iii) A fringe benefit, or (iv) Any other remuneration promised for service." Md. Code Ann., Lab and Empl. § 3-501 (c) (2) (emphasis added). Plaintiff contends he completed the work he was required to complete in order to earn a commission on accounts secured by him. Plaintiff also argues he completed this work prior to his termination; therefore, he is entitled to this compensation as part of his earned wages. In *Magee v. Dansources Technical Services, Inc., et al*, 769 A.2d 231 (Md. Ct. Spec. App. 2001), the Court of Special Appeals of Maryland held that an employee who had earned commissions on work performed "may have a cause of action based on an employer's failure to pay commissions that were earned during the employment, but which were not payable until after the employee was terminated." *Id.* at 258. We agree with plaintiff that plaintiff completed, prior to his termination, all the work required of him in order to qualify for receipt of commissions that may be due to him.

However, defendants argue § 3-501 simply provides a remedy for employees to recover unpaid commissions that were earned prior to termination; the statute does not mandate all employees will always receive commissions for billed work. Defendants contend the employment agreement signed by defendants and plaintiff prior to employment is the controlling document which specifies what plaintiff will receive as to compensation. Defendants argue this employment agreement states plaintiff will receive compensation only during the term of his employment. The agreement states:

> Annual Salary. During the Term, the company shall pay an annual salary (the "Annual Salary") of $90,000.00, payable in [sic] commensurate with the company's regular payroll cycle, in consideration of providing the Services for and on behalf of the Company. In addition, Employee will receive a 2% commission paid monthly on all billed work

primarily secured by the Employee.

Defendants contend the clear and unambiguous meaning of this provision compels a reading that the phrase, "During the Term," modifies both the first sentence of the provision and also the second sentence regarding the payment of commissions. Consequently, defendants contend they were not required to pay any commissions after plaintiff was terminated because plaintiff was unable to earn compensation after plaintiff was terminated.

However, we determine that the placement of the phrase "During the Term" is ambiguous as to whether it modifies only the first sentence of the provision or both sentences. We base this finding of ambiguity on the second sentence which contains a separate modifier, "In addition," and on the Maryland law discussed above which permits the payment of commissions after the date of termination if such commissions were earned prior to termination. Maryland law states "ambiguities in an instrument are resolved against the party who made it or caused it to be made, because that party had the better opportunity to understand and explain [its] meaning." *King v. Bankerd*, 492 A.2d 608, 612 (Md. 1985). Therefore, we construe the meaning against defendants because defendants could have written the provision to ensure that "During the Term" modified both sentences. We hold the phrase modifies only the first sentence. This reading is consistent with Maryland statutory law and the holding in *Magee*. In that plaintiff completed the work required of him to earn commissions prior to his termination, we hold the trial court erred in granting defendants' motion for summary judgment as to plaintiff's claims for commissions due under the terms of the employment agreement and under Maryland law.

Plaintiff next argues that the trial court erred as a matter of law in dismissing with prejudice his claim for triple damages and counsel fees for his commission claim based on the Maryland Wage Payment and Collection Act. Section 3-507.1(b) of the Maryland Act states that

> [i]f, in an action under subsection (a) of this section, a court finds that an employer withheld the wage of an employee in violation of this sub-title and not as a result of a bona fide dispute, the court may award the employee an amount not exceeding three times the wage, and reasonable counsel fees and other costs.

Md. Code Ann., Lab. & Empl. § 3-507.1(b) (1991).

In determining whether circumstances constitute a bona fide dispute, the Maryland court in *Admiral Mortgage, Inc. v. Cooper*, 745 A.2d 1026, 1031 (Md. 2000) focused on

> whether the party . . . resisting the claim has a good faith basis for doing so, whether there is a legitimate dispute over the validity of the claim or the amount that is owing. The issue is not whether a party acted fraudulently; fraud is certainly inconsistent with the notion of 'bona fide' or 'good faith,' but it is not required to establish an absence of good faith. The question, simply, is whether there was sufficient evidence adduced to permit a trier of fact to determine that [the employer] did not act in good faith when it refused to pay commissions to [the employee] on the five loans that closed after he terminated his employment.

See also Baltimore Harbor Charters, Ltd. v. Ayd, 759 A.2d 1091, 1102 (Md. Ct. Spec. App. 2000) (holding that a trial court can decide as a matter of law that there is no bona fide dispute only "if the employee fails to introduce facts that would allow an inference that the employer had no bona fide reason for failing to pay wages upon termination"), *vacated in part on other grounds*, 780 A.2d 303 (Md. 2001).

In *Admiral*, the Maryland Court of Appeals accepted the trial court's definition of "bona fide" used in its instruction to the jury. The jury instruction stated that "a party has a bona fide dispute if that party acts in good faith and without deceit or fraud in pursuing that dispute." *Admiral*, 745 A.2d at 1030. However, the appellate court noted that a showing of fraud is not necessary to establish an absence of good faith. *Id*. at 1031. The party defending against a claim for wages must have a legitimate dispute as to the validity of the claim or the amount owed to meet the good faith requirement. *Id.*

In the case before us, the trial court must first determine as a matter of law whether there was a bona fide dispute to justify defendants' withholding of plaintiff's earned commissions. The trial court must therefore determine whether there was sufficient evidence that defendants did not act in good faith when they refused to pay commissions to plaintiff that he earned during his employment. We note that as the *Admiral* court stated,

> [t]he question of whether [the employer's] withholding of the commissions was the result of a bona fide dispute has relevance only as to [the employee's] entitlement, under § 3-507.1(b), to additional (up to treble) damages, attorneys' fees, and costs. The right to recover the commissions themselves, provided for in § 3-507.1(a), does not depend

> on whether they were withheld as the result of a bona fide dispute.

Admiral, 745 A.2d at 1030. In other words, if the trial court determines defendants withheld commissions without a bona fide dispute, the trial court may award plaintiff up to three times the amount of commissions owed and reasonable counsel fees. Md. Code Ann., Lab. & Empl. § 3-507.1(b). As the word "may" denotes, the award is within the discretion of the trial court. *State v. Tucker*, 598 A.2d 479, 481 (Md. Ct. Spec. App. 1991).

Plaintiff additionally argues the trial court erred in dismissing his claim for an accounting for all billings on the accounts at issue from July 2000 through December 2000. The general rule under Maryland case law is that "a suit in equity for an accounting may be maintained when the remedies at law are inadequate." *P.V. Properties v. Rock Creek*, 549 A.2d 403, 409 (Md. Ct. Spec. App. 1988) (citing *Nagel v. Todd*, 45 A.2d 326 (Md. 1946)). Remedies at law are inadequate and an accounting is due where one party has exclusive control over financial records showing how much is owed to another. *P.V. Properties*, 549 A.2d at 409; *see Gianokas v. Magiros*, 208 A.2d 718 (Md. 1965).

In *P.V. Properties*, the court held the landlord and tenant were in a fiduciary relationship because the landlord exclusively maintained documentation showing expenses for property maintenance, compelling the tenant to rely on the good faith of the landlord in assessing the charges tenant owed. *P.V. Properties*, 549 A.2d at 410. The court stated that the only equitable solution was for the landlord to open its accounts, in order that the correct amount owed could be determined.

Similarly, the Maryland Court of Appeals explained in *Anderson v. Watson*, that the plaintiffs' claim that the defendants defrauded the plaintiffs when weighing coal mined by the plaintiffs is not itself a matter of equitable jurisdiction, but since only the defendants' documentation showed how much coal the plaintiffs mined, the defendants were compelled to produce their accounts in order that the total amount of coal mined could be ascertained. *Anderson*, 118 A. 569, 574-75 (Md. 1922). The plaintiffs were forced to rely on the defendants' good faith in weighing coal, and a fiduciary, confidential relationship resulted. The defendants weighed the coal using their own scales, by their own agents, and outside the plaintiffs' presence. The court reasoned that unless an accounting was granted, a court of law might be unable to provide a complete remedy, as an accounting was necessary to fully inform the plaintiffs of the extent of their claim. *Id.* at 569.

As in *P.V. Properties* and *Anderson*, defendants in the case before us had exclusive control of the billing records upon which plaintiff's claim is based. Plaintiff had no access to the billing records for the months of July through December 2000 and no adequate legal remedy to determine the amount of commissions owed to him. The trial court erred in dismissing plaintiff's claim for an accounting for all billings on the accounts at issue from July 2000 through December 2000.

Based on these determinations, plaintiff's alternative claims for relief for unpaid commissions under North Carolina law, breach of contract, and quantum meruit are not at issue; we affirm the trial court's dismissal of plaintiff's alternative claims.

We reverse the trial court's granting of defendants' motion for summary judgment and remand the case to the trial court. Plaintiff is entitled to commissions earned prior to his termination under the terms of the employment agreement and under Maryland law. Defendants must provide an accounting for all billings on the accounts at issue from July 2000 through December 2000. In deciding whether plaintiff is entitled to an award of treble damages, plus reasonable counsel fees and costs pursuant to Maryland law, the trial court must further determine whether or not there was a bona fide dispute to justify defendants' (1) withholding of plaintiff's earned commissions and (2) failure to pay plaintiff's salary increase.

Affirmed in part; reversed and remanded in part.

Judges WALKER and CAMPBELL concur.

Report per Rule 30(e).