[Cite as *Harman v. Am. Alliance of Creditor Attys.*, 2009-Ohio-4839.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Randall T. Harman,	:	
Plaintiff-Appellant,	:	
		No. 09AP-133
v.	:	(C.P.C. No. 07CVH06-8318)
American Alliance of Creditor Attorneys,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on September 10, 2009

Law Offices of Tony C. Merry, *LLC*, and *Tony C. Merry*, for appellant.

Carlile, *Patchen & Murphy LLP*, *Brigid E. Heid*, and *Elizabeth P. Kuhn*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

SADLER, J.

{¶1} Plaintiff-appellant, Randall T. Harman ("appellant"), appeals from a summary judgment that the Franklin County Court of Common Pleas granted in favor of defendant-appellee, American Alliance of Creditor Attorneys ("appellee"), on appellant's claim for breach of contract.

{¶2} Appellant is a salesman by trade and appellee is "engaged in the business of providing debt collection, processing and coordination through its network and system of licensed practicing attorneys." (Personal Service Contract ("contract"), 1.) Appellee hired appellant in October 2003 for the position of national sales manager. Pursuant to the contract, appellant was hired to work full-time to "develop[ ] sales leads and lists of prospective purchasers" of appellee's services. Id.

{¶3} Under the contract, appellee paid appellant a base salary plus commissions. Section 6 of the fully integrated contract provides, in pertinent part:

> COMPENSATION – For all services to be rendered by the Employee under this Agreement the Company agrees to pay the Employee as set forth in Schedule 6 attached hereto and incorporated herein and as may be amended in writing signed by the parties. * * * Any compensation due post employment shall be paid when earned as though Employee continued in the employ of Company. Company's obligation to pay commissions after termination shall be limited to those customers who had placed files with Company prior to termination of Employee's employment and based upon the Post-Employment Commission Schedule in Schedule 6.

{¶4} Schedule 6 provides that "Company shall pay Employee commissions for accounts generated by Employee * * *. Commissions are only paid on customers generated by Employee." (Contract, Schedule 6, Paragraph 4.) Schedule 6 further provides:

> Claims Ineligible for Commission. Employee shall be provided with a list of existing AACA clients, which list shall be attached hereto as Addendum A. Employee shall also be provided with a list of potential new clients already being pursued by other AACA personnel that shall be ineligible for commission, which list shall be attached hereto as Addendum B. A potential new client is one [with] which an AACA employee has had person [sic] contact within the most recent one hundred eighty (180) days. Employee shall provide to

> AACA a list of all leads Employee is actively pursuing in order to enable AACA to refer any sales call to the person procuring the sales lead to determine who is eligible for commission. Such listing will be maintained at AACA on an on going basis.

(Contract, Schedule 6, Paragraph 6.)

{¶5} Though the contract makes reference to Addenda A and B, no addenda were ever attached to the contract. Later, appellee's president, Richard Curtin ("Curtin"), advised appellant that there were some leads that appellee was pursuing for which appellant would not be paid any commissions. None of those accounts are at issue in this case. The parties' relationship proceeded smoothly from October 2003 through January 2005, with no disputes over appellant's entitlement to commissions.

{¶6} In January 2005, Curtin sent an e-mail message to appellant, which stated:

> Just so you know and we don't step on one another * * * I am working with a debt buyer by the name of Erin Capital Management. This is a lead that has to come to me for two reasons. One, it may have legal work suitable for our network, but it also might be interested in an acquiring AACA and be interesting [sic] in bidding against FRIC. Its [sic] way too early to know for sure, as I have only had one conference call with them. * * * Because of their dual interest, I want to exclusively handle the discussions with them and will be talking to them at Debt Buyers.

(Harman Deposition, Exhibit K.)

{¶7} According to appellant, he had spoken to Bob Russo and Bill Nolan of Erin Capital Management ("Erin") in October 2004 at a conference, and had received their business cards. He testified that he had no other contact with anyone from Erin prior to January 31, 2005. Appellant testified that when he received the above e-mail message from Curtin, he thought favorably about Curtin discussing with Erin a potential sale of the appellee, but "I think my response was, you know: As long as, you know, I'm getting

remunerated for this, I don't care." (Harman Deposition 62.) He made several attempts to communicate with Curtin about Erin after receiving Curtin's e-mail message, but was unsuccessful. Later, he learned that Erin had placed accounts with appellee for which appellant would not be receiving a commission.

{¶8} Appellant expressed his concern about that arrangement in an April 27, 2005 e-mail message to Curtin that stated:

> In that neither Addendum A nor Addendum B included this "hold" accounts (salesman terminology) or "Claims Ineligible for Commission" this was new business. Although these two lists were never provided the accounts I was told about were RMA, CapOne, Unifund, and Cavalry * * * none of these becoming AACA clients. The mere existence of this list at time of contract further makes the point of how future business would be handled. A salesman's territory is sacrosanct.
>
> "Accounts generated by employee" does not [apply] to only accounts that have called in, created by a cold call, generated as a lead, or from conference attendance, but should include those generated by advertising, marketing campaigns, etc. * * * Your ability to screen and choose those accounts that could be conceivably be closed very quickly or generate large placement volumes was not part of our contract. No salesman would agree to such a contract.

(Harman Affidavit, Exhibit 2.)

{¶9} On June 7, 2005, following additional discussions between appellant and Curtin about Erin commissions, appellee terminated appellant's employment. Thereafter, the two parties disagreed about whether appellant was due any commissions from certain accounts, including Erin. The parties eventually came to an agreement about which accounts appellant had "generated" except that they continued to disagree about whether he had "generated" the Erin account and three other accounts (Account Management

Services ("AMS"), Millennium Financial Group ("MFG"), and Ohio Receivable, LLC ("ORC")). They also continued to disagree about the amount due to appellant for the accounts upon which they had agreed that some amount was due ("the undisputed accounts").

{¶10} On July 17, 2007, appellant filed his complaint alleging breach of contract. He sought unpaid commissions on the Erin, AMS, MFG, and ORC accounts, as well as on the undisputed accounts. On September 2, 2008, appellee filed a motion for summary judgment. Appellant filed a memorandum contra. The primary focus of the parties' dispute in the summary judgment practice was the meaning of the word "generated" in the contract. By decision dated December 5, 2008, the trial court granted appellee's motion for summary judgment, finding that there was no genuine issue of fact with respect to whether appellant had "generated" the Erin, AMS, MFG, and ORC accounts, and determined that appellee was entitled to judgment as a matter of law. It also determined that there existed no genuine issue of material fact respecting how much money appellant was owed with respect to the undisputed accounts. The trial court journalized a judgment entry to that effect on January 16, 2009. Appellant timely appealed and advances three assignments of error for our review, as follows:

> ASSIGNMENT OF ERROR NO. 1
>
> The trial court erred in granting Defendant's motion for summary judgment because the trial court erred in finding that the contract was unambiguous.
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> ASSIGNMENT OF ERROR NO. 2
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> The trial court erred in granting Defendant's motion for summary judgment because material facts are in dispute as to whether Harman "generated" the Erin account.

ASSIGNMENT OF ERROR NO. 3

> The trial court erred in resolving a disputed issue of fact as to how much Harman was entitled to be paid on the undisputed accounts.

{¶11} We begin by recalling the standard of review of a summary judgment. Summary judgment is proper only when the party moving for summary judgment demonstrates: (1) no genuine issue of material fact exists, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds could come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, when the evidence is construed in a light most favorable to the non-moving party. Civ.R. 56(C); *State ex rel. Grady v. State Emp. Relations Bd*., 78 Ohio St.3d 181, 183, 1997-Ohio-221. An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc*. (1994), 94 Ohio App.3d 579, 588.

{¶12} In the proceedings below, the parties' primary disputes about the Erin account resolved to: (1) whether the contract was clear or ambiguous, and (2) whether, under the contract, appellant had "generated" the Erin account.

{¶13} Appellant argued that he was entitled to commissions from every new account placed with appellee while he was employed as national sales manager, except for any accounts listed on Addenda A or B referenced in the contract. Because he was appellee's only employee hired to engage in sales, he believed that he would be the only one "bringing in business"[1] during his tenure and that all sales leads would be routed to him. Thus, he expected that he would receive all commissions associated with any new

[1] Brief of appellant, 5.

account. On the other hand, appellee's position was that appellant was only entitled to commissions on accounts that he personally located and developed into new clients because the contract stated that appellant was being hired to "locate and develop new business for AACA." (Contract, Schedule 6, Paragraph 4.)

{¶14} In his first assignment of error, appellant argues that the trial court erred in finding the contract unambiguous. The word "generated" is not defined in the contract. Appellant argues that the term is ambiguous and should therefore be construed against appellee, the drafter. He contends that, when viewed as a whole, the contract provides for only three categories of accounts: (1) those of clients that already existed when appellant began his tenure; (2) those of clients that appellee had been pursuing prior to appellant's tenure; and (3) all remaining accounts placed during his tenure. Thus, he argues, because Erin does not fall into either of the first two categories, it belongs in the third category, which entitles him to commissions on all Erin accounts placed with appellee during appellant's tenure.

{¶15} Appellee argues that the term "generated" is not ambiguous just because it is undefined in the contract. Citing an English language dictionary, it maintains that the plain and ordinary meaning of "generate" is to bring into existence or to be the cause of. This, coupled with the language in the contract requiring appellant to "locate and develop new business,"[2] appellee argues, warrants payment of commissions to appellant only with respect to accounts that he develops and brings into existence through his own efforts. According to appellee, the mere fact that the contract references two addenda

[2] Contract, Schedule 6, Paragraph 4.

that purport to exclude appellant from commissions on certain accounts does not mean that all accounts that are not on those two lists automatically become "generated" by appellant. To interpret the contract in this manner, appellee asserts, would be to ignore the requirement that appellant "locate and develop" and "generate" new business. Finally, appellee argues that this court cannot determine the meaning of the contract based on what appellant believed or expected, but we must determine the contract's meaning based upon the four corners of the contract itself.

{¶16} We recently set forth the basic principles of contract interpretation in the case of *Babyak v. DSLangdale One, Inc.*, 10th Dist. No. 08AP-996, 2009-Ohio-4212, ¶28:

> Contract interpretation is a matter of law. *City of St. Marys v. Auglaize Cty. Bd. of Commrs*., 115 Ohio St.3d 387, 2007-Ohio-5026, ¶38. When interpreting a contract, a court's principle objective is to ascertain and give effect to the intent of the parties. *Hamilton Ins. Servs., Inc. v. Nationwide Ins. Cos*., 86 Ohio St.3d 270, 273, 1999-Ohio-162. "The intent of the parties to a contract is presumed to reside in the language they chose to employ in the agreement." *Kelly v. Medical Life Ins. Co*. (1987), 31 Ohio St.3d 130, paragraph one of the syllabus. In determining the parties' intent, a court must read the contract as a whole and give effect, if possible, to every part of the contract. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth*., 78 Ohio St.3d 353, 361-62, 1997-Ohio-202.

{¶17} "Common words appearing in a written instrument will be given their ordinary meaning unless manifest absurdity results, or unless some other meaning is clearly evidenced from the face or overall contents of the instrument." *Alexander v. Buckeye Pipeline Co.* (1978), 53 Ohio St.2d 241, paragraph two of the syllabus. Moreover, "[c]ourts will not, in effect, create a new contract by finding an intent not expressed in the clear language the parties employed." *The Jae Co. v. Heitmeyer*

Builders, Inc., 10th Dist. No. 08AP-1127, 2009-Ohio-2851, ¶14, citing *Shifrin v. Forest City Ents., Inc*., 64 Ohio St.3d 635, 638, 1992-Ohio-28. "Where the language of a contract is clear and unambiguous, no issue of fact need be determined, and the court need not go beyond the plain language of the agreement to determine the parties' rights and obligations." Id., citing *Inland Refuse Transfer Co. v. Browning-Ferris Industries of Ohio, Inc*. (1984), 15 Ohio St.3d 321, 322.

{¶18} In our view, the parties' contract is not ambiguous. By its plain language, appellant is entitled to commissions on accounts "generated by [him]" and he will be paid commissions "only * * * on customers generated by [him]." The word "generate" means "to bring into existence; cause to be; produce."[3] It also means "[t]o bring into being; give rise to."[4] The contract required that appellant "locate and develop" business and provided that he would be paid commissions on all accounts and customers' business that he "generated" or, according to the plain meaning of that word, brought into existence, produced or brought into being. Accordingly, appellant's first assignment of error is overruled.

{¶19} In his second assignment of error, appellant argues that there existed a genuine issue of fact with respect to whether appellant generated the Erin account.[5] In support of his argument that a genuine issue of fact exists on this point, appellant directs our attention to his own deposition testimony, wherein he testified that he met two Erin

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[3] Dictionary.com. *Dictionary.com Unabridged (v 1.1)*. Random House, Inc. http://dictionary.reference.com/browse/generate (accessed: September 3, 2009).

[4] Dictionary.com. *The American Heritage® Dictionary of the English Language, Fourth Edition*. Houghton Mifflin Company, 2009. http://dictionary.reference.com/browse/generate (accessed: September 3, 2009).

[5] In the trial court appellant argued that he had generated Erin, AMS, MFG, and ORC, but on appeal appellant is only pursuing this argument with respect to Erin and has apparently abandoned it vis à vis AMS, MFG, and ORC.

personnel in the fall of 2004 at a conference. Indeed, review of appellant's deposition reveals that he testified he met Erin personnel Bill Nolan and Bob Russo at a conference in either Chicago or Orlando, but he could not remember which city hosted the conference. He met them and took their business cards, but could not recall ever following up with either man. Appellant contends that because he was the first to make contact with Erin personnel, he generated the Erin accounts, despite the fact that "when it appeared that Erin would be a big account, Curtin froze him out of further discussion."[6]

{¶20} In response, appellee argues that it presented unrebutted evidence that appellant did not generate the Erin accounts. In his affidavit, James Boyle ("Boyle"), Erin's president, averred that he first became associated with appellee when he (Boyle) contacted Curtin. Boyle testified that the reason he contacted Curtin was because an Erin vice president had had a favorable experience with appellee several years earlier. Boyle testified that it was not because of appellant that Erin contacted appellee. According to both Boyle and Lisa Goodman, appellee's finance director during appellant's tenure, after the initial telephone contact with Curtin, Erin arranged for an in-person meeting with Curtin and Goodman at a Las Vegas conference on February 9, 2005. Boyle and Goodman testified by affidavit that appellant did not attend that meeting. On February 16, 2005, Curtin and Goodman again met with Boyle at appellee's Columbus office. According to Boyle and Goodman, appellant did not participate in that meeting either. Shortly thereafter, Erin negotiated a contract with appellee; appellant did not participate in those negotiations, according to both Boyle and Goodman. Boyle further averred that he does not know appellant and that appellant "did not have anything to do

[6] Brief of appellant, 17.

with ERIN's decision to contact [appellee] and to ultimately contract with [appellee], and * * * [appellant] was not a procuring cause of the ERIN and [appellee] contract." (Boyle Affidavit, Paragraph 14.)

{¶21} Appellant incidentally met two Erin employees at an unspecified conference, and never took any further action with respect to Erin. On the other hand, Erin's president unequivocally stated that appellant had nothing to do with Erin's choice to do business with appellee, that Erin contacted Curtin for reasons having nothing to do with appellant, and appellant had no involvement in any of the negotiations between the two companies. Appellant does not dispute these facts. On this evidence we do not perceive the existence of a genuine issue of fact as to whether appellant generated the Erin accounts. For this reason, we find no error in the trial court's grant of summary judgment with respect to appellant's claim for commissions on these accounts. Accordingly, appellant's second assignment of error is overruled.

{¶22} In his third assignment of error, appellant argues that summary judgment was not warranted as to the amount appellee owes to appellant respecting the undisputed accounts. Appellee contended that it owes $5,533.50, and to support this figure it presented Goodman's affidavit and a spreadsheet setting forth its calculations. Appellant, on the other hand, contended that appellee owes him $12,774.25. He presented his own affidavit and spreadsheet. On appeal, appellant argues that because the parties' figures are different, the trial court erred in granting summary judgment.

{¶23} In response, appellee points out that Goodman's affidavit and the accompanying spreadsheet include only the undisputed accounts, while appellant's spreadsheet also contains amounts attributed to AMS, MFG, and ORC, accounts on

which the trial court determined appellee owes no further commissions. In his reply brief, appellant does not dispute this fact.

{¶24} Careful review of the two spreadsheets reveals that they contain identical figures for all of the undisputed accounts, and the only difference in the two spreadsheets is that appellant has included figures for AMS, MFG, and ORC, while appellee has not. Given that appellant has not assigned error in the trial court's decision that he is not entitled to any post-termination commissions for the AMS, MFG or ORC accounts, and in light of the fact that in all other respects the parties' figures are identical, we perceive no genuine issue of fact with respect to the amount that appellant is owed for post-termination commissions. Accordingly, appellant's third assignment of error is overruled.

{¶25} Having overruled all three of appellant's assignments of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Judgment affirmed.

BRYANT and TYACK, JJ., concur.

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