

STATE OF MICHIGAN
IN THE 17th CIRCUIT COURT FOR KENT COUNTY

GRADCO, INC.,

Plaintiff,

vs.

ZEBRA SKIMMERS CORPORATION,

Defendant.

Case No. 14-10049-CKB

HON. CHRISTOPHER P. YATES

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND VERDICT

The Michigan Sales Representatives' Commissions Act ("SRCA"), MCL 600.2961, includes incentives to induce the payment of post-termination commissions for sales of goods. For example, "in addition to actual damages, a defendant may be liable for up to an additional \$100,000 for an intentional failure to pay sales commissions when due." Frank W Lynch & Co v Flex Technologies, Inc, 463 Mich 578, 579 (2001). Beyond that, "the court shall award to the prevailing party" in a suit under the SRCA "reasonable attorney fees and court costs." See MCL 600.2961(6). Here, Plaintiff Gradco, Inc. ("Gradco") alleges that Defendant Zebra Skimmers Corporation ("Zebra Skimmers") committed a breach of contract by failing to pay post-termination sales commissions. Thus, Gradco contends that the Court should award enhanced damages and attorney fees. Based upon the record developed at a two-day bench trial, the Court concludes that Gradco is entitled to some, but not all, of the damages it seeks in the form of unpaid sales commissions. Additionally, the Court concludes that Gradco is entitled to enhanced damages under the SRCA, see MCL 600.2961(5)(b), but Gradco cannot recover its attorney fees because Gradco is not a prevailing party on the entirety of its claim. See Peters v Gunnell, Inc, 253 Mich App 211, 222-223 (2002).

I. Findings of Fact

Pursuant to MCR 2.517(A)(1), in an action tried without a jury, “the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment.” The Court must render “[b]rief, definite, and pertinent findings and conclusions on the contested matters” that may take the form of a written opinion. See MCR 2.517(A)(2) & (3). Therefore, the Court shall begin with findings of fact, followed by conclusions of law, and ultimately the verdict.

On July 15, 1996, Defendant Zebra Skimmers entered into a contract with Plaintiff Gradco that prescribed the terms of their relationship. See Trial Exhibit B. That one-page contract spelled out Gradco’s sales territory as “[t]he great state of Michigan” and provided for a sales commission of “10% to you, remunerated immediately upon our receipt of payment.” See id. For many years, the parties operated under those basic terms. See Trial Tr Vol I (2/15/16) at 15-16. But the contract also included a termination provision, which states as follows: “Cancellation: Either party, with at least 60 days notice.” See Trial Exhibit B. On April 28, 2014, Zebra Skimmers gave a termination letter to Gradco with an effective date of April 31, 2014.¹ See Trial Exhibit C. That letter advised Gradco that it would “continue to receive commissions – 100% for April, a decreasing amount for the following months.” See id. That practice, which the parties describe as tapering, forms the basis of a fundamental disagreement in this case.

One day after the parties’ principals met at a restaurant in Grand Rapids and Defendant Zebra Skimmers’s president, Steve Davidian, handed the termination letter to Plaintiff Gradco’s president, Bill Kerr, Zebra Skimmers mailed a second letter to Gradco accusing Kerr of threatening Davidian,

¹ Although the letter bears the date of April 25, 2014, Defendant Zebra Skimmers’s principal handed the letter to Plaintiff Gradco’s principal at a meeting on April 28, 2014. See Trial Tr Vol I (2/15/16) at 17-18. For the record, there is no such date as April 31.

declaring Gradco “in violation of Zebra’s code of ethical conduct,” and terminating “current relations . . . upon payment of Gradco’s April commissions.” See Trial Exhibit D. As a result, the only post-termination commissions Zebra Skimmers paid to Gradco involved payments due for April of 2014. In Gradco’s view, that course of conduct violated the parties’ contract by cutting off post-termination commissions within the 60-day period prescribed in the letter of agreement that Zebra Skimmers had sent to Gradco on July 15, 1996. See Trial Exhibit B.

On October 24, 2014, Plaintiff Gradco filed a straightforward two-count complaint alleging breach of contract and violation of the SRCA. In February 2016, the Court conducted a bench trial, where the parties identified two disagreements: (1) whether Defendant Zebra Skimmers had the right to unilaterally deny post-termination commissions based upon the conduct of Gradco’s president at the meeting on April 28, 2014; and (2) whether the parties’ contract permitted Zebra Skimmers to taper post-termination commissions during the 60-day period after it gave the notice of termination to Gradco. Because the Court finds that Gradco’s president did not engage in improper conduct on April 28, 2014, that would justify rescission of the obligation to pay post-termination commissions, the Court must weigh Zebra Skimmers’s right to taper during the 60-day post-termination period.²

II. Conclusions of Law

The parties have cleanly framed the issues in a logical sequence. First, the Court must decide whether the conduct of Plaintiff Gradco’s president justified Defendant Zebra Skimmers’s decision to unilaterally deny post-termination commissions. Second, because the Court concludes that Zebra Skimmers had no right to unilaterally deny post-termination commissions, the Court must determine

² Although zebras and tapirs are both mammals and furry quadrupeds, more analysis than that is necessary to determine whether Defendant Zebra Skimmers can taper commissions.

whether Zebra Skimmers had the right to taper the post-termination commissions. Third, the Court must compute the amount of post-termination commissions Zebra Skimmers owes Gradco. Fourth, the Court must determine whether MCL 600.2961(5)(b) requires enhanced damages because Zebra Skimmers “intentionally failed to pay the commission when due” to Gradco. Finally, the Court must resolve Gradco’s demand for “reasonable attorney fees” pursuant to MCL 600.2961(6) based upon its contention that it is “the prevailing party” in this case. The Court shall address each of these five issues in turn.

A. Defendant Zebra Skimmers’s Right to Rescind.

In the termination letter dated April 25, 2014, Defendant Zebra Skimmers acknowledged its obligation to pay post-termination commissions to Plaintiff Gradco. See Trial Exhibit B. Shortly after Zebra Skimmers’s president delivered that letter on April 28, 2014, however, Zebra Skimmers rescinded that commitment in a letter dated April 29, 2014, purportedly because Gradco’s president violated “Zebra’s code of ethical conduct.” See Trial Exhibit D. Even assuming, *arguendo*, that the code of ethical conduct modified the parties’ contract, the Court finds as a fact that the president of Gradco, Bill Kerr, did nothing at the April 28, 2014, meeting to violate the terms of that code. The only language in Zebra Skimmers’s “Standards of Business Conduct for Representatives” that could arguably apply to the situation at issue speaks in generalities. See Trial Exhibit J. For example, the code provides that Zebra Skimmers “expect[s] you to have the highest standards of conduct.” Id. Similarly, the code states that “all people must be extended courtesy: customers, vendors, and even our neighbors. Anger, heated words, or retribution in any form will not be tolerated.” Id. Finally, the code warns that Zebra Skimmers “will consider any intentional deviations from our stated policy

as extremely serious, and reconsider our relationship within that light.” Id. Even if the Court could find that Gradco’s president somehow acted inappropriately (which the Court emphatically does *not* find based upon the record, see Trial Tr Vol I (2/15/16) at 22), nothing in the code authorizes Zebra Skimmers to deny Gradco post-termination commissions due under the parties’ contract. Therefore, for two separate reasons, the Court concludes that the code affords no assistance to Zebra Skimmers in its effort to deny post-termination commissions to Gradco.

B. Defendant Zebra Skimmers’s Right to Taper Commissions.

Having decided that Defendant Zebra Skimmers lacked authority to deny all post-termination commissions to Plaintiff Gradco, the Court must consider whether Zebra Skimmers had a contractual right to taper the post-termination commissions, rather than pay them at the 100-percent rate for the entire 60-day period after Zebra Skimmers terminated its contract with Gradco. “When analyzing a claim for posttermination commissions, the first step is to look at the parties’ contract.” KBD & Associates, Inc v Great Lakes Foam Technologies, Inc, 295 Mich App 666, 675 (2012); see also MCL 600.2961(2). In this case, the parties’ original letter agreement makes no mention of tapering. See Trial Exhibit B. Thus, the Court concludes that, under the terms of the original contract, no right to taper commissions existed. Indeed, the “payment” provision spelled out a 10-percent commission rate, and the “cancellation” provision simply stated: “Either party, with at least 60 days notice.” Id.

But Defendant Zebra Skimmers insists that the parties’ course of conduct established a clear right to taper commissions. Under Michigan law, the freedom to contract “permits parties to enter into new contracts or modify their existing agreements.” Quality Products and Concepts Co v Nagel Precision, Inc, 469 Mich 362, 371 (2003). But “the freedom to contract does not authorize a party

to *unilaterally* alter an existing bilateral agreement.” Id. at 372. “Rather, a party alleging waiver or modification must establish a mutual intention of the parties to waive or modify the contract.” Id. Mutual intent exists “where a modification is established through clear and convincing evidence of a written agreement, oral agreement, or affirmative conduct establishing mutual agreement to waive the terms of the original contract.” Id. at 373.

On February 27, 2004, Defendant Zebra Skimmers took “away [a] line from Gradco for Ohio and Western PA” and “phase[d] out commissions based on the 60/30 formula that makes [Gradco] comfortable.” See Trial Exhibit L. Again, on March 25, 2013, Zebra Skimmers switched territory in Western Pennsylvania “to Eagen’s Tooling Solutions from Gradco.” See Trial Exhibit N. Zebra Skimmers advised Gradco in a letter that it would taper commissions as follows:

For the first full month following implementation of this decision the current agency [*i.e.*, Gradco] receives 75% of the eligible commissions and the new agency [*i.e.*, Eagen’s] will receive 25%. In the second month, each agency receives 50%. And in the third month the current agency receives 25%, and the new agency, 75%.

See Trial Exhibit N. This course of conduct establishes that Zebra Skimmers occasionally engaged in tapering Gradco’s commissions, but that practice was haphazard and inconsistent in application.³ Accordingly, the Court finds that Zebra Skimmers has failed to prove, “through clear and convincing evidence,” see Quality Products, 469 Mich at 373, that Gradco agreed to modify the original contract to permit tapering of commissions. Thus, the Court must compute the commissions due to Gradco under the terms of the parties’ July 15, 1996, written agreement. See Trial Exhibit B.

³ Citing Kelly-Stehney & Associates, Inc v MacDonald’s Industrial Products, Inc, 265 Mich App 105, 119-121 (2005), Defendant Zebra Skimmers insists that Plaintiff Gradco assented to the tapering of commissions in two forms – termination tapering of 60%-30% over two months and the separate practice of transition tapering of 75%-50%-25% over three months. But no correspondence between the parties draws that distinction. Instead, the record reflects that Zebra Skimmers imposed tapering on an *ad hoc* basis insufficient to show mutual intent by clear and convincing evidence.

C. The Amount of Post-Termination Commissions Due.

Having found merit in Plaintiff Gradco's breach-of-contract claim, the Court must next assess the damages that Defendant Zebra Skimmers must pay Gradco. Unpaid sales commissions constitute the most obvious damages Gradco has incurred, see Peters, 253 Mich App at 216-219, but the parties disagree about the amount of commissions due to Gradco. According to Gradco, Zebra Skimmers owes \$17,864 in unpaid sales commissions without tapering. In contrast, Zebra Skimmers contends that the amount of unpaid sales commissions is \$12,214.66 without tapering. The Court concludes that Zebra Skimmers has the better argument on this point.

Defendant Zebra Skimmers has presented sales sheets with commission computations for the months of May 2014 and June 2014, which comprise the entire 60-day post-termination period. See Trial Exhibits E & F. Without tapering, those sales sheets demonstrate that Zebra Skimmers owes Plaintiff Gradco \$6,201.01 for the month of May, see Trial Exhibit E, and \$6,013.65 for the month of June, see Trial Exhibit F, for a total amount of \$12,214.66 in unpaid sales commissions. Gradco, in contrast, asserts that the amount of unpaid commissions is \$17,864. Gradco arrives at that figure by including payments for July 2014, August 2014, and September 2014. See Trial Exhibits G, H, & I. In Gradco's view, its damages must include sales commissions triggered by invoices processed at any point in the 60-day termination period. The Court disagrees. The parties' agreement entitled either party to cancel the contract "with at least 60 days notice." See Trial Exhibit B. Cancellation of the contract with 60 days' notice plainly refers to a complete severance of the parties' contractual relationship, as opposed to the mere commencement of a long winding-up process that could drag on for many months beyond the 60-day period. Consequently, the Court concludes that Gradco is entitled to \$12,214.66 in unpaid sales commissions.

D. Enhanced Damages Under the SRCA.

Pursuant to the SRCA, if Defendant Zebra Skimmers “is found to have intentionally failed to pay the commission[s] when due,” Zebra Skimmers must pay Plaintiff Gradco “an amount equal to 2 times the amount of commissions due but not paid . . . or \$100,000.00, whichever is less.” See MCL 600.2961(5)(b). The letter sent by Zebra Skimmers’s president, Steve Davidian, to Gradco’s president, Bill Kerr, on April 29, 2014, leaves no doubt that Zebra Skimmers “intentionally failed to pay the commission when due,” as contemplated by MCL 600.2961(5)(b).⁴ See Trial Exhibit D. To be sure, the basis for refusal – an alleged violation of the Zebra Skimmers code of conduct – was provided as the justification for denial of commissions due under the parties’ contract. But the Court has ruled that Zebra Skimmers had no justification for relying upon the code of conduct to renounce its contractual obligation to pay sales commissions to Gradco, so the Court concludes that Gradco is entitled to the remedy prescribed by MCL 600.2961(5)(b): “an amount equal to 2 times the amount of commissions due but not paid” by Zebra Skimmers. Consequently, the Court shall augment its award of damages to Gradco to include an enhancement of \$24,429.32, which constitutes twice the amount of unpaid commissions found by the Court. Adding that amount to the unpaid-commission figure of \$12,214.66 yields a total award of \$36,643.98 in damages.

⁴ With regard to timing, the SRCA states that the “terms of the contract between the principal and sales representative shall determine when a commission becomes due.” See MCL 600.2961(2). The SRCA also prescribes a default rule that requires commissions “due at the time of termination of a contract between a sales representative and principal” to “be paid within 45 days after the date of termination[,]” see MCL 600.2961(4), and mandates that commissions “that become due after the termination date shall be paid within 45 days after the date on which the commission shall become due.” Id. The April 29, 2014, letter from Defendant Zebra Skimmers to Plaintiff Gradco leaves no doubt that the denial of sales-commission payments was absolute, rather than a matter of timing, so the Court need not determine precisely when the sales commissions came due. Zebra Skimmers’s president, Steve Davidian, amplified that point when he testified at trial about his decision to sever all ties with Gradco on April 29, 2014. See Trial Tr Vol I (2/15/16) at 166.

E. Attorney Fees.

As a general rule, “attorney fees are not recoverable as an element of costs or damages unless expressly allowed by statute, court rule, common-law exception, or contract.” See Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club, 283 Mich App 264, 297 (2009). Here, the language of the SRCA provides the basis for Plaintiff Gradco’s claim for attorney fees: “If a sales representative brings a cause of action pursuant to this section, the court shall award to the prevailing party reasonable attorney fees and court costs.” See MCL 600.2961(6). The “word ‘shall’ generally indicates a mandatory directive,” Smitter v Thornapple Township, 494 Mich 121, 136 (2013), but the SRCA narrowly defines a “prevailing party” as “a party who wins on all the allegations of the complaint[.]” See MCL 600.2961(1)(c). Accordingly, Gradco’s entitlement to attorney fees depends upon its ability to establish that it “prevailed fully on each and every aspect of the claim . . . asserted under the SRCA.” Peters, 253 Mich App at 223. Although Gradco nearly ran the table, Gradco lost in its effort to obtain unpaid sales commissions purportedly due in July, August, and September of 2014. Accordingly, based upon the narrow definition of a “prevailing party” in MCL 600.2961(1)(c) and the standard laid down by our Court of Appeals in Peters, 253 Mich App at 223, the Court must deny Gradco’s request for attorney fees under MCL 600.2961(6).

III. Verdict

For the reasons stated in the Court’s findings of fact and conclusions of law, the Court hereby renders a verdict in favor of Plaintiff Gradco and against Defendant Zebra Skimmers in the amount of \$12,214.66 for damages in the form of past-due sales commissions, see MCL 600.2961(5)(a), and \$24,429.32 in enhanced damages pursuant to the SRCA, see MCL 600.2961(5)(b), for a total award

of \$36,643.98 in damages. The Court must deny Gradco's request for attorney fees pursuant to MCL 600.2961(6) because Gradco has not achieved the status of a prevailing party as that term is defined in MCL 600.2961(A)(c). The Court invites Gradco to submit a proposed judgment pursuant to MCR 2.602(B)(3) that memorializes the Court's verdict.⁵

IT IS SO ORDERED.

Dated: July 12, 2016



HON. CHRISTOPHER P. YATES (P41017)
Kent County Circuit Court Judge

⁵ Although the Court has denied Plaintiff Gradco's request for attorney fees under the SRCA based upon the narrow definition of a "prevailing party" in MCL 600.2961(1)(c), Gradco may very well be entitled to tax costs under the more general rules governing taxation of costs in civil cases. If Gradco submits a proposed bill of costs as part of its proposed judgment, the Court shall consider Gradco's right to tax costs only if Defendant Zebra Skimmers objects to the bill of costs.