

14-1284

IN THE CIRCUIT COURT OF MINERAL COUNTY, WEST VIRGINIA

MELISSA ROTRUCK,
Plaintiff,

vs.

Case No. 12-C-135
Judge Phil Jordan

JANICE SMITH d/b/a
INSURANCE QUEEN,
Defendant.

AMENDED ORDER DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL

This matter came before the Court, Judge Phil Jordan presiding, on October 20, 2014, pursuant to the filing of an opinion of the West Virginia Supreme Court of Appeals entered on October 15, 2014. This opinion vacated this Court's January 15, 2014, Order Denying Plaintiff's Motion for a New Trial and instructs to enter a new order that addresses all of the issues raised in the Plaintiff's Motion for a New Trial.

This Court held a bench trial in this matter on December 10, 2013. Plaintiff Melissa Rotruck ("Ms. Rotruck") was represented by counsel, Harley O. Staggers, Jr. The Defendant, Janice Smith ("Ms. Smith"), d/b/a Insurance Queen, Inc., appeared *pro se*. Both Parties gave opening statements. Plaintiff presented the Defendant as her first witness and then the Plaintiff testified as the second witness. After Ms. Rotruck's testimony, Ms. Smith cross-examined her extensively. Plaintiff then rested. The Court noted that after more than three and a half hours of testimony, the Plaintiff had clearly failed to prove her case and

M. Staggers
J. Smith
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failed to prove the basic elements of an unpaid wages claim. Therefore, the Court directed a verdict for the Defendant, Ms. Smith. The Court entered a judgment order on December 18, 2013, entitled Order from Trial Before the Court. The Court's findings of fact and conclusions of law from this order are hereby incorporated into this order.

The Plaintiff filed her Motion for New Trial on December 20, 2014. In her motion, Ms. Smith made the following arguments:

1. That the Court's alleged finding that the employment contract to be an illegal contract was unsupported by law;
2. That the Court's finding that the Sales Template was a written notice of pay under West Virginia Code § 21-5-9 conflicted with its finding that the Sales Template was not a promise to pay;
3. The Defendant's future wage assignments did not follow the requirements of West Virginia Code § 21-5-3 and thus were invalid and unenforceable;
and
4. The Defendant owed the Plaintiff the value of the commissions she had earned.

Above all else, the Plaintiff mischaracterizes the Court's findings and the Court's December 18, 2013, Order from Trial Before the Court. In general, the Plaintiff recites arguments that she used at trial. Each argument will be addressed in turn.

Legal Background

A motion for a new trial should be filed within ten days after of judgment. R.Civ. P. 59(b). Ms. Rotruck's motion was timely filed. The West Virginia Supreme Court of Appeals has made it clear that the power to grant a new trial should be rarely used. See Gerver v. Benavides, 207, W.Va. 228, 530 S.E.2d 710 (1999); Andrews v. Reynolds Memorial Hosp, Inc., 201 W.Va. 624, 499 S.E.2d 846 (1997); Tennant v. Marvin Health Care Foundation, Inc., 194 W.Va. 97, 459 S.E.2d 374 (1995). In order to overturn a trial court's ruling on a motion for new trial, it must be clear that the trial court acted under some misapprehension of law or evidence. Andrews v. Reynolds Memorial Hosp, Inc., 201 W.Va. at 630, 499 S.E.2d at 852 (quoting Syl. Pt. 4, Sanders v. Georgia-Pacific Corp., 159 W.Va. 621, 225 S.E.2d 218 (1976)). The Supreme Court reviews trial court's findings under the abuse of discretion standard. Id at 629, 851.

Discussion

The chief issue in the trial was how the Plaintiff, Melissa Rotruck, was to be paid for her employment with the Defendant, Janice Smith d/b/a Insurance Queen, Inc. The Court found that Ms. Rotruck was clearly hired as a commission-only sales associate.

The Plaintiff herself conceded at trial that when she began employment with the Defendant, she did not expect to receive a salary. While Ms. Rotruck was being questioned by Ms. Smith, the testimony proceeded as follows:

Q: Were you advised, during the interview, that you will be working as a commission only sales associate?

A: Yes, ma'am.
Q: So you were not expecting a salary?
A: When I was first hired, when we discussed, when I was first hired, at that point, no I was not, it was commission only.
Q: So just to clarify, you knew that it was commission only, no salary, when you were hired?
A: That's what I was told.

Trial Transcript, December 10, 2013, p. 100, lines 5-16.

All of Plaintiff's claims are predicated on the assumption that Plaintiff was to receive a salary of \$50,967.00. With that assumption dismantled, Plaintiff's claims crumble.

I. Illegal Contract

Ms. Rotruck argues in her motion that the Court found that the employment contract was an illegal contract and that this finding was unsupported by law. The exact phrase the Plaintiff used was "[t]his court found that the parties agreed to an illegal contract.¹ Such an interpretation is not supported by established law." She cites the December 18, 2013, Order, which states

[i]n July of 2011, Plaintiff's husband, Richard Rotruck, approached Janice Smith and asked if there were any positions open at Ms. Smith's business. Ms. Smith told him there were no openings, but that she could give Mrs. Rotruck a sales position in which she could learn the insurance business while preparing for the Property and Casualty licensing examination. She was hired as a commission-only sales associate.

December 18, 2013, Order from Trial Before the Court, p. 2, ¶ 2.

Plaintiff's Exhibit No. 3 at trial, a document entitled "Job Description" states under Subsection E., "Other Requirements" that the employee "[m]ust be licensed to sell insurance in the States determined by the management within 2

¹ Page 2; #2

months of date of hire.” While the Plaintiff was employed by the Defendant, she did not acquire a license to sell insurance policies and the Court found that she actively concealed her failure to take or pass the requisite examinations from her employer.

The Plaintiff does not explain how the employment agreement was an illegal contract. Presumably the Plaintiff is arguing that an employee cannot be paid solely by commission. However, the Plaintiff did not raise this argument at trial and does not cite any legal authority in support of this proposition. This Court has reviewed case and statutory law on the subject and could not readily find any support for this proposition. Although not an issues in the case, the West Virginia Supreme Court noted that in Miller v. Massachusetts Mutual Life Insurance Co., the employee was paid mostly, if not entirely, by commission. Miller, 193 W.Va. 240, 455 S.E.2d 799 (1995). The Supreme Court did not exhibit any concern over the practice at that time.

II. Sales Template

The Plaintiff argues that the Court’s findings regarding the Sales Template (alternately referred to as an “Income Planner” at the trial and was admitted into evidence as Plaintiff’s Exhibit No. 2) were contradictory. At trial, Ms. Rotruck claimed she was given no written notice of her pay, as required by W.Va. Code § 21-5-9 and that a Sales Template given to her at the time she was hired by the Defendant constituted a promise to pay a salary of \$50,967.00. The Court rejected

these arguments. West Virginia Code § 21-5-9 requires that employers notify employees at the time of hiring of their rate of pay.

First, the Plaintiff concedes in her pre-trial memorandum that the employment agreement “included an explanation of her compensation.” Plaintiff’s Pre-Trial Memorandum, p. 1, ¶ 2. Plaintiff’s Exhibit 1, “Job Description” stated that the employee would be paid by commission or a small salary supplemented by commission.

Second, at trial, Ms. Rotruck testified that “[t]his document [the Sales Template] was given to me and I was told it was a breakdown to show me what I would have to make, you know the given amounts and when I was given this document I was told, if I did what she instructed, this was what I would make for the first year, \$50,967.00.” Trial Transcript, December 10, 2013, pp. 59-60, lines 21-24, 1-2.

Third, the Court found that the Sales Template was a written notice of pay. As previously discussed in the trial order, Ms. Rotruck was hired as a commission-only sales associate. She was hired with the condition that she would be able to pass the relevant insurance examinations to allow her to earn commissions. Thus, the Sales Template was used by the Parties in order to illustrate how Ms. Rotruck’s pay by commission would be calculated. According to Ms. Smith’s testimony at trial, Ms. Rotruck stated that she wished to ultimately earn approximately \$50,000.00 per year on commission. Ms. Smith then used the Sales Template to work out how many policies Ms. Rotruck would have to sell in order to earn her desired income. The only way that the Sales Template could be

construed as a promise to \$50,967.00 would be if Ms. Rotruck had (1) earned her insurance license; and (2) had sold all of the policies indicated in the Sales Template within the time frame suggested. Neither of those conditions was met and thus the Sales Template was not a promise to pay a salary of \$50,967.00.

III. Future Wage Assignments

The Plaintiff makes the same argument regarding wage assignments that she did at trial and does not demonstrate how the Court was mistaken regarding the facts or the law. She argues that the alleged wage assignments were invalid and enforceable because they did not meet the requirements of West Virginia Code § 21-5-3.

The Court found that the Plaintiff did not prove at trial that the alleged transactions were wage assignments. These transactions consisted of payments from the Defendant employer to the Plaintiff employee. While the case of Clendenin Lumber-Supply v. Carpenter, 172 W.Va. 375 (1983) does state that an employer can be considered “another” under W.Va. Code § 46A-2-116(2)(b) and can be considered a creditor of the employee, the Court found that the Plaintiff did not adequately prove that the employer here was a creditor. In her Motion for New Trial, the Plaintiff does not establish how the Court acted under a misapprehension of the facts and abused its discretion by finding that there was not enough evidence to prove the employer here was a creditor. Nor did the Plaintiff show in her motion how the Court failed to adequately interpret Clendenin Lumber-Supply v. Carpenter.

IV. Commissions

Plaintiff argues that by failing to object at trial to the introduction of evidence that the Plaintiff was paid commissions, the Defendant essentially conceded that the Defendant was paid commissions. The alleged failure of the *pro se* Defendant to object to the introduction of some of Plaintiff's evidence does not require the Court to adopt wholesale the Plaintiff's version of the facts.

It was undisputed at trial that the Plaintiff did not pass the licensing examination that would allow her to earn commissions. The Court further found that Ms. Rotruck repeatedly misled her employer about her alleged attempts to taking the licensing examination. When the Defendant required the Plaintiff to pass the examination within 30 days in order to keep her position, the Plaintiff failed to take the test and her employment was terminated. December 18, 2013, Order from Trial Before the Court, p. 2, ¶¶ 4-7. Ms. Smith testified that she did not pay the Plaintiff commission and the Court accepted her testimony as more credible than the Plaintiff's.

The Plaintiff has not shown in her Motion for New Trial how the *pro se* Defendant's alleged failure to object caused the Court to act under a misapprehension of the facts and abuse its discretion in finding that Ms. Rotruck was not entitled to commissions and was not paid commissions.

CONCLUSION

The Plaintiff has not met its burden of proving that the Court abused its discretion on any of its arguments by proving that the Court acted under a misapprehension of the facts or law. Because the Plaintiff has not met its burden, this Court is not bound to grant the Plaintiff a new trial, especially given the West Virginia Supreme Court's admonition against granting new trial.

WHEREFORE, the Court hereby **ORDERS** that the Plaintiff's Motion for New Trial be **DENIED**. It is further **ORDERED** that this case be stricken from the active docket of the Court.

The Clerk of the Court shall forward a copy of this order to (1) Harley O. Stagers, Jr., P.O. Box 876, Keyser, WV 26726; and (2) Janice Smith, 690 S. Mineral Street, Keyser, WV 26726.

DONE and ENTERED this 14th day of November, 2014.



Judge Phil Jordan, Chief Judge
21st Judicial Circuit

TESTE COPY



Clerk Circuit Court of Mineral County, W. Va.