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2014 IL App (3d) 120922-U

Order filed March 13, 2014

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2014

PAT V. ASHLEY and SCOTT WAPLE,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiffs-Appellants,	)	Kankakee County, Illinois,
	)	
v.	)	
	)	Appeal No. 3-12-0922
IM STEEL, INC., an Illinois Corporation,	)	Circuit No. 01-L-133
and MARC POZAN, individually, and as	)	
an officer or agent for GLOBAL STEEL	)	
TRADING CORP., BELSON SCRAP and	)	
STEEL, INC., and IM STEEL, INC.,	)	The Honorable
	)	Kendall O. Wenzelman,
Defendants-Appellees.	)	Judge, Presiding.

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JUSTICE CARTER delivered the judgment of the court.  
Presiding Justice Lytton and Justice McDade concurred in the judgment.

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**ORDER**

¶ 1 *Held:* In a case in which two former salespersons brought suit against the corporations they had worked for and against the director of those corporations for violating the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1 *et seq.* (2000)) by failing to pay certain commissions, the trial court, upon remand after a bench trial and an appeal, did not err in denying plaintiffs' motion to amend the complaint or in denying, after further consideration, plaintiffs' claim for violation of the Act. The appellate court, therefore, affirmed the judgment of the trial court.

¶ 2 Plaintiffs, Pat Ashley and Scott Waple, brought suit against Global Steel Trading Corporation (GST), Belson Scrap and Steel, Inc. (Belson), IM Steel, Inc. (IM), and Mark Pozan (both individually and as an officer or agent of GST, Belson, and IM) under the Illinois Wage Payment and Collection Act (Act) (820 ILCS 115/1 *et seq.* (2000)) for allegedly failing to pay plaintiffs certain sales commissions to which they were entitled. A default judgment was entered against GST and Belson. A bench trial was later held on plaintiffs' claims against IM and Pozan (collectively referred to in this appeal as defendants), at the conclusion of which, the trial court found in favor of defendants and denied plaintiffs' claims for relief. Plaintiffs appealed. This court reversed several aspects of the trial court's decision and remanded the case to the trial court for further consideration as to those aspects (the remanded issues). *Ashley v. IM Steel, Inc.*, 406 Ill. App. 3d 222 (2010). On remand, plaintiffs sought leave to amend their complaint to add a count of fraud against Pozan for breach of fiduciary duty. The trial court denied plaintiffs' request for leave to amend and, upon further consideration, again found in favor of defendants and denied plaintiffs' claims for relief. Plaintiffs brought this second appeal, arguing in this appeal that the trial court erred: (1) in denying plaintiffs' motion to amend the complaint; and (2) in ruling in favor of defendants on two of the remanded issues.

¶ 3 **FACTS**

¶ 4 The underlying facts in this case were set forth in detail in the previous appeal (see *Ashley*, 406 Ill. App. 3d at 223-34) and will only be repeated here to the extent necessary to fully address the issues raised in this appeal. GST and Belson were wholesale distributors of steel. Pozan was the president of GST and Belson. In June 1999, plaintiffs entered into a written agreement with GST whereby plaintiffs would work as salespersons exclusively for GST and Belson and would be paid commissions. Of relevance to this appeal, paragraph 12 of the

agreement provided that: "[r]epresentatives [(the plaintiffs)] will receive commission as of July 1, 1999[,] on Andrica Metals and Macomb Steel. Pat [Ashley] and Scott [Waple] agree to sell exclusively for [GST]."<sup>1</sup>

¶ 5 At some point prior to May 2001, GST and Belson ran into financial trouble because of a downturn in the industry. Both corporations were eventually liquidated. On May 7, 2001, Pozan, on behalf of GST and Belson, executed an assignment for the benefit of the corporations' creditors (the assignment).<sup>2</sup> The assignment allowed the trustee (the assignee) to operate the businesses and to liquidate the assets of the corporations in order to satisfy the debt owed to the secured creditor, American National Bank (the bank). At the time of the assignment, GST and Belson had about \$16.6 million in assets, about \$9.8 million in secured debt, and about \$5.8 million in unsecured debt. About \$5 million of GST's and Belson's \$16.6 million in assets consisted of accounts receivable.<sup>3</sup> All of the accounts receivable were assigned to the bank as a result of the assignment.

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<sup>1</sup> The terms of the agreement were written in all capital letters. The formatting has been changed here for the ease of the reader.

<sup>2</sup> "An assignment for the benefit of creditors is a voluntary transfer by a debtor of his property to an assignee in trust for the purpose of applying the property or proceeds thereof to the payment of his debts and returning the surplus, if any, to the debtor." *Illinois Bell Telephone Co. v. Wolf Furniture House, Inc.*, 157 Ill. App. 3d 190, 194-95 (1987).

<sup>3</sup> An account receivable is generally a debt due from a customer who has purchased goods on credit and has not yet paid for them. See Black's Law Dictionary (9th ed. 2009) (listed under "account").

¶ 6            Shortly after the above assignment, Pozan formed and became director of a new corporation, IM, of which Pozan was the only shareholder. During the process of liquidating GST and Belson, Pozan provided advice to the trustee regarding various matters, including the payment of commissions to plaintiffs. According to Pozan, nothing was paid out after the assignment without the trustee's approval. Pozan, as the president of IM, also entered into an agreement with the trustee to help sell some of the inventory of GST and Belson. In return for any sales he helped procure, Pozan was paid a 35% commission by the bank in the form of a credit. That commission rate was substantially higher than the sales commission rate plaintiffs had received. In addition, IM also purchased about \$500,000 of GST's and Belson's post-accounts receivable, which the bank had deemed uncollectable, but which Pozan thought that he could collect.

¶ 7            At a later public auction, IM purchased some of the assets of GST and Belson at a substantially discounted price, which Pozan described as a "fire sale." In total, including the post-accounts receivables referenced above, IM paid about \$1.9 million to the trustee for the assets it had purchased. About \$1.1 million of the purchase price was paid for with the credit that IM had received from the bank for accounts receivable that were collected on behalf of IM (about \$400,000) and for commissions on the sale of liquidated assets (about \$700,000), including those assets that were sold to IM. The remaining approximately \$800,000 of the purchase price was paid for by a loan that IM obtained that Pozan personally guaranteed from a separate bank.

¶ 8            Plaintiffs worked for a brief period of time as salespersons for IM and were paid a lower commission rate than what they had received as salespersons for GST and Belson. Eventually, a dispute arose over certain unpaid commissions to which plaintiffs claimed they were entitled for

sales that they had made (or that had been made) on behalf of GST, Belson, or IM. After plaintiffs' demands for payment went unanswered, this lawsuit was filed.

¶ 9 The initial complaint in this case was filed in October 2001. As noted above, GST and Belson were eventually liquidated and a default judgment was entered against them in 2002. In January 2003, after numerous pretrial proceedings, plaintiffs filed their third amended complaint (referred to herein as the complaint), the operative complaint in this case. The complaint contained four counts. Three of the counts alleged that Pozan was personally liable under the Act for the unpaid commissions because Pozan, as an officer of each corporation, had knowingly permitted the corporations to violate the Act (one count for each corporation). The remaining count alleged that IM had failed to pay earned commissions in violation of the Act and was liable for those commissions. Of relevance to this appeal, the complaint specifically alleged that Pozan was a director of all three corporations: GST, Belson, and IM.

¶ 10 In March 2009, the case proceeded to a bench trial, which lasted several days. During the course of the trial, the trial court heard the testimony of several witnesses, including Pozan, each plaintiff, and Eric Martell, who was the office and credit manager of GST. The trial court also admitted numerous financial exhibits into evidence.

¶ 11 Relevant to the issues raised in this appeal, the evidence presented at trial established that from the time of the agreement between GST and plaintiffs (at times referred to herein as the parties' agreement) until the time of the assignment, GST or Belson had made sales to Andrica Metals (Andrica) and Macomb Steel (Macomb). None of those sales were made personally by either plaintiff and no commissions were paid to plaintiffs as a result of those sales. Plaintiff Waple estimated in his testimony that the amount of commissions to which plaintiffs were entitled for those sales was approximately \$17,000. Plaintiff Ashley testified that she and Waple

were initially told that they could not sell to Andrica and Macomb because GST was already selling to them but that GST eventually agreed that it would pay her and Waple commissions on any sales to Andrica and Macomb made by any of GST's salespersons because she and Waple had sold to Andrica and Macomb in the past and considered them to be one of their customers. Ashley testified further that plaintiffs' agreement with GST provided that plaintiffs would receive commissions on all sales to Andrica and Macomb, even if those sales were made by other sales members. As to the Andrica and Macomb commissions, GST's office and credit manager, Eric Martell, testified that plaintiffs asked him on a monthly basis about the commissions for sales to Andrica and Macomb and that he told plaintiffs that the corporations' vice president, Isaac Vadish, was the one holding up the payment of commissions to them. Martell also testified that there was no way to tell from the exhibits that had been presented at trial whether the underlying invoices had been paid, but in other testimony, Martell indicated that at the time of the assignment, there were only about \$3,500 in unpaid invoices remaining. Martell testified further that he was never told by Pozan not to pay commissions to plaintiffs for Andrica and Macomb. Pozan testified that as far as he knew, all commissions owed to plaintiffs under the parties' agreement were paid, although he had no specific knowledge of the matter.

¶ 12 Also of relevance to this appeal was the evidence presented regarding commissions paid to plaintiffs after the assignment. The evidence at trial established that after the assignment, two commission payments were made to plaintiffs, but the amount of those payments were reduced at the direction of Pozan. Regarding the first payment, plaintiffs' commissions were initially calculated to be about \$11,500 but, according to Martell, they were reduced at Pozan's direction to \$5,500 (a reduction of about \$6,000) because some of the parts that had been ordered were left in the warehouse and had not been shipped. As to the second payment, plaintiffs' commissions

were initially calculated to be about \$12,200, but, according to Ashley and Pozan, they were reduced at Pozan's direction to about \$3,700 (a reduction of about \$8,500) for parts that needed further processing and were not shipped (\$4,000 of the reduction) and for parts that were rejected by a customer (the remaining \$4,500 of the reduction). In discussing the reductions, Ashley testified that as to the parts left on the floor, at that time, there were no longer any employees left to complete the product because GST's burn department had been shut down and all of the employees had been moved. As to the parts that were rejected by a customer, Ashley testified that the parts were initially not burned properly and were rejected. Ashley stated further that the parts were later fixed and returned but were in a rusty condition so the customer took a deduction from the amount it was to pay for the parts. Martell provided similar testimony as to why the reductions were made, although Martell also testified that a \$4,000 reduction in commission payments was taken because plaintiffs had received an advance on their commission payment earlier in the month. In his testimony on the matter, Pozan acknowledged that the reduction in the second commission check was made at his direction for the reason indicated.

¶ 13 At the completion of the bench trial, in a written order, the trial court concluded that even if plaintiffs were deemed to be "employees" under the Act, their claims would still have to be denied because plaintiffs had failed to prove any of the counts of their cause of action. In reaching that conclusion, the trial court found that Pozan's testimony was credible. Based upon the evidence presented, the trial court determined that any alleged failure to pay commissions was not due to the acts of defendants, but, rather, was attributable to the economic conditions and the decisions of GST's and Belson's lenders. The trial court, therefore, ruled in favor of defendants and denied plaintiffs' claims for relief. Because of its ruling, the trial court saw no need to determine whether plaintiffs would actually qualify as "employees" under the Act.

¶ 14 Plaintiffs appealed. This court affirmed the trial court's denial of plaintiffs' claim against IM. As to plaintiffs' claims against Pozan, however, this court reversed several of the trial court's underlying findings and conclusions and remanded the case to the trial court for further consideration of those matters (the remanded issues). Of relevance to this appeal, in determining whether Pozan had knowingly permitted the corporations to violate the Act, the trial court was directed to consider further, among other things: (1) whether plaintiffs were "employees" under the Act; (2) whether under the parties' agreement, plaintiffs were entitled to commissions for sales to Andrica and Macomb and, if they were, at what rate; and (3) whether the commissions that were paid to plaintiffs after the assignment were improperly reduced.

¶ 15 Upon remand, plaintiffs sought leave to amend their complaint to add a count of fraud against Pozan for breach of fiduciary duty. After briefing and oral argument on the matter were completed, the trial court denied plaintiffs' request.

¶ 16 Turning to the remanded issues, after further consideration, in a detailed written order, the trial court found that plaintiffs had failed to establish both that: (1) they were entitled to the payment of the contested commissions; and (2) Pozan had knowingly set out to deprive plaintiffs of any otherwise earned commissions. The trial court, therefore, denied plaintiffs' remaining claims under the Act and ruled in favor of defendants. As part of its ruling and of relevance to this appeal, the trial court specifically found that: (1) plaintiffs were "employees" under the Act; and (2) as a matter of contract interpretation, paragraph 12 of the parties' agreement did not require that plaintiffs be paid sales commissions for sales to Andrica and Macomb that were made by other salespersons. The trial court did not specifically address the allegedly improper reductions to plaintiffs' commission checks that were paid after the assignment occurred, other than to reference its general overall findings and to note that Martell had testified that a \$4,000



reduction had been taken because plaintiffs had previously received an advance on their commissions. Plaintiffs again appealed and challenged the trial court's ruling.

¶ 17

#### ANALYSIS

¶ 18

On appeal, plaintiffs argue first that the trial court erred in denying their motion to amend the complaint upon remand to add a count of fraud against defendant Pozan for breach of fiduciary duty. Plaintiffs assert that the amendment should have been allowed under either section 2-616(c) or section 2-616(a) of the Code of Civil Procedure (Code) (735 ILCS 5/2-616(c), (a) (West 2010)) because: (1) plaintiffs' failure to amend the complaint at an earlier time was caused by Pozan's continued concealment of his fraudulent conduct and intent; (2) plaintiff's did not learn of Pozan's fraudulent conduct and intent prior to trial; (3) Pozan would not be prejudiced by the amendment since Pozan's own misrepresentations caused the need for the amendment; and (4) extreme injustice would occur if plaintiffs were not allowed to amend in that all of the unsecured creditors would be defrauded out of about \$5.8 million. Defendants argue that the trial court's ruling was proper and should be affirmed. Defendants assert that plaintiffs' motion was appropriately denied because: (1) none of the issues on remand had to do with fraud or breach of fiduciary duty; (2) plaintiffs' motion to amend was untimely and had been made after almost a decade of litigation, which included a trial, a judgment, an appeal, and a remand for further consideration; (3) plaintiffs had numerous opportunities to amend the complaint at an earlier time to add a count of fraud since plaintiffs had known for several years that Pozan was a director of GST, Belson, and IM; (4) defendants would have suffered prejudice if the amendment would have been allowed as the amendment would have expanded the damages and relief sought by plaintiffs; and (5) no injustice would have occurred if the amendment was denied since fraud in this case was irrelevant and since there was no evidence that fraud occurred.

In Illinois, courts are encouraged to freely and liberally allow amendments to pleadings so that litigants may be permitted to fully present their causes of action and may resolve their disputes on the merits. See *Lee v. Chicago Transit Authority*, 152 Ill. 2d 432, 467 (1992); *Stringer Construction Co. v. Chicago Housing Authority*, 206 Ill. App. 3d 250, 258 (1990). In fact, section 2-616(a) of the Code authorizes the amendment of pleadings at any time before final judgment on just and reasonable terms and section 2-616(c) of the Code allows for the amendment of a pleading, even after judgment, to conform the pleadings to the proofs. 735 ILCS 5/2-616(a), (c) (West 2010). A party's right to amend pleadings, however, is not absolute or unlimited. *Lee*, 152 Ill. 2d at 467. After a trial has begun, a party generally may not amend a pleading to raise a matter of which the party had full knowledge when the previous pleading was filed, unless a sufficient excuse is presented for the failure to put the matter into the previous pleading. See *id.* at 469. The decision whether to grant leave to amend a pleading rests within the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *Id.* at 467. The threshold for finding an abuse of discretion is a high one and will not be overcome unless it can be said that the trial court's ruling was arbitrary, fanciful, or unreasonable, or that no reasonable person would have taken the view adopted by the trial court. See *Blum v. Koster*, 235 Ill. 2d 21, 36 (2009); *In re Leona W.*, 228 Ill. 2d 439, 460 (2008). Some of the factors to be considered in determining whether to allow a motion to amend pleadings are whether the amendment would cure a defect in the pleadings, whether the other party would be prejudiced or surprised by the proposed amendment, whether the proposed amendment was timely, and whether there were previous opportunities to amend the pleadings. *Lee*, 152 Ill. 2d at 467. The most important consideration, however, is whether allowing the amendment would

further the interests of justice. See *Stringer Construction Co., Inc.*, 206 Ill. App. 3d at 260. Any doubts should be resolved in favor of allowing the motion to amend. *Id.* at 258.

¶ 20 Having reviewed the record in the instant case, we find that the trial court properly denied plaintiffs' motion upon remand to amend the complaint. Contrary to plaintiffs' assertions on appeal, with the proposed amendment, plaintiffs were seeking to do much more than merely conform the pleadings to the proofs presented at trial. See 735 ILCS 5/2-616(c) (West 2010). Rather, for the first time, upon remand, plaintiffs were seeking to add a new cause of action against Pozan for actual or constructive fraud. Plaintiffs' motion, therefore, was in the nature of a section 2-616(a) motion for leave to amend, rather than a section 2-616(c) motion to conform the pleading to the proofs. See 735 ILCS 5/2-616(a), (c) (West 2010). However, as defendants correctly note, the factual basis of the proposed fraud claim in this case—that Pozan was a director of all three corporations and was on both sides of the asset-sales transaction—had been known to plaintiffs for some time. Indeed, it was alleged from the outset in 2003 when the third amended complaint was filed, that Pozan was a director of all three corporations. An additional count for the alleged fraudulent conduct could have easily been added to plaintiffs' complaint at a much earlier time. In addition, allowing the amendment at this stage of the case would have greatly increased the prejudice to defendants since it would have exposed defendants to additional litigation and to an expansion in plaintiffs' claim for relief and would have delayed the lengthy proceedings in this case even further. Thus, under the circumstances of the present case, the trial court did not commit an abuse of discretion in denying plaintiff's motion for leave to amend the complaint. See *Lee*, 152 Ill. 2d at 467; *Blum*, 235 Ill. 2d at 36; *Leona W.*, 228 Ill. 2d at 460.

As their second point of contention on appeal, plaintiffs argue that the trial court erred in its decision on two of the remanded issues. Specifically, plaintiffs assert that the trial court erred: (1) in its decision that plaintiffs had failed to establish that they were entitled to commissions from sales to Andrica and Macomb that accrued prior to the assignment, a decision which plaintiffs claim was based in part upon the trial court's erroneous interpretation of the agreement between plaintiffs and GST, that the agreement did not require that plaintiffs be paid commissions for sales made to Andrica or Macomb by other salespersons; and (2) in its decision that Pozan did not improperly reduce the commissions that were paid to plaintiffs after the assignment. Defendants argue that the trial court's rulings on those issues were proper and should be affirmed. As to the Andrica and Macomb commissions, defendants assert that the claims against Pozan were correctly denied because: (1) under the agreement between plaintiffs and GST, plaintiffs were not entitled to commissions for sales to Andrica and Macomb made by other salespersons; (2) there was no indication that the invoices for those sales had been paid, as necessary for the commission payment to accrue; and (3) even if plaintiffs were entitled to the commissions, there was no indication that Pozan did anything to prevent the payment of those commissions. As for the alleged improper reduction in commissions paid after the assignment, defendants assert that the claims against Pozan were correctly denied because: (1) the evidence showed that the reductions were caused by adjustments that were made due to delivery or payment problems and not as the result of a knowing violation of the Act; and (2) there was no evidence presented that the underlying invoices were paid. Finally, as an alternative to all of their assertions on this issue, defendants contend that the denial of plaintiffs' claim for unpaid commissions should also be affirmed because plaintiffs did not qualify as "employees" under the Act.

¶ 22 A trial court's findings made after a bench trial will not be reversed on appeal unless they are against the manifest weight of the evidence. *Eychaner v. Gross*, 202 Ill. 2d 228, 251 (2002); *Meyers v. Woods*, 374 Ill. App. 3d 440, 449 (2007). A finding is against the manifest weight of the evidence only if it is clearly apparent from the record that the trial court should have reached the opposite conclusion or if the finding itself is unreasonable, arbitrary, or not based upon the evidence presented. *Best v. Best*, 223 Ill. 2d 342, 350 (2006); *Eychaner*, 202 Ill. 2d at 252; *Meyers*, 374 Ill. App. 3d at 449. Under the manifest weight standard, deference is given to the trial court as finder of fact because the trial court is in a better position than the reviewing court to observe the conduct and demeanor of the parties and witnesses. *Best*, 223 Ill. 2d at 350. "A reviewing court will not substitute its judgment for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn." *Id.* at 350-51.

¶ 23 In the present case, after having reviewed the record, we find that the trial court's conclusions upon remand were not against the manifest weight of the evidence. First, as to the Andrica and Macomb commissions, there was no evidence presented to establish, or to even suggest, that Pozan had anything to do with GST's failure to pay those commissions, if plaintiffs were, in fact, entitled to them. Rather, the evidence clearly established that the vice president of the company, Isaac Vadish, was the person who held up payment of those commissions. Thus, even if we were to construe the employment agreement in such a manner as to require that plaintiffs be paid commissions for sales made by other salespersons to Andrica or Macomb for the relevant period, we would still have to conclude that the trial court's ruling as to this matter was not against the manifest weight of the evidence. See *Eychaner*, 202 Ill. 2d at 251-52; *Best*, 223 Ill. 2d at 350-51; *Meyers*, 374 Ill. App. 3d at 449.

¶ 24 Second, as to the commissions that were paid after the assignment and were allegedly improperly reduced, although the record established that the reduction was attributable to Pozan, conflicting evidence was presented as to whether those reductions were made for legitimate business reasons or for improper ones. On the one hand, in support of defendants' contention that the reductions were legitimate, the office and credit manager of GST, Martell, testified that the reductions were made because some of the product that had been sold was rejected and returned as scrap and because another portion of the product that was sold was apparently never delivered due to a lack of personnel after the burn department was shut down. Martell also testified that a \$4,000 reduction was taken because plaintiffs had previously received an advance on their commission payments. On the other hand, in support of plaintiffs' assertion that the reductions were improper, was the evidence that was presented as to the purchase of GST and Belson's assets by IM at a steep discount and the allegedly exorbitant commission paid to Pozan for his efforts in helping to sell the corporations' inventory. With that evidence, plaintiffs sought to establish by inference that the assignments were improper, that aspects of the liquidation were improper, and that Pozan's credibility was suspect. The trial court, however, was in the best position to assess credibility (see *Best*, 223 Ill. 2d at 350) and found that Pozan's testimony was credible. We will not substitute our judgment for that of the trial court on this matter. See *id.* at 350-51. Thus, we conclude that the trial court's determination as to the reduced commissions was not against the manifest weight of the evidence and must be affirmed. See *Eychaner*, 202 Ill. 2d at 251; *Best*, 223 Ill. 2d at 350-51; *Meyers*, 374 Ill. App. 3d at 449.

¶ 25 Having determined that the trial court's ruling was not against the manifest weight of the evidence as to the two remanded issues that were contested in this appeal, we see no reason to

address defendants' alternative assertion, that the trial court erred in finding that plaintiffs were "employees" under the Act.

¶ 26

#### CONCLUSION

¶ 27

For the foregoing reasons, we affirm the judgment of the circuit court of Kankakee County.

¶ 28

Affirmed.