SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5354-14T1

MARK VAN WINKLE,

Plaintiff-Appellant,

v.

STORIS, INC.,

Defendant-Respondent.

Argued February 14, 2017 – Decided March 2, 2017

Before Judges Yannotti and Fasciale.

On appeal from Superior Court of New Jersey, Law Division, Morris County, Docket No. L-2916-13.

Damian Christian Shammas argued the cause for appellant (Law Offices of Damian Christian Shammas, L.L.C., attorneys; Mr. Shammas and Kristen Jasket Piper, on the briefs).

Robert Mahoney argued the cause for respondent (Norris, McLaughlin & Marcus, P.A., attorneys; Mr. Mahoney and Annmarie Simeone, on the brief).

PER CURIAM

Mark Van Winkle (plaintiff) appeals from a June 25, 2015 order granting summary judgment to defendant STORIS, Inc. (STORIS). We affirm.

STORIS provides software for retailers primarily in the home-furnishing industry. STORIS employed plaintiff from April 15, 1996 until April 2, 2013. Plaintiff became the director of sales at STORIS in February 2007. Once plaintiff became the director of sales, STORIS compensated him using a base salary plus commissions on sales made by his sales team, known as override commissions.

Plaintiff entered into a compensation plan (FY12) with STORIS for the 2012 fiscal year, which covered the period from October 1, 2011 to September 30, 2012. FY12 stated that it was "subject to change at any time without notice" and that "[a]ll profit calculations are determined by administration." It further provided in the "Acceptance" provision that "[FY12] is subject to change at any time. Any determinations or interpretations to be made on any issues regarding this Compensation Override Plan will be made by either the COO [Chief Operating Officer] or CEO [Chief Executive Officer] of STORIS."

FY12 also included a section entitled "Discounts," which stated:

1. Any software, equipment or services given free, or at a discounted rate will be charged as a cost of sale against the net selling price of the deal at the then current price for the service, software or equipment.

2. Any discounts for subscription fees may be charged against profit as an additional cost of the sale calculated over a 3-year period, regardless if approved by management.

3. If concessions other than direct discounts are made, then an estimate of the monetary value of such concession may be treated as a gross profit margin reduction. Examples include custom code or funded development specifically included in an Agreement that is not fully charged for on the Agreement.

4. Any discount greater than 20% from STORIS' standard for proposals, requires the approval in advance of either the President or COO.

The provision entitled "Manufacturer/Franchise Deals/Reseller" stated:

> Commissions and Quota applicability for transactions with a Manufacturer, Franchiser, Buying Group, Reseller, or an organization with similar credentials serving a population of retailers may result in revised commissions due to excessive discounts or unusual deals necessary to secure unusual business opportunities.

The provision entitled "Credits/Cancellations/Terminations" stated that

> [c]redits may be issued at any time for any adjustments to gross profit margin calculations including cancellations, cost adjustments, insolvency, bad debts or otherwise. All commissions paid or earned are

> due back to the company if the customer receives a credit for any sale . . . . Any sale that is not paid in accordance to the terms will be credited/charged back. If a client does not pay for any portion of subscription or services contracted on the initial contract or subsequent renewal, [this] will result in a pro-rata chargeback.

FY12 also delineated STORIS' policies for processing commissions. To earn a commission, the sale upon which the commission is based must be "Booked." FY12 provided further that the following procedure existed for a sale to be "booked" for the purposes of calculating commissions:

> An order will be considered "Booked[,"] for commission purposes, when the following has been approved by administration.
>
> 1. Customer[-]executed copy of the Agreement without any contingencies
>
> 2. Minimum 25% Deposit Check[]
>
> 3. Professional STORIS Turnover Document
>
> 4. Completed CPQ Form For All New Customers
>
> 5. Internal PO/Excel worksheet defining the products sold and transaction details
>
> 6. Technical Quotation for modifications (when applicable)

Finally, FY12 outlines a "Payment Policy" stating that "[c]ommission forms will not be processed until a sale is considered 'Booked.' All commissions become accrued at the time the order is Booked and are calculated based upon the applicable

commission plan and the commission rate in effect at the time the order is Booked."

Plaintiff filed his complaint alleging breach of contract, breach of the implied covenant of good faith and fair dealing, violation of the New Jersey Wage Payment Law (WPL), N.J.S.A. 34:11-4.1 to -4.14, unjust enrichment, and quantum meruit. Plaintiff alleged that he received insufficient commissions for STORIS' contracts with Bassett, Broad River, and Hill Country. STORIS denied these allegations.

STORIS moved for summary judgment. In granting that motion, the court remarked that the "agreement states that the adjustments [to plaintiff's commissions] are in the sole discretion of [STORIS]" and that in each instance where defendant made such an adjustment STORIS "set forth specific business reasons for reducing the commission rates." The court concluded there was no evidence of bad faith on behalf of STORIS.

On appeal, plaintiff argues that STORIS lacked the discretion to change the commission percentage rates contained in FY12. Plaintiff further argues that genuine issues of material facts preclude the entry of summary judgment. Plaintiff also maintains that fact issues exist as to whether STORIS acted in bad faith by lowering his commissions.

We conclude that plaintiff's arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E). We add the following remarks.

When reviewing an order granting summary judgment, we apply "the same standard governing the trial court." Oyola v. Xing Lan Liu, 431 N.J. Super. 493, 497 (App. Div.), certif. denied, 216 N.J. 86 (2013). We owe no deference to the motion judge's conclusions on issues of law. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995). Applying these standards, we conclude there was no error.

We reject plaintiff's contention that STORIS lacked authority to change the commission percentage rates in FY12's compensation plan as to the business deals involving Bassett, Hill Country, and Broad River.

Under FY12's "Discounts" and "Manufacturer/Franchise Deals/Reseller" provisions, STORIS had authority to grant discounts to secure "unusual business opportunities" from "[b]uying [g]roup[s]," and "[f]ranchiser[s]," or "organization[s] with similar credentials serving a population of retailers." These discounts would be subtracted from gross profits before calculating plaintiff's commission.

Donald Surdoval, STORIS' CEO, testified at his deposition that Bassett, Hill Country, and Broad River were all "very unique

deals" allowing STORIS the discretion to offer "excessive discounts" which reduced plaintiff's commissions. Hill Country and Broad River negotiated together as part of a "lean performance group," not unlike a buying group where companies bond together for negotiating leverage. The Bassett deal was unique in that it was STORIS' second time working with a publicly-traded company, that this presented unique challenges, and that Bassett had "independent dealers" similar to a franchiser.

These factors also provide legitimate business reasons to provide discounts and reduce commissions in order to secure the contracts. Further, the "Acceptance" portion of FY12 states that it is "subject to change at any time without notice," which gave STORIS almost unlimited discretion to determine compensation.

These deals were unusual and required the exercise of STORIS' discretion under FY12. Plaintiff provided no credible evidence that Bassett, Hill Country, and Broad River were not manufacturers, franchisers, resellers, part of a buying group, or in the category of other organizations with similar credentials serving retailers as contemplated in FY12.

Indeed, plaintiff explicitly refers to Bassett as a manufacturer. And he conceded that Hill Country and Broad River were part of a group that operated Ashley Furniture Group, and

that they purchased from STORIS at the same time to leverage a better deal.

Although plaintiff argues that these entities were not of the type contemplated in that provision of FY12, it is well-settled that "'conclusory and self-serving assertions' in certifications without explanatory or supporting facts will not defeat a meritorious motion for summary judgment." Hoffman v. Asseenontv.com, Inc., 404 N.J. Super. 415, 425-26 (App. Div. 2009) (quoting Puder v. Buechel, 183 N.J. 428, 440 (2005)). Such is the case here.

We see no genuine issues of material fact precluding summary judgment as to plaintiff's allegations that STORIS breached an implied covenant of good faith and fair dealing.

"A covenant of good faith and fair dealing is implied in every contract in New Jersey." Wilson v. Amerada Hess Corp., 168 N.J. 236, 244 (2001) (citing Sons of Thunder, Inc. v. Borden, Inc., 148 N.J. 396, 420 (1997)). "[G]ood faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; it excludes a variety of types of conduct characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness." Id.

at 245 (quoting Restatement (Second) of Contracts, §205 comment a (1981)).

"[A] party must exercise discretion reasonably and with proper motive when that party is vested with the exercise of discretion under a contract." Id. at 247 (citation omitted). Further, in order to succeed on a claim of breach of the implied covenant, evidence of "[b]ad motive or intention is essential[.]" Id. at 251.

Here, STORIS exercised its discretion under the contract for the legitimate purpose of securing unusual business opportunities. There exists unrefuted evidence that the three subject deals fell under that provision giving STORIS discretion in determining the amounts of plaintiff's commissions. On this record, we see no credible evidence to the contrary. Instead, the motion record demonstrates that STORIS exercised its discretion to secure unusual business opportunities.

Finally, we see no fact issues precluding summary judgment on plaintiff's claims under the WPL. N.J.S.A. 34:11-4.2 provides that "[e]xcept as otherwise provided by law, every employer shall pay the full amount of wages due to his employees at least twice during each calendar month, on regular paydays designated in advance by the employer[.]" The statute defines "wages" to include "direct monetary compensation for labor or services rendered by

an employee, where the amount is determined on a . . . commission basis excluding any form of supplementary incentives and bonuses which are calculated independently of regular wages and paid in addition thereto." N.J.S.A. 34:11-4.1(c).

Under the plain language of the statute, the payments that plaintiff alleges he is due are not wages but instead are "supplementary incentives . . . calculated independently of regular wages and paid in addition thereto." Plaintiff's commissions are paid in addition to a base salary of $117,500, as a means of incentivizing sales.

Affirmed.