



STATE OF MICHIGAN
SIXTEENTH JUDICIAL CIRCUIT COURT

BOSQUETT & COMPANY,

Plaintiff,

vs.

Case No. 2016-218-CB

STERLING BENEFITS, LLC,

Defendant.

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OPINION AND ORDER

This matter is before the Court after a bench trial.

I. Factual and Procedural History

On or about September 4, 2009, the parties entered into an Asset Purchase Agreement ("APA"). It is undisputed that the APA required Defendant to pay Plaintiff for, *inter alia*: (1) the personal lines (2) commercial lines, and (3) benefits book. With respect to the personal lines, the APA called for a purchase price of \$350,000.00, \$150,000.00 of which the parties agree has been paid. The remaining \$200,000.00 was to be paid over four semi-annual payments of \$50,000.00 if certain conditions were met. The parties dispute whether the conditions in question were met.

With regards to the commercial lines and benefits book, Plaintiff was required to pay Defendant 45% of the actual commissions it received in connection with the commercial lines, and 35% in connection with the benefits book, for three years from the date the APA was executed. Further, Plaintiff was required to make a pre-payment of \$50,000.00 that was to be utilized to cover the first \$50,000.00 required to be paid in connection with the commercial lines and benefits book. It is undisputed that the

required \$50,000.00 payment was made. However, the parties dispute whether Defendant was required to make any additional payments in connection with the commercial lines and/or benefits book.

In addition, the parties dispute whether, if Defendant owes Plaintiff additional payments under the APA, Plaintiff is entitled to pre-complaint interest. Further, the parties each maintain that they are the “prevailing” party in this case and are therefore entitled to an award of attorney fees under the APA. The Court will address each of these issues in turn.

II. Analysis

1) Personal Lines

The parties do not dispute that the purchase price for the personal lines business, prior to adjustment, was \$350,000.00. The central dispute with regards to the personal lines is whether the \$350,000.00 price was adjusted, and, if so, what the adjusted purchase price was. With respect to adjustments, the APA provides:

(b) The [\$350,000.00] Purchase Price (and Note) shall be adjusted post-Closing based upon a proportionate decrease related to the percentage decrease in retention of the amount of commissions received by [Defendant] from the Personal Lines Book during the subsequent 24 months from August 1, 2009..... [The] four additional Fifty Thousand dollar (\$50,000.00) payments may be made, one every six months, subject to a possible adjustment based upon a retention rate as of the date of installment. There shall be no adjustment made if the retention rate exceeds 88% of the Benchmark as of the first and second installments and 85% of the Benchmark as of the third and fourth installments. However if the retention rate falls below 70% on any installment date, then no payment shall be made for that period and the amount shall represent a deduction in the Purchase Price.

(See APA, Trial Exhibit 1, at Section 1.4(b).)

First, the parties dispute the amount of the Benchmark. The APA merely states that the Benchmark is the amount of commissions, with some exceptions, that Plaintiff had received from the personal lines book for the year preceding August 1, 2009. (See APA, Trial Exhibit 1, at Section 1.4(a)). In this case, Defendant argues that the Benchmark is \$834,501.17. In support of its argument, Defendant relies on the August 17, 2009 Book of Business it received from Plaintiff that showed commissions of \$834,501.17. However, testimony was presented at trial that indicated that Defendant's principals did not review the document in detail. Further, evidence was presented that showed that had Defendant's principals reviewed the document they would have, or should have, realized that many of the figures were inflated to an extent that would make it clear that the \$834,501.17 amount was not the actual amount of commissions received.

In response, Plaintiff argues that the Benchmark is \$315,243.75, which is based on documents it provided to Defendant at closing. Defendant actually appears to concede that this figure reflects the actual commissions received for the relevant time frame. (See Defendant's Proposed Findings of Fact and Conclusions of Law, at 4 ("Plaintiff maintains that the benchmark amount is \$315,243.75 which is based on the actual commission for the prior year while Defendant maintains that the benchmark amount is \$834,501.17 based upon the documentation in the August 17, 2009 Book of Business.") Accordingly, while the Court is convinced that the evidence presented at trial establishes the Benchmark was \$315,243.75, that fact is, for the reasons discussed below, immaterial.

Plaintiff argues that it is Defendant's burden to establish the Benchmark was not achieved, thereby triggering the adjustment provision in Section 1.4(b). However, the APA does not appear to create any such burden. Rather, the APA merely provides that the question of whether the Benchmark is achieved is to be determined based upon the retention rate at each of four payment dates. In this case, it is Plaintiff, not Defendant, who is alleging that the Benchmark was achieved, and that as a result Defendant is required to make additional payments. A plaintiff bears the burden of establishing the elements of its claim. *Hi-Way Motor Co v Intl Harvester Co*, 59 Mich App 366, 371; 229 NW2d 456 (1975). In this matter, Plaintiff argues that Defendant breached the terms of the APA by failing to make the required payments for the Personal Lines. However, those payments were only required to be made if the Benchmark was achieved. In this case, Plaintiff has failed to present any evidence that the Benchmark was achieved. As a result, Plaintiff has failed to establish that it is entitled to recover any additional sums in connection with the personal lines.

Plaintiff also argues that Defendant breached the APA by failing to provide periodic reports. In particular, Plaintiff avers that Defendant was required to provide reports under Section 1.4(g) of the APA. However, Section 1.4(g) merely provides that Plaintiff is "entitled to regular reports from carriers as to commissions received by [Defendant] in respect to the purchased books." (See APA, Trial Exhibit 1, at Section 1.4(g))(Emphasis added). Clear and unambiguous language must be enforced as written. *Greenville Lafayette, LLC v Elgin State Bank*, 296 Mich App 284, 291; 818 NW2d 460 (2012). Consequently, courts may not read words into the plain language of a contract, *Northline Excavating, Inc. v. Livingston Co.*, 302 Mich App 621, 628; 839

NW2d 693 (2013), or rewrite its terms under the guise of interpretation, *Harbor Park Mkt., Inc. v Gronda*, 277 Mich App 126 131; 743 NW2d 585 (2007). While Section 1.4(g) allows Plaintiff to get reports from the carriers, it does not obligate Defendant to obtain the reports from the carriers and to forward such reports to Plaintiff. Consequently, Plaintiff's position is without merit.

In sum, Plaintiff has failed to establish that Defendant has breached the APA by failing to make additional payments in connection with the personal lines or by failing to provide periodic reports.

2) Commercial Lines and Benefits Book

Under the APA, Defendant is required to compensate Plaintiff for the commercial lines and benefits book in the following manner:

45% of commissions actually received for any type of insurance sold to customers from the Commercial Book and 35% of commission actually received for any type of insurance sold to customers in the Benefits Books by [Defendant] during the subsequent three (3) years, based on the Commercial Book and the Benefit Book as determined from insurance provider reports for the year preceding September 1, 2009.

(See APA, Trial Exhibit 1, at Section 1.7)

As a preliminary matter, Defendant argues that Plaintiff is only entitled to receive the above-referenced percentages if the commissions in question were earned as a result of Plaintiff's principal's assistance in retaining the accounts. While Section 1.7 does provide that Plaintiff's principal would assist Defendant in the transition of Plaintiff's clients and existing business to Defendant, neither Section 1.7, nor any other part of the APA, conditions Defendant's payment obligations on receiving such assistance. Consequently, the Court is satisfied that Defendant's position is without merit and that Defendant is obligated to make the required payments in connection with

the benefits book and commercial lines regardless of whether Plaintiff's principal aided it in earning those commissions.

The Court will now turn to how much, if any, compensation Plaintiff is entitled to receive in connection with the commercial lines. Plaintiff argues that, exclusive of interest, it is owed \$228,672.06. In support of its position, it relies on Trial Exhibits A-F, 13, 16 and 21. Defendant has not provided any evidence contesting that the amount represents 45% of the total commissions it earned in connection with the commercial lines during the relevant time frame, after deducting the \$50,000.00 it has already paid. However, Defendant has presented several purported defenses that it argues reduces, if not eliminates altogether, its liability in connection with the commercial lines.

First, Defendant argues that it is not liable for any commissions received in connection with the Wireless Vision account. Indeed, Schedule 1.2, which lists the assets excluded from the APA, provides that commissions earned in connection with Wireless Vision are to be excluded. Nevertheless, Plaintiff argues that the exclusion does not apply. However, Plaintiff has failed to present any evidence that this account was to be included despite the clear exclusion in Schedule 1.2. Accordingly, the Court is satisfied that the commissions earned in connection with Wireless Vision should be excluded. Forty-five percent (45%) of the total commissions earned from the Wireless Vision account for the relevant time frame is \$65,993.69. Accordingly, after deducting that amount from the \$228,672.06 originally owed in connection with the commercial lines, the adjusted amount owed for the commercial lines is \$162,678.37.

Next, Defendant maintains that it is not liable for any part of the commissions it earned in connection with the Hartford Accounts. Specifically, Defendant avers that a

month after closing it was required to enter into a contract with Hartford to sell its accounts because Plaintiff had previously breached its agreement with Hartford. Therefore, Defendant argues that it did not receive those accounts by operation of the APA and should not be required to pay commissions to Plaintiff in connection with the Hartford Accounts. Specifically, Defendant argues that requiring it to pay commissions to Plaintiff on the Hartford Account would operate to require it to pay twice for those accounts, and that such a result would be unjust.

In response, Plaintiff argues that under Section 7 of the APA, Defendant was required to notify it of Hartford's allegation that it had breached their contract. Further, Plaintiff maintains that Section 7.2 required Defendant to notify it of any claim and allow it to defend the claim. Indeed, Section 7.2 required Defendant to notify Plaintiff of the Hartford's claim and allow Plaintiff the opportunity to defend the claim. (See APA, Trial Exhibit 1, at Section 7.2) In this matter, it appears undisputed that Defendant did not notify Plaintiff of Hartford's claim. Rather, Defendant settled the claim by entering into a separate contract with Hartford. That course of action operated as a breach of the terms of the APA. While the Court recognizes that Defendant will be forced to pay for the Hartford accounts twice if it is required to pay Plaintiff commissions on that account, that result was caused by Defendant's own breach of the APA and Plaintiff should not be prejudiced by Defendant's breach. The APA provided a mechanism for Plaintiff to resolve the dispute with Hartford and thereby avoid Defendant paying twice for the account. However, Defendant elected to pursue a course of action that operated as a breach of the APA. It was that choice that ultimately has caused it to pay for the

Hartford accounts twice. Consequently, Defendant's contention that the Hartford accounts should be excluded is without merit.

Defendant also argues that it is not required to pay commissions in connection with the Asmar account. However, Defendant has not pointed to any evidence supporting that position. Moreover, based on the record it appears that Defendant's objection with regards to the Asmar account relates to a debt that Plaintiff allegedly owed in connection with that account. As discussed above, Section 7.2 of the APA required Defendant to notify Plaintiff of any claims. Defendant has not presented any evidence that such notice was given. As a result, the Court is convinced that Defendant has failed to establish that it is not required to pay commissions in connection with that account.

Finally, Defendant maintains that it does not need to pay commissions on accounts managed by individuals retained as independent contractors or lapsed accounts. However, the clear and unambiguous language of the APA provides that Defendant is required to pay commissions on the accounts listed in the commercial line book. (See APA, Trial Exhibit 1, at Section 1.7) The accounts in question were listed in the commercial lines book and Defendant has not identified any exception to Section 1.7 that operates to relieve it of its obligation to pay commissions in connection with the accounts. As a result, Defendant's position is without merit.

Turning to the benefits book, Plaintiff argues that it is entitled to \$112,000.00 in connection with the benefits book. Specifically, Plaintiff avers that Defendant did not provide the required reports to it and that as a result this Court must estimate the amount owed. However, as discussed above, there is no requirement in the APA

requiring Defendant to provide reports to Plaintiff. As a result, Plaintiff's position is without merit. Further, as Plaintiff has failed to point to any evidence establishing that any commissions are owed in connection with the benefits book, its request for damages in connection with the benefits book is denied.

3) Phone Bill

Plaintiff argues that Defendant should be required to pay it \$10,000.00 for a phone bill. Plaintiff avers that its attorney paid the phone bill in question. However, Plaintiff has not presented any evidence that it ultimately repaid its attorney the funds in question or that Defendant has an obligation to repay the funds. Accordingly, Plaintiff has failed to establish that Defendant is liable to it for the phone bill in question.

4) Interest and Attorney Fees

A. *Interest*

In the Complaint, Plaintiff requests pre-complaint interest pursuant to the terms of the parties' promissory note. The parties' promissory note is incorporated into the APA. Pursuant to the promissory note, Defendant was obligated to pay Plaintiff \$200,000.00 for "value received". Upon reviewing the APA, it is clear that the \$200,000.00 referenced in the promissory note is the potential \$200,000.00 that was to be paid for the personal lines, absent any adjustments. As discussed above, Plaintiff has failed to establish that any amounts are owed in connection with the personal lines. Therefore, Plaintiff has also failed to prove that any potential interest owing on those payments is owed. As a result, Plaintiff's request for pre-complaint interest is without merit.

B. Attorney Fees

In this case, both parties have requested that they be awarded attorney fees pursuant to Section 8.11 of the APA. Section 8.11 of the APA provides, in part:

In the event any suit or other legal proceeding is brought for the enforcement of any of the provisions of this Agreement, the parties agree that the prevailing party or parties shall be entitled to recover from the other party or parties upon final judgment on the merits reasonable attorney fees....

(See APA, Trial Exhibit 1, at Section 8.11)

Accordingly, the parties in this case are only entitled to recover attorney fees if they are the prevailing party. In this matter, the Court is convinced that neither side can be considered to have prevailed. In its proposed conclusions of law and findings of fact, Plaintiff requests that the Court award it \$228,672.06 in connection with the commercial lines, \$200,000.00 in connection with the personnel lines, \$112,000.00 in relation to the benefits book and \$10,000.00 with respect to the phone bill, for a total of \$550,672.06.

Additionally, Plaintiff seeks to recover the following interest: \$109,603.93 for the commercial lines, \$85,000.00 in connection with the personal lines, \$47,600.00 related to the benefits book and \$4,700.00 with respect to the phone bill. Accordingly, the total amount of interest sought is \$246,903.93. Therefore, the aggregate amount Plaintiff seeks to recover is \$797,575.99.

For the reasons set forth above, the Court has determined that Plaintiff is not entitled to recover the \$65,993.69 it has requested in connection with the Wireless Vision Account. Further, Plaintiff is not entitled to recover the \$285,000.00 it has requested for the personal lines, the \$159,600.00 it has requested in connection with the benefits book or the \$14,700.00 it seeks for the phone bill. Moreover, the Court has

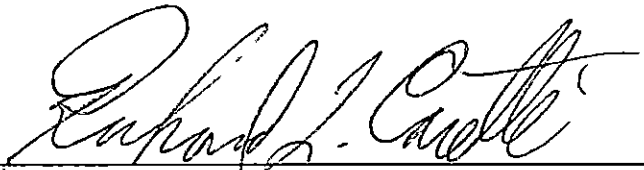
determined that Plaintiff is not entitled to the requested \$109,603.93 in 6% pre-complaint interest in conjunction with the commercial lines. Once the \$285,000.00 Plaintiff has requested in connection with personal lines, the \$159,600.00 sought in connection with the benefits book, the \$14,700.00 requested for the phone book, the \$65,993.69 for the Wireless Vision Account, and the pre-complaint interest for the commercial lines in the amount of \$109,603.93 is deducted from Plaintiff's requested damages of \$797,575.99, Plaintiff recovery in this case is \$162,678.37, plus statutory interest pursuant to MCL 600.6013 from the date the complaint in this matter was filed. That amount represents a low percentage of what Plaintiff was requesting in this case. Consequently, Plaintiff cannot be viewed as having prevailed in this case.

Similarly, Defendant has maintained that it is not liable for any amount to Plaintiff. However, the Court is persuaded the Defendant in fact owes \$162,678.37, plus statutory interest, to Plaintiff. Accordingly, Defendant has not prevailed in this case. For these reasons, neither side has achieved a result close to what they sought in this case. As a result, neither side can be viewed as "prevailing." Therefore, neither side is entitled to have the other pay its attorney fees.

Conclusion

Based upon the reasons set forth above, the Court finds that Plaintiff is entitled to \$162,678.37 in connection with its claims, plus statutory interest. In compliance with MCR 2.602(A)(3), the Court states this Opinion and Order CLOSES this matter.

IT IS SO ORDERED.



RICHARD L. CARETTI
Circuit Court Judge

Dated: February 28, 2018

cc: Jonathan B. Frank, Attorney for Plaintiff
Vincent P. Hoyumpa, Attorney for Defendant
Avis Choulagh, Attorney for Defendant