

STATE OF MAINE
COURT
CUMBERLAND, ss

BUSINESS AND CONSUMER

Location: Portland
Docket No.: BCD-CV-13-82



JOHN E. MCDONALD, JR.)
)
) Plaintiff,)
)
) v.)
)
) CETIS, INC)
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) Defendant.)
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**FINDINGS AND ORDER FOR ENTRY
OF JUDGMENT**

I. INTRODUCTION

This matter came on for trial without a jury on August 5, 2014. The parties filed post-trial submissions, the last of which was received by the Court on October 14, 2014. The Court has reviewed the evidence admitted at trial and received pursuant to the Court's Order RE: Post-Trial Proceedings dated August 7, 2014. The Court has considered the parties' written arguments, and issues the following findings and Order for entry of Judgment.

II. PROCEDURAL BACKGROUND

The parties have referred to the two legal disputes between the parties as "McDonald I" and "McDonald II." The Court will do the same. McDonald I involved a claim brought by John E. McDonald against Scitec, Inc. (Cetis' former name) in March of 2010. It initially involved a claim that Scitec owed Mr. McDonald commissions involving Teledex, a company that had been acquired by Scitec. All claims regarding

Teledex were resolved in favor of Scitec before trial. Claims brought in an Amended Complaint included an allegation that Scitec owed Mr. McDonald commissions for sales made by Scitec to Avaya. The claim arose when Scitec, upon being sued regarding Teledex, terminated its commission agreement with Mr. McDonald regarding Avaya sales. That claim went to a jury trial before the Business and Consumer Court, with a jury finding in Scitec's favor. The Business Court deferred ruling on other issues until after the jury trial, and the verdict and other rulings were appealed.

In May of 2013, the Maine Supreme Court vacated the jury verdict and held that the commission agreement between the parties required Scitec to pay commissions regarding Avaya sales even after the commission agreement was terminated. Cetis conceded in its Post-Trial Brief that the Law Court's opinion "decided Mr. McDonald's breach of contract claim." (Br. of Cetis 2.) However, on June 20, 2013 the Law Court issued an amended decision, as it had not addressed Mr. McDonald's claim that he was entitled to relief under the Illinois Sales Representative Act ("ISRA"), including an award of exemplary damages and counsel fees. The Law Court sent the case back to the Business and Consumer Court to determine those issues, and on September 20, 2013 Justice Nivison held that ISRA did apply to Mr. McDonald's claims against Scitec in that he was a "sales representative" within the meaning of that statute. After further briefing, on January 7, 2014, the court awarded counsel fees, but declined to award exemplary damages.¹ In this decision, Justice Nivison noted that courts who have interpreted ISRA have concluded that "(n)o automatic award of exemplary damages is granted for every violation of the Act." *Installco Inc. v. Whiting Corp.*, 784 N.E.2d 312, 320 (Ill. App. Ct. 2002) (citing *Maher & Assocs., Inc. v. Quality Cabinets*, 640 N.E.2d 1000 (Ill. App. Ct.

¹ Neither party appealed Justice Nivison's post-remand decisions.

1994)). The court found that the standard required “willful or wanton conduct or vexatious refusal to pay” (*Zavell & Assoc., Inc. v. CCA Indus., Inc.* 628 N.E.2d 1050, 1052), or a “finding of culpability that exceeds bad faith.” *Maher*, 640 N.Ed.2d at 1008. The court ruled it was not able to make such a finding about Scitec’s conduct towards Mr. McDonald.

McDonald II began with the filing of a two-count Complaint alleging that Cetis breached its commission agreement with Mr. McDonald for failing to pay post-trial commissions from December 5, 2011 forward. In addition, the Complaint brought a claim for exemplary damages and counsel fees under ISRA. McDonald II was filed on October 24, 2013, approximately three months before Justice Nivison issued the now-final order regarding exemplary damages and counsel fees in McDonald I, and a day before the post-trial and post-Law Court decision commissions were paid.²

III. FINDINGS AND CONCLUSIONS

Count I of the Complaint alleges breach of contract. The claim is that Cetis’ failure to pay post-trial commissions immediately after the Law Court’s decision in May of 2013 constituted a breach of the commission agreement. The agreement is clearly a contract, and as Cetis has conceded in its post-trial argument, the Law Court’s decision in McDonald I resolved the breach of contract claim in that case. That decision also settled the issue of Cetis’ ongoing obligation to pay commissions on Avaya sales. Therefore, if Cetis did not make these payments, it was in breach of its contract to Mr. McDonald. The evidence is clear that Cetis has acknowledged its obligation to pay the commissions as of the date of the Law Court’s decision, and it is also clear that Cetis did not come current

² The parties seem to have worked out an acceptable arrangement for payment of commissions owed since October 23, 2013.

with its obligation until months after the Law Court's decision became final, and just one day before the current lawsuit was filed.

Count II, however, is the heart of Mr. McDonald's claim, as ISRA imposes time requirements for when commissions must be paid after termination of a commission agreement, and it and provides for certain remedies (attorneys fees, costs, and under certain circumstances, exemplary damages) when the time requirements are not met. Under ISRA any commissions due at the time a commissions contract is terminated must be paid within thirteen (13) days of the date on which commissions come due under the agreement.³ The Court will deal first with the issue of exemplary damages, followed by a consideration of Plaintiff's demand for an award of counsel fees.

a. Exemplary Damages

It has been noted that ISRA "as written, requires an award of exemplary damages in all instances where a principal fails to pay commissions due within 13 days of termination of the representation agreement." Leonard A. Nelson, *Punitive Damages Under the Illinois Sales Representative Act*, 86 Ill. B. J. 622 (1998). However, courts in Illinois and in other jurisdictions (including this Court) that have had occasion to apply ISRA have required much more than a simple violation of the statute's time requirements in order to award exemplary damages.

Mr. McDonald argues that Cetus had no justification in delaying payment of the post-trial commissions once the Law Court determined that Cetus' obligation to pay commissions on Avaya sales survived the termination of their agreement. Cetus asserts that it had no obligation to pay any commissions until January 28, 2014 at the earliest,

³ The Act is not a new basis for liability. A claim under the Act "is parasitic on (a) breach of contract claim" which requires a party to establish first that it is entitled to commissions under a valid contract. *AA Associates, Inc. v. Coni-Seal, Inc.*, 550 F3d. 605, 609 (7th Cir. 2008).

which was when the McDonald I judgment became final.⁴ Cetis further argues that Mr. McDonald could have, but did not, obtain entry of a final judgment with respect to fewer claims pursuant to Rule 54(b)(1) and therefore by the time the judgment was final on the issue of the applicability of ISRA, Cetis had already paid the commissions.

Mr. McDonald also argues that Cetis' alternative defense --that the parties were working on a global settlement -- is not supported by the trial evidence, and that Cetis' delay in payment was actually motivated by animus or ill will toward Mr. McDonald such that an order for exemplary damages is required under ISRA.

Justice Nivison in his January 2014 order denying Mr. McDonald's demand for exemplary damages stated that the parties' dispute in that case was "a legitimate legal dispute over the duration of a contract, which dispute was ultimately resolved by the Law Court." At the time the court came to that conclusion, McDonald II had already been filed, and the post-trial commissions owed under McDonald II had been paid. In addition, it is important to note that it was not until September 20, 2013 that the court found that Mr. McDonald was a "sales representative" within the meaning of ISRA such that he could prevail on a claim for exemplary damages in either McDonald I or McDonald II -- depending on what he could prove about Cetis' conduct. The Plaintiff does not seem to be arguing here that Cetis did anything constituting bad faith by making its argument to the court that ISRA did not apply. Rather, he seems to argue that despite the fact that the court did not make that finding until September of 2013, Cetis had an obligation no later than the amended decision from the Law Court in June of 2013 to pay the post-trial commissions in full.

⁴ Justice Nivison ruled on September 20, 2013 that ISRA applied to the parties' agreement, but did not rule on the Mr. McDonald's demand for exemplary damages and counsel fees until January 7, 2014.

It is clear to the Court from the procedural history of this case, as Justice Nivison found in McDonald I, that at the time the Law Court issued its spring 2013 decisions, there were still legitimate, unresolved legal disputes between the parties, including whether ISRA even applied to Mr. McDonald. Mr. McDonald cannot really argue otherwise. However, that is not the same thing as saying that Cetus had no legal obligation to pay any outstanding commissions until the judgment in McDonald became final in January of 2014. Importantly, Cetus has conceded that the Law Court's spring 2013 decisions resolved Mr. McDonald's breach of contract claim. In addition, Cetus was on notice, as of September 20, 2013, that Mr. McDonald was a sales representative under ISRA, and was entitled as a matter of law to argue pursuant to it that he was entitled to exemplary damages.⁵

The court in McDonald II has been asked to consider Cetus' conduct since the Law Court decision in the spring of 2013 and to find it to be vexatious. The Court cannot do that, however, without giving some weight to the legitimate legal disputes that remained unresolved during much of the time between the Law Court decisions, and when the payments were made.

In addition, the Court finds that there were attempts to come to a global settlement of the parties' dispute. Plaintiff has argued throughout McDonald II that any such discussions are irrelevant to the issues the Court must decide on the issue of exemplary damages. First, he argues that no settlement offers were ever made by Cetus, and even if

⁵ The Court rejects Cetus' argument that issue preclusion works in this case to prevent recovery of exemplary damages by Mr. McDonald. The court's January 2014 decision focused upon Scitec's decision to terminate the agreement and refusal to pay commissions on Avaya sales after termination. And as noted, it considered the dispute between the parties to be a "legitimate legal dispute over the duration of a contract, which dispute was ultimately resolved by the Law Court." Pg. 3 of January 7, 2014 Decision and Order. In this case, the Court focuses on the failure to pay post-trial commissions once the Law Court issued its spring 2013 decisions.

there were “discussions” that they were so insubstantial that they do not provide a defense for Cetis on the issue of exemplary damages. In addition, Plaintiff seems also to argue that Cetis’ position regarding these discussions, such as they were, should not be given any weight because the parties were still litigating.

The Court finds at the outset that there were in fact settlement discussions which were actually initiated by Plaintiff’s counsel. The Court has not been made privy to the details of the discussions, but it is undeniable that they occurred, even if they were ultimately unsuccessful. The Court would note that both parties would likely be motivated to settle, particularly Cetis, since after the Law Court issued its spring 2013 decisions, Cetis remains indefinitely obligated to pay commission to Mr. McDonald for Avaya sales. While it is clear that Dr. Sun is not a fan of Mr. McDonald, it is equally clear from Mr. McDonald’s trial testimony that he has no positive regard for Dr. Sun. Years of high-conflict, expensive litigation likely have played a large role in their mutual dislike. In addition, the Court does not find persuasive Plaintiff’s argument that settlement discussions are unlikely to occur, or to be meaningful, if parties are actively involved in litigation. The Court is confident that counsel for both parties have successfully and simultaneously engaged in these different strategies on many occasions in their legal practices.

The parties have spent much effort debating about the extent of the settlement discussions. In addition, Plaintiff claims they are not relevant at all, while Cetis essentially asserts their existence as a defense. Plaintiff has insisted throughout that Cetis waived attorney-client privilege by asserting this defense, while Cetis focuses on the fact

that there were, as the Court has found, settlement discussions, and that they were initiated by Plaintiff's counsel.

A review of the correspondence between the parties, including emails, indicates that these discussions were not continuous throughout the time period from when they were initiated by Mr. McDonald's counsel (the day the case was orally argued before the Law Court) and the time the commission were paid in October of 2013. However, the Court disagrees with Plaintiff's characterization of these discussions as insubstantial and irrelevant. The parties agree there was a discussion at the oral argument in April of 2013 (Def.'s Ex. 46), and an early June 2013 email confirms that Mr. McDonald's attorney was requesting "commissionable sales" information from Cetus in hopes of reaching a negotiated settlement regarding Plaintiff's rights to "future commission payments." (Def.'s Ex. 47.) Another email from Cetus' counsel to his client dated July 2, 2013 references Plaintiff's interest in more financial information for that same purpose. (Def.'s Ex. 48.) It appears that the next steps in the litigation, namely the briefing and arguments regarding the applicability of ISRA, became the priorities of both parties, perhaps to the detriment of negotiation, with Plaintiff's Reply Brief being filed on or about August 7, 2013. However, a week after the decision on ISRA's applicability was conveyed to Dr. Sun on September 23, 2013, the issue of settlement re-emerged. Plaintiff's counsel (according to Defendant's counsel) suggested "that you (Dr. Sun) and McDonald might want to think again about settling this dispute." (Def.'s Ex. 52.) The Court infers from this email from Cetus' counsel to Dr. Sun that at least from the point of view of Defendant's counsel, whatever negotiations that had occurred and which had failed could be revived only if *both* parties were willing to "think again." On October 3, 2013

Plaintiff's counsel sent a "Damages Analysis" for purposes of Cetus "buying out" Plaintiff's entitlement to future compensation. On October 7, 2013 Plaintiff's counsel made a demand for "commissions that have accrued since the trial in December 2011 to date (the "post-trial commissions"). However, Plaintiff's counsel in that same letter also demanded that if those post-trial commissions -- together with "interest and exemplary damages" were not resolved by October 15, 2013, that a new lawsuit would be filed. (Def.'s Ex. 54.) On October 22, 2013 Defendant's counsel informed his client that Plaintiff's client was unhappy with being told that Cetus intended, as of that date, to only pay past due commissions and keep current with the account. Plaintiff's counsel's unhappiness was attributed to his wanting "a settlement payment for all claims, including the fee and exemplary damage issue and a lump sum for future commissions." (Def.'s Ex. 54.) In other words, Plaintiff's position as of that date, at least as reported by Defendant's counsel and left essentially un-challenged in the trial record, was that Plaintiff's demand included not only past-due commissions, but also attorneys fees, exemplary damages, and a lump sum for future obligations. At least some of these issues, namely counsel fees and exemplary damages, were still awaiting resolution by Justice Nivison.

Neither party during the time periods when some discussions did occur -- at least up until October of 2013 -- seems to have clearly suggested to the other party that Cetus make a "partial" payment of the post-trial commissions while awaiting judicial resolution of the fee and exemplary damages issue, and perhaps further negotiation on a lump sum payment for future obligations. On that date, Plaintiff's counsel noted that a global settlement had failed, but that Cetus needed to make commission payments for post-trial commissions, and on an ongoing basis. The Court finds that both parties were free to

suggest such an interim solution, while reserving their rights on the judicially-unresolved issues of exemplary damages and counsel fees under McDonald I. On October 23, 2013 Cetus sent Plaintiff a check by overnight mail for post-trial commissions, and the parties agree that Cetus was current as of that date for all commissions owed. Plaintiff's Complaint was filed October 24, 2013.

The Court is unpersuaded, based upon its review of case law, that it should hold Cetus to a different standard under ISRA than was articulated by Justice Nivison in his January 7, 2014 decision. The Court further concludes based on the evidence presented, that Cetus' conduct did not constitute bad faith, much less "vexatious" refusal to pay. The Court cannot ignore the complex procedural posture of this case, including the demanding litigation efforts expended by both parties at the same time settlement discussions between the parties occurred, and ultimately failed. It also cannot ignore Justice Nivison's previous finding of January 7, 2014, there were legitimate legal disputes between the parties which required judicial determination. Finally, it cannot ignore the lack of clear demand from the Plaintiff for payment of just the post-trial commissions while the parties awaited judicial resolution of McDonald I, until just before the commissions were paid and this lawsuit was filed.

The Court therefore rejects Plaintiff's claim for exemplary damages under ISRA.

b. Counsel Fees

While the Court has rejected Plaintiff's claim for an award of exemplary damages, it would note again that Defendant has conceded that the Law Court's initial May, 2013 decision in McDonald I resolved the breach of contract claim in that case. In the Court's view, that decision also resolved the breach of contract claim in this case

(McDonald II) as well. That is, once the Law Court issued its decision, there could be no question but that Cetus had an obligation to pay post-trial commissions on Avaya sales, and commissions on an ongoing basis.

In addition, as noted above, neither party clearly excepted from their settlement discussions the issue of the payment of just the post-trial commissions, until just before they were paid. These could have been paid by Cetus while both parties reserved their rights to argue about the applicability of ISRA, Plaintiff's demand for exemplary damages and counsel fees, while also allowing the parties to conduct further negotiations on how Cetus might satisfy its future obligations to the Plaintiff. This fact works strongly against Cetus on the issue of counsel fees. Cetus' negotiations and litigation efforts from the Spring of 2013 forward, which the Court finds were conducted in good faith, did not absolve it of its obligations to pay the past and ongoing commissions. The Court rejects Cetus' argument that it could await final judgment on the applicability of ISRA (and the exemplary damages analysis) before it complied with its contractual obligations (Count I of this case). While the Court once again does not find that Cetus' pursuit of its arguments regarding ISRA (as well as its arguments on exemplary damages) displayed any bad faith, Cetus pursued those arguments at some risk to itself, namely the risk that ISRA would be found to apply. The risk could have been avoided by timely payment of the post-trial and ongoing commissions once the Spring 2013 decisions in McDonald I clearly established its legal duties.

The Court concludes that Plaintiff is entitled to an award of counsel fees, pursuant to ISRA, from the date the Law Court issued its decisions in McDonald I until at least the date the fees were paid. With respect to the fees incurred by the Plaintiff after the date the

commissions were paid, Plaintiff did not directly address the issue of whether fees incurred these fees should be subject to a different analysis than fees incurred before they were paid.⁶ Plaintiff therefore has twenty-one (21) days from the day of this decision to file an affidavit of counsel fees, and to present argument as to why any fees should be awarded for services provided after payments of the post-trial commissions were made in full. Defendant shall have fourteen (14) days to respond to Plaintiff's filings.

IV. CONCLUSION

Based on the foregoing the entry will be:

- 1). On Count I (Breach of Contract) Judgment shall be entered for Plaintiff.
- 2). On Count II (Violation of the Illinois Sales Representative Act), Judgment shall be entered for Plaintiff, and an award of counsel fees shall be made consistent with the directive above regarding further briefing on that issue. Plaintiff's demand for an award of exemplary damages is denied.
- 3). Plaintiff is entitled to his costs.

11/24/14
DATE

J. Michaels
BUSINESS AND CONSUMER COURT

Entered on the Docket: 11-24-14
Copies sent via Mail Electronically

⁶ Cetus addresses this issue on page 22 of its Post-Trial Brief.