

[J-157-1998]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

BANKS ENGINEERING CO., INC. : No. 5 W.D. Appeal Docket 1998
: :
: :
v. : Appeal from the Order of the Superior
: Court dated July 16, 1997 at No 1959
: PGH 1996, affirming the judgment of the
: Court of Common Pleas of Westmoreland
: County dated October 3, 1996 at Civil
MICHAEL POLONS AND DENISE : Division No. 4936 of 1994
POLONS, HIS WIFE : :
: 697 A.2d 1020 (Pa.Super. 1997)
APPEAL OF: MICHAEL POLONS : :
: ARGUED: September 15, 1998

CONCURRING AND DISSENTING OPINION

MR. CHIEF JUSTICE FLAHERTY

DECIDED: JUNE 23, 2000

I join Mr. Justice Saylor's concurring and dissenting opinion. I write separately only to note that, despite the majority's assertion to the contrary, there is a logical basis for adopting the presumption against liability on the part of sales agents "that comports with common experience and understanding." As a general rule, employers are in a position of superior bargaining power and should bear the burden of rebutting this presumption. Indeed, the circumstances of the present case belie the majority's claim that Banks was not in the superior position. Regardless of appellee's corporate status, his refusal to release Polon's first paycheck unless he signed the addendum certainly seems to indicate that Banks was in a superior position in this relationship and that this was a "take it or leave it" proposition at that point.

In any event, the majority correctly states the court should interpret the language of the agreement and the parties' understanding of it in order to determine the outcome of this type of case. The plain language of the agreement states that "[t]his draw will continue until the commissions exceed the draw and this contract is in effect" and "once commissions exceed the draw . . . payment will continue at the rate of the draw until the . . . draw is compensated for by commissions . . . or by other means. When the . . . draw has been compensated for . . . the full commission will be paid and the draw eliminated." This language indicates that the anticipated repayments of advances, whether by commissions or other means, would occur during the expected life of the contract and not after its termination. The language of the addendum requiring repayment after termination is further evidence that the parties understood that the agreement itself did not require such repayment.

In this case, the contract was no longer in effect, the commissions never exceeded the draw and the draw had never been compensated for during the life of the contract. The contract explicitly provided that the draw and repayment of advances applied solely during the life of the contract. Additionally, the phrase "by other means" is irrelevant; it too only applied during the life of the contract. Had the addendum not failed for lack of consideration and been determined to be a proper modification of the contract, appellee's argument might have been more convincing since the addendum expressly provided for repayment in the event of termination. However as the addendum failed, so must appellee's argument. I do not believe that a remand is necessary, since the plain language of the agreement would refute any attempt to rebut the presumption.