2017 IL App (1st) 163322-U

FIRST DIVISION
November 27, 2017

No. 1-16-3322

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MALCOLM LAWRIE,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellant,	)	Cook County,
	)	
v.	)	No. 15 CH 3775
	)	
ABT ELECTRONICS, INC.,	)	Honorable
	)	Kathleen Pantle,
Defendant-Appellee.	)	Judge Presiding.

JUSTICE MIKVA delivered the judgment of the court.
Presiding Justice Pierce and Justice Harris concurred in the judgment.

O R D E R

¶ 1 *Held*: Dismissal of plaintiff's verified second amended class action complaint for statutory wage violations and breach of contract is affirmed because plaintiff could plead no set of facts showing that the parties manifested a mutual intent to be bound by a definition of "profit" that included manufacturer payments to defendant employer for purposes of calculating plaintiff's sales commissions.

¶ 2 Plaintiff Malcolm Lawrie appeals the dismissal of his verified second amended class action complaint against defendant Abt Electronics, Inc. (Abt) for violations of the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1, *et seq.* (West 2014)) and for common law breach of contract. The trial court dismissed the complaint pursuant to section 2-615 of the

Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)). On appeal, Mr. Lawrie argues that (1) he was not required to plead the existence of an oral agreement that explicitly included Special Performance Incentive Funds ("spiffs") in Abt's profit-based commission calculations in order to state a claim for violation of the Act or breach of contract; (2) the parties' disagreement about the definition of "profit" is not a proper basis for dismissal under section 2-615; and (3) the trial court erred by treating Abt's weekly sales reports as "past practices" that reflected the fact that there was no agreement to include spiffs in the profit calculation. For the reasons that follow, we affirm.

¶ 3 BACKGOUND

¶ 4 Mr. Lawrie alleged the following facts in his complaint which, for purpose of reviewing a dismissal under section 2-615, we take as true. *Bonhomme v. St. James*, 2012 IL 112393, ¶ 34. Abt is a family-owned, privately-held appliance and electronics store based in Glenview, Illinois. Mr. Lawrie worked at Abt as a salesperson from November of 2000 until August of 2012. Through the spring of 2010, he was a salesperson in the audio-visual department. For his last two-and-a-half years at Abt, he handled inbound telephone sales of Abt's products.

¶ 5 Mr. Lawrie was hired by Abt's owner, Bob Abt. Bob Abt's son, Billy Abt, was the store manager and told Mr. Lawrie—at the time Mr. Lawrie was considering accepting the salesperson position—that he "would be compensated by receiving a percentage of 'any profit that is made on the items' he sold." Mr. Lawrie accepted the position on those terms and the parties entered into an oral employment contract.

¶ 6 Mr. Lawrie pleaded that the term "profit" was not defined by the parties, and "as such, it must be given its ordinary meaning." He then cited one of five definitions of "profit" in the Merriam-Webster Online dictionary, which is "the excess of returns over expenditure in a

transaction or series of transactions; *especially*: the excess of the selling price of goods over their cost" (http://www.merriam-webster.com/dictionary/profit (last visited November 16, 2017)). Mr. Lawrie insisted that "[t]he oral contract entered into by Mr. Lawrie and Abt therefore called for him to receive commissions on the difference between the selling price of the goods he sold and their cost to Abt."

¶ 7 Mr. Lawrie alleged that he "understood from his conversation with the Abts at the time he entered into the oral contract, and from subsequent conversations with management, that his commissions would be paid based on the difference between the selling price of the goods he sold and their cost to Abt." This difference is important because it forms the total "profit" predicating the commissions that, according to Mr. Lawrie, Abt was supposed to pay him.

¶ 8 Mr. Lawrie's claim is based on failure to include the incentive payment from a manufacturer, or "spiff." Mr. Lawrie alleged that spiffs "are typically paid by the manufacturer directly to the salesperson to incentivize the salesperson to sell a particular item or brand." "However," he added, "Abt handles these manufacturer spiffs differently," by "receiv[ing] and keep[ing] all manufacturer spiffs," rather than "allowing them to be paid to individual sales people." Thus, Mr. Lawrie alleged, "Abt's calculation of its profits does not take into account the value of the manufacturer spiffs that Abt is retaining for itself."

¶ 9 To show the disparity between his actual commissions and what he alleged he ought to have been paid, Mr. Lawrie offered the following hypothetical in his complaint:

> "Abt might assign a refrigerator a commission rate of 5% of Abt's gross profit. If Abt paid $8,000 for the refrigerator and received and kept for itself a spiff from the manufacturer of $1,200, and the salesperson sold it for $10,000, then Abt's profit would be $3,200 ($2,000 plus $1,200).

> Rather than paying the sales person 5% of its actual profit of $3,200, however, Abt would ignore the manufacturer spiff of $1,200 that it retained for itself and pay the salesperson only on the $2,000.
>
> So, in the example above, the salesperson would be paid $100 (5% of $2,000) rather than the $160 he was actually owed under the terms of the oral contract, which called for him to be paid based on Abt's profit (5% of $3,200)."

¶ 10 Mr. Lawrie alleged that he "sold items on a daily basis for which Abt calculated his commission without taking into account its actual profit," alleging for instance that he "sold four LG kitchen appliances to a customer named Singer" totaling $6,000 on February 6, 2012. He stated that LG paid Abt a spiff of "approximately $600 for these sales," and that he earned a 5% commission on this sale. Having excluded the spiff from that profit calculation, however, he was "paid approximately $30 less on this sale than he was owed under his agreement with Abt." Mr. Lawrie estimated that he "averaged at least one commissionable sale per hour, or at least 25,000 commissionable sales" over his nearly 12-year tenure as a sales person at Abt.

¶ 11 Mr. Lawrie's complaint also alleged that "Abt provides salespeople with itemized weekly sales reports regarding their commissions," which "list the sales price of the items sold, the 'cost' to Abt, Abt's 'margin' (profit), and the salesperson's commission." He alleged that he was never informed "that Abt did not take the value of spiffs that it retained into account when calculating the 'margin' (profit)." Instead, "the weekly sales reports appeared to be and were always represented to Mr. Lawrie and the class members to be an accurate report of Abt's profit on the items sold."

¶ 12 Mr. Lawrie alleged that, beginning in 2007 or 2008, he overheard comments from another salesperson and he "began to have doubts" that Abt was basing its commission payments

on its "total profit" on an item sold, as he saw it. However, "it was not until after leaving Abt in 2012 that Mr. Lawrie consulted counsel who conducted an investigation on his behalf and determined that Abt had not been complying with its oral contract with Mr. Lawrie and the other salespeople." He alleged that "Abt's treatment of manufacturer spiffs is a standard practice that affects all Abt sales people in the same manner."

¶ 13 Mr. Lawrie filed his original class action complaint on March 5, 2015, and filed a motion for class certification on March 10, 2015. Abt moved to dismiss the original complaint under section 2-615. The trial court entered and continued Mr. Lawrie's motion for class certification and dismissed the complaint without prejudice on August 31, 2015, granting Mr. Lawrie leave to amend his complaint. He filed his first amended complaint on September 28, 2015. Abt attacked this amended complaint on the same basis and the trial court again dismissed it without prejudice. Mr. Lawrie filed the second amended complaint on April 18, 2016, containing one count alleging violations of the Act and another count for common law breach of contract. Abt again moved to dismiss under section 2-615. On November 16, 2016, the trial court dismissed Mr. Lawrie's second amended complaint with prejudice, finding it "apparent that no set of facts could be proved under the pleadings entitling plaintiffs to recovery." This appeal followed.

¶ 14 JURISDICTION

¶ 15 Mr. Lawrie timely filed his notice of appeal in this matter on December 15, 2016. That gives this court jurisdiction under Illinois Supreme Court Rules 301 and 303 governing appeals from final judgments entered by the trial court in civil cases. Ill. S. Ct. R. 301 (eff. Feb. 1, 1994); R. 303 (eff. Jan. 1, 2015).

¶ 16 ANALYSIS

¶ 17 The trial court dismissed Mr. Lawrie's second amended complaint under section 2-615 of

the Code (735 ILCS 5/2-615 (West 2014)). A section 2-615 motion to dismiss "challenges the legal sufficiency of the complaint." *Chicago City Day School v. Wade,* 297 Ill. App. 3d 465, 469 (1998). The inquiry is whether sufficient facts are contained in the pleadings which, if proved, would entitle a plaintiff to relief. *Id.* Our supreme court has articulated this inquiry as follows:

> "Because Illinois is a fact-pleading jurisdiction, a pleading must be both legally and factually sufficient. It must assert a legally recognized cause of action and it must plead facts which bring the particular case within that cause of action. * * * Thus, the question presented by a section 2-615 motion is whether the allegations of the complaint, when viewed in a light most favorable to the plaintiff, are sufficient to state a cause of action upon which relief can be granted." (Internal quotation marks omitted.) *Chandler v. Illinois Central Railroad Co.*, 207 Ill. 2d 331, 348 (2003).

¶ 18 Count I of Mr. Lawrie's complaint alleged breaches of an agreement under the Act and count II pled Abt's actions were in breach of a common law contract. Both claims alleged that Abt excluded spiffs in calculating Mr. Lawrie's—and similarly-situated Abt employees'—sales commissions. We address this motion to dismiss under a *de novo* standard of review. *Visvardis v. Ferleger*, 375 Ill. App. 3d 719, 724 (2007). Mr. Lawrie concedes that, if there is no agreement under the Act, there is also no oral contract.

¶ 19 An employment " 'agreement' is broader than a contract and requires only a manifestation of mutual assent on the part of two or more persons; parties may enter into an 'agreement' without the formalities and accompanying legal protections of a contract." *Zabinsky v. Gelber Group, Inc.*, 347 Ill. App. 3d 243, 249 (2004) (citing Restatement (Second) of Contracts § 3, Comment *a*, at 13 (1981)). The regulations implementing the Act state that

manifestations of mutual assent can be expressed by words or conduct, including past practice. 56 Ill. Adm. Code 300.450; *Schultze v. ABN AMRO, Inc.*, 2017 IL App (1st) 162140, ¶ 23.

¶ 20 On appeal, Mr. Lawrie first argues that the trial court erred by requiring him to allege facts showing that his oral compensation agreement with Abt—based on "any profit that is made on the items sold"—necessarily included the manufacturer spiffs in the calculation of "profit." Mr. Lawrie argues that the spiffs are "within the scope of all of Abt's profits, hence, pursuant to the employment agreement, Abt is obliged to include them in commission calculations."

¶ 21 The trial court correctly noted that Mr. Lawrie alleged no facts in his complaint to show that the parties used or contemplated his dictionary definition of "profit," or any definition of "profit" that included spiffs, when he was hired. See *Visvardis*, 375 Ill. App. 3d at 724. As we held in *Visvardis*, a court "must take as true all well-pled allegations of fact," but not "conclusions of law and conclusory allegations not supported by specific facts." *Id.* Mr. Lawrie freely admits that the term "profit" was not defined in the oral agreement with Abt. He cannot now state a claim binding Abt to a "profit" definition that he believes *should have been* in its owners' minds at the time they hired him.

¶ 22 As the trial court properly pointed out, the definition of "profit" cited by Mr. Lawrie is not the only possible definition. Indeed, the definition in the second amended complaint is one of five definitions in the Merriam-Webster online dictionary. Mr. Lawrie gives no reason why this definition ought to bind the parties instead of the other four in the online entry. Nor does he state why it is better than the definition Abt relied on in the course of its commission calculations, with profits as the difference between the price at which it purchased the product and the price at which it sold the product, without factoring the spiffs it received from the manufacturer. Mr. Lawrie's insistence on his preferred definition in the face of this ambiguity is conclusory

pleading unsupported by specific facts. See *Visvardis*, 375 Ill. App. 3d at 724. The second amended complaint failed to allege that the parties agreed to define profits in the manner Mr. Lawrie claims they should have been defined or that this definition is the only possible way to define profit.

¶ 23 Mr. Lawrie's second argument is a variation on the first. He claims that a section 2-615 dismissal was inappropriate because the difference in the parties' definitions of profit is a factual issue to be resolved "through discovery and trial." Mr. Lawrie is correct in that he was under no evidentiary burden to survive a section 2-615 challenge. However, that does not alleviate his pleading burden to allege sufficient facts showing a "manifestation of mutual assent" between the parties in order to state a claim under the Act for violation of an employment agreement. 56 Ill. Adm. Code 300.450 (defining "agreement" as "the manifestation of mutual assent on the part of two or more persons"). As we noted in *Schultze*, 2017 IL App (1st) 162140, ¶ 23, a plaintiff alleging employment "agreement" violations need not establish the "formalities and accompanying legal protections of a contract," but he is "required to demonstrate facts displaying mutual assent to terms". Mr. Lawrie failed to allege any facts that demonstrated that the parties mutually assented to a construction of the term "profit" that included the spiffs for purposes of calculating commissions.

¶ 24 In his final argument, Mr. Lawrie attacks the trial court's use of the weekly sales reports to confirm the terms of the oral agreement as excluding spiffs from profits. As Mr. Lawrie points out, an agreement under the Act can be exposed by words or conduct, including past practices. Mr. Lawrie could point to no words that evinced Abt's intent to be bound by his definition of "profit," so the trial court properly also examined conduct as a basis for demonstrating what the parties meant by "profit." The parties' conduct, through Mr. Lawrie's nearly 12 years of

employment with Abt, demonstrated that Abt did not understand its profit to include spiffs. The trial court properly looked to weekly sales reports to demonstrate that there was no past practice of including spiffs in the calculation of profit. Contrary to Mr. Lawrie's claim that past practice provides "at best, an affirmative defense" of *laches* or an acquiescence defense, the weekly sales reports directly undercut any support for the conclusory allegation in the complaint that Abt intended to be bound by what Mr. Lawrie characterizes as an "ordinary meaning" of "profit" that included the spiffs.

¶ 25 Rather than accepting that the weekly sales reports demonstrate a consistent practice of excluding spiffs as evidence that Abt defined profit in a manner that excluded spiffs, in his complaint, Mr. Lawrie tried to use the weekly sales to support his claim. He did this by alleging that the weekly sales reports listed "the sales price of items sold, the 'cost' to Abt, Abt's 'margin' (profit), and the salesperson's commission" and that he was never informed that Abt did not include the spiffs in the calculation of "cost," implying that Abt was deceiving him in that "the weekly sales reports appeared to be and were always represented to Mr. Lawrie and the class members to be an accurate report of Abt's profit on the items sold." However, this can only represent deception if the profit necessarily included spiffs, which would only be the case if the parties had agreed on that definition or it was the only possible definition of profit. Mr. Lawrie was required to include specific factual allegations that Abt knew of and agreed to his definition of "profit." He cannot get there with no allegations that Abt had this knowledge and by instead suggesting that Abt spent 12 years concealing unlawful wage practices on a weekly basis. We agree with the trial court that the sales reports represent Abt's understanding of what profit meant and do not reflect an ongoing deception on their part.

¶ 26 Having found that no agreement existed under the Act that included the manufacturer

spiffs in the "profits" for commission calculations, we find that Mr. Lawrie's complaint likewise failed to state a claim for common law breach of contract. With no manifestation of mutual assent under the Act to a "profit" definition that included spiffs, Mr. Lawrie can plead no set of facts showing the existence of an enforceable oral contract that included the spiffs in the commission calculations. See *Zabinsky*, 347 Ill. App. 3d at 249. We affirm the section 2-615 dismissal of the common law breach of contract claim as well.

¶ 27 CONCLUSION

¶ 28 In sum, we affirm the trial court's dismissal of Mr. Lawrie's second amended complaint.

¶ 29 Affirmed.