STATE OF MICHIGAN

SIXTEENTH JUDICIAL CIRCUIT COURT

BOSQUETT & COMPANY,

Plaintiff,

vs. Case No. 2016-218-CB

STERLING BENEFITS, LLC,

Defendant.
_____/

OPINION AND ORDER

This matter is before the Court in connection with Plaintiff's motion for a new trial and/or to amend the judgment entered in this matter pursuant to MCR 2.611(A)(2)(c).

I. Procedural History

On March 2, 2018, the Court entered its Opinion and Order in which it made its findings of fact and conclusions of law following the bench trial held in connection with this matter. On March 8, 2018, Plaintiff filed its instant motion for a new trial and/or to amend the judgment entered in this matter pursuant to MCR 2.611(A)(2)(c). On April 18, 2018, Defendant filed its response. On April 20, 2018, Plaintiff filed a reply brief in support of its motion. On August 2, 2018, the Court held a hearing in connection with Plaintiff's motion and took the matter under advisement.

II. Analysis

As a preliminary matter, while Plaintiff's motion requests a new trial, it does not provide any basis for such relief. Rather, the motion identifies reasons Plaintiff maintains the Court should amend its findings of fact and conclusions of law. As a result, Plaintiff's request for a new trial must be denied.

Turning to Plaintiff's request to amend, Plaintiff challenges four aspects of the Court's March 2, 2018 Opinion and Order. The Court will address each issue in turn.

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 was the adjusted purchase price? With respect to adjustment, 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).)

Accordingly, Plaintiff was entitled to some sort of payment so long as 70% of the Benchmark was achieved for each of the four payment periods. Specifically, it is undisputed that payment would be owed if the commissions obtained for any of the 6 month periods exceeded $110,335.31 (70% of the $315,243.75 Benchmark divided by 2 to take into account the 6 month payment term).

As a preliminary matter, Plaintiff once again argues that it is Defendant's burden to establish that the $110,335.31 figure was not achieved in any of the relevant 6 month periods. However, for the reasons set forth in the Mach 2, 2017 Opinion and Order, the

Court is convinced that Plaintiff's position is without merit. Nevertheless, even if Plaintiff were correct that it was Defendant's burden, Defendant has provided sufficient evidence to satisfy that burden. As to the first 6 month period (9/9/09 thru 3/1/10), Defendant's production reports evidences that only $92,532.51 in commissions were generated. (*See* Trial Exhibits 6 & 7.) Accordingly, that report evidences that the target figure was not achieved for the first 6 month period. In addition, Defendant's production report for the final period (3/1/11 until 8/31/11), evidences that the total commissions received were $107,336.33, which is also less than the $110,335.31 target figure. (*See* Trial Exhibits 8 and 9.)

As to the remaining two periods, Defendant's production reports evidence that Defendant received $117,969.80 for the second 6 month period (3/1/10 thru 8/31/10) and $111,776.70 for the third 6 month period (from 9/1/10 thru 2/28/11). While those amounts are above the $110,335.31 target figure that would trigger a payment obligation, Defendant presented evidence that the amounts listed in the production reports included accounts not within the APA's purview. Specifically, the production reports contain accounts not listed within the book of business sold to Defendant. (*Compare* Trial Exhibits 2, 3, 4 and 5 to Trial Exhibit G.) Once those amounts are deducted from the totals referenced in the production reports, the total commissions for the two periods in question are $103,347.26 (for the period between 3/1/10 and 8/31/10) and $103,802.13 (for the period from 9/1/10 to 2/28/11). Those amounts are less than the target figure of $110,335.31. As a result, no payments are due in connection with the personal lines and Plaintiff's position is without merit.

2) Commercial Lines

Next, Plaintiff argues that Defendant is liable for a percentage of the commissions it received in connection with the Wireless Vision account. 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 ¶1.7)

With respect to the Wireless Vision account, Schedule 1.2, which lists the assets excluded from the APA, provides, in pertinent part:

Schedule 1.2 Excluded Assets

Wireless Vision, LLC

> Commissions associated with this account, if consummated, shall be assigned to Patrick F. Parke, who is currently employed by Buyer. However, Buyer will be responsible for delinquent amounts owed to Auto Owners Insurance, to a maximum amount of Nine Thousand Dollars ($9,000). An amount paid in excess of the maximum amount shall be offset against payments to the Company.

(*See* APA, Trial Exhibit 1.)

A contract must be interpreted according to its plain and ordinary meaning. *Woodington v Shokoohi*, 288 Mich App 352, 373-374; 792 NW2d 63 (2010). The APA does not provide that the Wireless Vision account was to be excluded in its entirety. Rather, Schedule 1.2 merely provides that Defendant would be liable for up to $9,000.00 in amounts due to Auto Owners, but not any amounts of over $9,000.00.

Further, the conclusion that Wireless Vision was not excluded in its entirety is consistent with the fact that the other assets listed in Schedule 1.2 were not transferred to Defendant, whereas it is undisputed that the Wireless Vision account was transferred to Defendant as part of the APA. For these reasons, the Court is convinced that the Wireless Vision account was not excluded under the APA and that Defendant is liable for the commissions owed pursuant to ¶1.7 of the APA. 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 adding that amount to the $162,678.37 owed in connection with other commercial lines accounts, Defendant owes $228,672.06 in connection with the commercial lines book.

3) Pre-Judgment Interest

In its motion, Plaintiff argues that it is entitled to pre-judgment interest on the amounts it has recovered in connection with the commercial Lines.

> Michigan has long recognized the common-law doctrine of awarding interest as an element of damages. The doctrine recognizes that money has a "use value" and interest is a legitimate element of damages used to compensate the prevailing party for the lost use of its funds. Furthermore, the decision whether to award interest as an element of damages is not dependent upon a contractual promise to pay interest.... [T]he pivotal factor in awarding such interest is whether it is necessary to allow full compensation.
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> *Gordon Sel-Way, Inc v. Spence Bros, Inc*, 438 Mich 488, 499; 475 NW2d 704 (1991) (citations omitted).

In *Woodland Paving Co, LLC v Ledford*, unpublished per curiam decision of the Court of Appeals, decided April 21, 2000 (Docket No. 212442), the Michigan Court of Appeals noted that "[w]hether to award precomplaint interest as an element of damages is a discretionary decision to made by the trier of fact." *Id.* at 5. In *Woodland*, the trial

court denied plaintiff's request for prejudgment interest based on the fact that plaintiff had delayed in filing suit for two years after the alleged breach of contract. The Court of Appeals affirmed that decision. Specifically, the Court of Appeals held "we find no abuse of discretion in denial of precomplaint interest as an element of damages, particularly when plaintiff delayed in filing suit for almost two years." *Id.*

In this matter, as in *Woodland*, Plaintiff delayed in bringing its claims. The APA was executed in 2009 and required that the payments for the commercial Lines be paid 90 days after August 31, 2012. (*See* APA, Trial Exhibit 1, at ¶1.7). It is undisputed that no payments were made for the commercial Lines after the APA was executed. Plaintiff's complaint in this matter was not filed until January 26, 2016, over three years after the payments were due. While this Court recognizes that prejudgment interest is generally awarded to allow a plaintiff a full recovery, such an award in this case would have the effect of awarding Plaintiff for delaying the pursuit its rights. The Court is not persuaded that such behavior should be awarded. As a result, Plaintiff's request for precomplaint interest will be denied.

4) Attorney Fees

In this case, Plaintiff requests that it be awarded attorney fees pursuant to ¶8.11 of the APA. Paragraph 8.11 of the APA provides, in part:

> In the event any suit of 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....

A contract may allow the prevailing party in a dispute to recover reasonable attorneys' fees. *Fleet Business Credit, LLC v. Krapohl Ford Lincoln Mercury Co.*, 274

Mich App 584, 589; 735 NW2d 644 (2007). In this matter, the APA provides that the parties are only entitled to recover attorney fees if they are the prevailing party. In its motion, Plaintiff argues that it has "prevailed" in this matter because it has improved its position. In support of its argument, Plaintiff relies on MCR 2.625(B)(2), which provides:

> Actions with Several Issues of Counts. In an action involving several issues or counts that state different causes of action or different defenses, the party prevailing on each issue or count may be allowed costs for that issue or count. If there is a single cause of action alleged, the party who prevails on the entire record is deemed the prevailing party.

MCR 2.625(B) deals with how a court determines who is the prevailing party for the purpose of awarding taxable costs, not awarding attorney fees provided for pursuant to a contract. Accordingly, MCR 2.625(B) is not determinative.

The Court of Appeals, in *Mitchell v Dahlberg*, 215 Mich App 718; 547 NW2d 74 (1996), addressed how to determine whether a party has "prevailed" in connection with a contractual provision awarding attorney fees to the prevailing party. In *Mitchell*, the parties' contract provided: "In any action to enforce any right under the Purchase Contract, the prevailing party may recover all costs and expenses incurred in connection with the action, including reasonable attorney fees." *Id.* at 729. In that matter, the plaintiffs maintained that they had prevailed because they had succeeded on their counterclaim for judgment on an arbitration award and defendants were denied their claims for foreclosure and acceleration. However, the trial court determined that neither party had prevailed in full and that as a result neither was entitled to attorney fees. On appeal, the Court of Appeals recognized that: "Whether to award attorney fees is within the trial court's discretion, and we will not find an abuse of that discretion unless the 'result so violates fact and logic that it constitutes perversity of will, defiance

of judgment or the exercise of passion or bias.'" *Id.*, quoting *Wojas v Rostati*, 182 Mich App 477, 480; 452 NW2d 864 (1990). In affirming the trial court's decision, the Court of Appeals held that the court did not err in denying plaintiffs' request for attorney fees where neither side prevailed in full. *Id.*

In this matter, neither side has prevailed in full. Indeed, while Plaintiff succeeded in recovering the amount it contended was owed in connection with the commercial lines, it did not prevail on its claim in connection with the personal lines, benefits book, phone bill or prejudgment interest. Consequently, for these reasons the Court is convinced that Plaintiff has not prevailed in this matter and is therefore not entitled to recover its attorney fees.

Conclusion

Based upon the reasons set forth above, Plaintiff's motion for a new trial is DENIED. Moreover, Plaintiff's motion to amend the Court's findings of fact and conclusions of law is GRANTED, IN PART, and DENIED, IN PART. Specifically, Plaintiff's request to amend the Court's findings of fact and conclusions of law with respect to the personal lines, prejudgment interest and attorney fees is DENIED. Defendant's request to amend the Court's findings of fact and conclusions of law with respect to the commercial lines is GRANTED to the extent that Defendant is entitled to be paid for the commissions earned in connection with the Wireless Vision account. Specifically, Plaintiff is entitled to recover $65,993.69 in connection with that account. As a result, the Court hereby amends the judgment in this case to $228,672.06 ($162,678.37 Original Judgment Amount + $65,993.69 owed in connection with the

Wireless Vision account), plus statutory interest. In compliance with MCR 2.602(A)(3), the Court states this matter REMAINS CLOSED.

IT IS SO ORDERED.

RICHARD L. CARETTI
Circuit Court Judge

Dated: September 6, 2018

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