COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 98-0612

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

CHARLES F. POLENZ,

PLAINTIFF-APPELLANT,

v.

TCI CABLEVISION OF WISCONSIN, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed.*

Before Eich, Roggensack and Deininger, JJ.

DEININGER, J. Charles Polenz appeals a summary judgment dismissing his complaint against his former employer, TCI Cablevision of Wisconsin, Inc., for commissions he claims were earned but unpaid at the time he terminated his employment. Polenz argues that the trial court erred in dismissing his claim because he was entitled to full commissions on all of his pre-termination

sales under the "procuring cause" doctrine as recognized in Wisconsin. He further asserts that the limitation on commissions due him at termination contained in a TCI compensation plan for account executives was not enforceable against him because TCI had implemented the plan without consideration and he had not accepted it. Finally, Polenz argues that even if the plan was enforceable with respect to commissions he earned after it was implemented, TCI remained obligated to pay in full those commissions he had earned on sales he made prior to the effective date of the compensation plan. We reject Polenz's arguments and affirm the judgment dismissing his complaint against TCI.

BACKGROUND

Polenz alleges in his complaint that he voluntarily terminated his employment as a sales representative with TCI on January 12, 1996. He claims that as of his termination, he had procured sales for TCI of over $187,000, for which he was due commissions of almost $44,000 which TCI had willfully failed to pay. TCI answered, admitting that Polenz had been employed as an account executive for approximately six years prior to his resignation on January 12, 1996, but it denied that Polenz was "entitled to any commissions for which he had not been paid." TCI also pled, as an affirmative defense, that Polenz had been paid in accordance with its 1995 Account Executive Compensation Plan, a copy of which was attached to the answer. Section sixteen of the plan sets forth the amount of compensation an account executive was to receive "after termination of employment for any reason." In addition to accrued vacation time, unreimbursed expenses, and base salary through the termination date, to the extent any of these items applied, a terminating account executive was entitled to receive the following:

> Commissions on amounts collected by the Company through the date of termination, for advertising sold by you prior to termination, plus an amount equal to one-sixth (1/6) of the total commissions paid to you for the full six months prior to the termination, if commissions are part of your compensation at the time of termination.

The plan also provided that its terms "supersede[] all prior promises, statements, policies, descriptions or agreements regarding compensation, whether written or oral."

Following discovery, TCI moved for summary judgment. In support, TCI filed an affidavit of its general manager and excerpts from Polenz's deposition. The TCI manager averred the following: Post-sale service to purchasers of commercial time on the cable system "is a critical aspect of an account executive's job," and such service included providing production support, script writing, billing and ensuring customer satisfaction. Polenz was not employed under any signed employment agreement and was "an employee at-will." Polenz had attended a meeting at which the manager had "distributed, discussed and explained the 1995 Account Executive Compensation Plan," and Polenz received a copy of the plan at that meeting. The manager informed Polenz on or about May 11, 1995, that the plan would be effective as of June 4, 1995, and Polenz continued to work for TCI until he resigned to take another job on January 12, 1996. After June 4, 1995, TCI compensated Polenz according to the terms of the compensation plan, and upon Polenz's resignation, the company tendered $6,932.67, an amount computed pursuant to the termination pay provisions of the plan, but Polenz refused to accept the amount tendered.

Polenz testified in his deposition to the following: He had worked for TCI since January 1990. He described his duties as having "sold and serviced advertising accounts," which included "production, support, writing of scripts …

contact with the customer." He "earned [his] commission when a spot was paid for." He resigned from TCI on January 12, 1996 to take another job. He was offered a payment of $6,932.67, which was explained to him as including the amounts due at termination under the compensation plan. Polenz refused the tendered amount twice. He attended a meeting prior to May 11, 1995, at which the compensation plan was distributed and discussed. He signed a document dated May 11, 1995, acknowledging receipt of a copy of the plan. That document stated the plan was effective June 4, 1995, although Polenz did not remember being informed of the effective date of the plan. He knew the "compensation part" of the plan did go into effect, but had no idea if "other parts" did, in that he didn't know what other departing sales executives had been paid at termination. He did not know whether the plan went into effect "on June 4th or if it was July or August," but he did receive commissions according to the plan "in the latter part of 1995." Although he signed the May 11th acknowledgment regarding the new compensation plan, he informed the TCI manager that he "would not agree to the plan" referred to. Polenz kept working and getting paid until his resignation in January 1996.

The only document in the record which appears to have been filed in opposition to TCI's motion is an affidavit from Polenz. In it, Polenz acknowledges receipt of a copy of the proposed new compensation plan in "approximately April of 1995." He claims that the plan copy he received did not state when it would go into effect. He also acknowledges signing a receipt for the plan on "May 11, 1996 [sic]," but again claims that he voiced verbal objections to the manager regarding the terms and conditions of the plan. He states further that "I was never told or notified that acceptance of this plan was a requirement for continued employment with [TCI]," and that "I do not believe that the receipt I

signed, of which I did not receive a copy of at the time, had a title or effective date." Polenz relates in his affidavit that he had many customers who signed annual advertising contracts which usually commenced in January. After a customer's commercials were run, they were billed, and he would receive his commission when the customer paid the bill. Finally, he averred the following:

> 12. On January 12, 1996, the date I resigned, there were many spots from the prior year[']s sales that had run, but not yet been paid for and there were many spots that had been sold, but not yet run by [TCI]. Almost all of the spots that had run, but not yet been paid for, were from sales made the previous year in January of 1995.

The trial court granted TCI's motion for summary judgment and entered judgment dismissing Polenz's complaint.[1] Polenz appeals.

ANALYSIS

We review an order for summary judgment de novo, applying the same standards as the trial court. *See* ***Voss v. City of Middleton***, 162 Wis.2d 737, 748, 470 N.W.2d 625, 629 (1991). Summary judgment is proper when the pleadings, answers, admissions and affidavits show no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See* ***Maynard v. Port Publications, Inc.***, 98 Wis.2d 555, 558, 297 N.W.2d 500, 502-03 (1980).

[1] Polenz claimed in a second cause of action that, in addition to the payment of all commissions for contracts he had procured during his employment, he was entitled to $6,932.67 in severance pay under TCI's policy of paying departing sales personnel one-sixth of the commissions earned during the six months prior to termination. The trial court did not address Polenz's second claim in its decision on TCI's motion, nor does Polenz do so in this appeal. This claim appears to be for the amount TCI conceded Polenz was due at termination under the compensation plan. It is the sum which TCI had tendered but Polenz refused to accept. (TCI asserts in its brief that Polenz accepted payment of this sum after judgment was entered in the trial court, although this "fact" is not reflected in the record.)

In granting TCI's summary judgment motion, the trial court concluded there were no disputed issues of material fact and that the June 1995 compensation plan was enforceable upon Polenz's termination inasmuch as Polenz had accepted its terms by continuing in TCI's employ for some seven months after its implementation. The court also held that TCI's post-plan employment of Polenz, an at-will employee, constituted consideration for TCI's implementation of the plan's terms and conditions, including those governing compensation due upon Polenz's termination. Thus, Polenz was subject to an "agreement [which] specifically limits the recovery of commissions following termination," which rendered inapplicable the common law "procuring cause" doctrine. *See* ***Leen v. Butter Co.***, 177 Wis.2d 150, 154-55, 501 N.W.2d 847, 848 (Ct. App. 1993). Although our review is de novo, we concur in the trial court's analysis.

Polenz first argues that under Wisconsin's "long established" embrace of the procuring cause doctrine, TCI could not, simply by establishing a "new" compensation plan, deprive him of commissions he had earned that remained unpaid at the time of his termination. Under the procuring cause doctrine, "a selling agent earns his commission when he procures an order from a ready, willing, and able purchaser, and this order is received by the company." ***Zweck v. D P Way Corp.***, 70 Wis.2d 426, 430-31, 234 N.W.2d 921, 924 (1975). Polenz claims, correctly, that TCI presented no evidence that "prior to the alleged implementation of the June 4, 1995, Compensation Plan, there was any existing agreement that overrode this common-law principle." Nor, as Polenz also notes, did TCI present evidence that any specific post-sale services were to be performed by Polenz as a condition precedent to his commissions being fully earned. Neither point, however, undermines the basis for the trial court's decision, or ours to affirm it.

As we have noted, the trial court concluded, and we agree, that the June 1995 plan constituted an agreement between Polenz and TCI which governed the payment of commissions on Polenz's termination of his employment. This court has previously concluded that such an agreement renders the procuring cause doctrine inapplicable. *See* ***Leen***, 177 Wis.2d at 154-55, 501 N.W.2d at 848.

Thus, Polenz next argues, as he must, that the June 1995 compensation plan was not binding or enforceable, and it is thus not an agreement which vitiates his entitlement to all earned but unpaid commissions for advertising contracts he had procured prior to his termination. This is so, according to Polenz, because the compensation plan was not supported by consideration and, moreover, he never "accepted" it. Polenz cites ***NBZ, Inc. v. Pilarski***, 185 Wis.2d 827, 520 N.W.2d 93 (Ct. App. 1994), in support of his argument that, since TCI submitted no evidence that it conditioned his continued employment on his acceptance of the plan, it fails as a contract for lack of consideration.

The issue in ***NBZ, Inc.*** was "whether a covenant not to compete subject to § 103.465, STATS., must be supported by consideration." ***Id***. at 835, 520 N.W.2d at 95. We concluded that (1) the statute did not clearly express an intent to abrogate common law; (2) the common law requires restrictive covenants in employment contracts to be supported by consideration; and (3) because the employer had provided no authority for its assertion that continued employment alone may serve as consideration for a covenant not to compete, an exchange of promises was required. *See* ***id***. at 835-38, 520 N.W.2d at 95-97. We then determined that the trial court's factual findings supported its conclusion that the covenant at issue was not supported by consideration. The covenant was executed about one month after Pilarski had begun employment, and her continued employment was not conditioned on its execution, it appearing that the employer

had no consistent policy of obtaining covenants not to compete from its employees. *See* ***id***. at 839, 520 N.W.2d at 97.

We agree with TCI that neither the conclusions we reached in ***NBZ, Inc.***, nor the analysis we employed, have any necessary application to the present facts. There is no covenant not to compete at issue here, and authority exists for the proposition that policies implemented during the course of an employment-at-will are enforceable based on the continuation of employment alone. The supreme court in ***Ferraro v. Koelsch***, 124 Wis.2d 154, 368 N.W.2d 666 (1985), considered whether representations in an employee handbook were binding on the employer. The court concluded they were because "the acceptance by the employee … of the terms set forth in the handbook created an employment contract." ***Id.*** at 157-58, 368 N.W.2d at 668. In reaching that conclusion, the court noted that whether the handbook was contractual at the time of hiring is largely irrelevant, the proper question being whether a binding contract exists at the time when a party seeks to enforce an employer's previously announced policy. *See* ***id***. at 163, 368 N.W.2d at 671. The court concluded that "black letter law"—an exchange of promises constitutes consideration to support a bilateral contract—rendered the handbook provisions enforceable, the consideration being "the promise of employment on stated terms and conditions by [the employer] and the promise by [the employee] to continue employment under those conditions." ***Id***. at 164, 368 N.W.2d at 671-72.

Polenz attempts to distinguish ***Ferraro*** by claiming that the record before the trial court on summary judgment does not support a conclusion that he "accepted" the new compensation plan, or that he was even aware that it had gone into effect. We disagree. Polenz is correct that TCI presented nothing to refute his statements in his deposition and affidavit that he informed his manager in April

or May of 1995 that he objected to the terms of the new compensation plan. By the same token, however, there is no dispute that Polenz received a copy of the new plan on or before May 11, 1995, that he continued in TCI's employ for seven months after the new plan became effective, and that he was compensated during that period according to its terms. In ***Ferraro***, even though the employee had accepted the handbook in both word and deed, the supreme court indicated that, in this context, actions speak louder than words. The court did not deem the employee's written acceptance of the employer's policies to be a prerequisite to their enforceability; rather, it emphasized that the employee "accepted, i.e., performed, in response to and with the knowledge of the handbook contents." ***Id***. at 159 n.2, 368 N.W.2d at 669. Similarly, Polenz accepted the new compensation plan when, despite his protestations, he continued to perform services for TCI after being informed that his compensation was governed by the new plan.

Polenz also claims there is a dispute of material fact regarding whether or when he became aware that the new compensation plan had gone into effect. This assertion is similarly unavailing. The TCI manager states in his affidavit that he informed Polenz of the June 4th effective date for the plan, and that the plan did go into effect on that date. In his affidavit, Polenz avers only that he does "not believe" that the document he signed acknowledging receipt of a copy of the plan "had a title or effective date." His deposition testimony is to the same effect, except that he is even more equivocal, stating only that he did not "remember" the June 4th effective date being on the receipt.[2] Polenz also testified

[2] A copy of the document in question is contained in the respondent's appendix, but it does not appear in the record. Therefore, we have not considered the document itself but only Polenz's deposition testimony that he signed a receipt for a copy of the plan, that the receipt presented as a deposition exhibit contained the June 4, 1995, effective date for the plan, and that he didn't remember the date having been on the receipt he signed.

that he knew "that at some point in 1995" after he had received a copy of it, the plan did go into effect. He acknowledged as well that he was compensated in accordance with the plan but didn't "know if it was June 4th or if it was July or August."

For purposes of summary judgment analysis, statements that a party does not "believe," "know" or "remember" certain matters do not place in dispute facts which are sworn to by another witness. *See* ***Leszczynski v. Surges***, 30 Wis.2d 534, 539, 141 N.W.2d 261, 265 (1966) ("[E]videntiary facts stated in the affidavits are taken as true if not contradicted by other opposing affidavits or proof."); *see also* ***Kraemer Bros., Inc. v. United States Fire Ins. Co.***, 89 Wis.2d 555, 278 N.W.2d 857, 964 (1979) (affidavit made on information and belief does not satisfy summary judgment requirements). Under § 802.08(3), STATS., a party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of the pleadings but the … party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial." Here, Polenz's claimed uncertainty regarding his awareness of the precise date the compensation plan became effective does not meet or controvert either the TCI manager's averments on the issue or Polenz's own acknowledgment that he continued to work and get paid under the plan for several months after it became effective.

Finally, Polenz argues that even if the terms of the compensation plan deprive him of his claim for unpaid commissions for sales he procured after its effective date, he is still entitled to receive unpaid commissions for sales he procured prior to that date. In response, TCI asserts that Polenz did not raise this issue in the trial court and thus has waived it. We agree. *See* ***Textron Fin. Corp. v. Firstar Bank Wis.***, 217 Wis.2d 582, 588, 579 N.W.2d 48, 50 (Ct. App. 1998)

("Because Firstar failed to allow the trial court the opportunity to consider this issue, we will not now consider it for the first time on appeal." (citing ***Wirth v. Ehly***, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980)).

The trial court's memorandum decision recites that Polenz raised two issues in opposition to TCI's summary judgment motion: the lack of consideration for TCI's implementation of the new compensation plan, and his refusal to accept the terms of the plan. The record before us contains only TCI's motion for summary judgment and the deposition excerpts and affidavits submitted in support of and opposition to the motion, which we have described above. None of the parties' trial court briefs are in the record, nor is there a transcript of any hearing that may have been conducted in the trial court on the motion. In his reply brief, Polenz points solely to paragraph twelve of his affidavit, which we have quoted in full in the Background section of this opinion, to support his claim that his entitlement to pre-plan sales commissions "was obviously an issue that the trial court had in front of it at the time it made its decision." We disagree.

First, nothing in paragraph twelve of the affidavit draws any distinction between pre-plan and post-plan sales. The averment is simply that, at the time of his termination, there were many commercial "spots from the prior year[']s sales" for which Polenz had not received commissions, either because they had not yet run or had not been paid for, and that the bulk of those spots "were from sales made the previous year in January of 1995." More importantly, however, we do not accept the notion that because a fact was arguably placed before the trial court, the court was obligated to somehow divine Polenz's unstated contentions which might flow from that fact. Nothing in Polenz's complaint or affidavit, or in the excerpts of his deposition testimony contained in the record,

even hints that he was bifurcating his claim for unpaid commissions, or that he was advancing separate theories to support different portions of his claim.

Thus, we conclude Polenz has not met his burden as an appellant of ensuring that the record on appeal reflects that he raised in the trial court all issues he now wishes to raise on appeal. *See* ***Beaupre v. Airriess***, 208 Wis.2d 238, 250 n.8, 560 N.W.2d 285, 290 (Ct. App. 1997). Even if he had properly preserved the issue, however, we question whether Polenz could avoid dismissal on summary judgment of a claim for unpaid commissions allegedly due for sales contracts he procured prior to the compensation plan's effective date. As we have noted, the compensation plan provided that its terms superseded "all prior promises, statements, policies, descriptions or agreements regarding compensation, whether written or oral." This language suggests that the purpose of the plan was to establish in comprehensive fashion an account executive's entitlement to compensation after its effective date, supplanting any and all other entitlements. It is thus distinguishable from the agreement we reviewed in ***Kreinz v. NDII Securities Corp.***, 138 Wis.2d 204, 406 N.W.2d 164 (Ct. App. 1987), upon which Polenz relies. The agreement in ***Kreinz*** provided that it governed "compensation for all services performed … *hereunder*," ***id***. at 216, 406 N.W.2d at 169 (emphasis added by ***Kreinz*** court), and we concluded that the agreement applied to commissions for sales procured after, but not before, its execution, *see* ***id***. at 217, 406 N.W.2d at 169. Given the difference in language between the two agreements, were we to address the issue, we are not convinced that we would deem our conclusion in ***Kreinz*** controlling on the present facts.

CONCLUSION

For the reasons discussed above, we affirm the judgment dismissing Polenz's complaint against TCI.

By the Court.—Judgment affirmed.

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