COOK v. COLDWELL BANKER/FRANK LAIBEN REALTY CO.

Missouri Court of Appeals
967 S.W.2d 654 (1998)

KATHIANNE KNAUP CRANE, Presiding Judge.

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Defendant real estate brokerage firm appeals from a judgment entered on a jury verdict awarding defendant's former salesperson $ 24,748.89 as damages for breach of a bonus agreement. Defendant claims that the salesperson failed to make a submissible case in that she did not accept the bonus offer before it was revoked. Defendant also asserts trial court errors relating to instructions, evidence, and closing argument. We affirm.

Plaintiff, Mary Ellen Cook, a licensed real estate agent, worked as a real estate salesperson or agent pursuant to a verbal agreement for defendant Coldwell Banker/Frank Laiben Realty Co. and its predecessors. Plaintiff listed and sold real estate for defendant as an independent contractor. Frank Laiben was a co-owner of defendant.

At a sales meeting in March, 1991, defendant, through Laiben, orally announced a bonus program in order to remain competitive with other local brokerage firms and to retain its agents. The bonus program provided that an agent earning $ 15,000.00 in commissions would receive a $ 500.00 bonus payable immediately, an agent earning $ 15,000.00 to $ 25,000.00 in commissions would receive a twenty-two percent bonus, and an agent earning above $ 25,000.00 in commissions would receive a thirty percent bonus. Bonuses over the first $ 500.00 were to be paid at the end of the year. The first year of the program would be January 1, 1991 to December 31, 1991 and it would continue on an annual basis after that. Laiben kept track of the agents' earnings in a separate bonus account.

At the end of April, 1991, plaintiff surpassed $ 15,000.00 in earnings, entitling her to a $ 500.00 bonus which defendant paid to her in September, 1991. By September, 1991 plaintiff surpassed $ 32,400.00 in commissions.

At another sales meeting in September, 1991, Laiben indicated that bonuses would be paid at a banquet to be held in March of the following year instead of at the end of the year. Plaintiff asked if that meant that an agent had to be "here" in March in order to collect the bonus. Laiben indicated that was what it meant. Plaintiff testified that, at the time of the change in the bonus agreement, she had no intention of leaving defendant, but stayed with defendant until the end of 1991 in reliance on the promise of a bonus.

During 1991 plaintiff was contacted about joining Remax, another real estate brokerage firm. Although she was not initially interested, in January, 1992 she accepted a position with Remax and advised Laiben of her departure. Laiben informed her that she would not be receiving her bonus. At the end of 1991, plaintiff had total earnings of $ 75,638.47, which made her eligible for a combined bonus of $ 17,391.54. After placing her license with Remax, plaintiff finished closing four or five contracts that she had been working on prior to leaving defendant. In March,

1992 plaintiff sent a demand letter to defendant, seeking payment for the bonus she believed she had earned. Defendant did not pay plaintiff.

On December 17, 1992 plaintiff filed an action against defendant for breach of a bonus contract, seeking damages in the amount of $ 18,404.31. She amended this petition to include prejudgment interest. At trial Laiben denied that at the March meeting he had stated the bonuses would be paid at the end of the year and testified that at that meeting he had told the agents the bonuses would not be paid until the following March. The jury returned a verdict in favor of plaintiff and awarded her damages in the amount of $ 24,748.89.00. The court entered judgment in this amount.

In its first point defendant contends that the trial court erred in overruling its motions for directed verdict because plaintiff failed to make a submissible case of breach of the bonus agreement. In particular, defendant argues that plaintiff did not adduce sufficient evidence to establish a reasonable inference that 1) she tendered consideration to support defendant's offer of a bonus, or that 2) she accepted defendant's offer to give a bonus.

A directed verdict is a drastic action and should only be granted where reasonable and honest persons could not differ on a correct disposition of the case. Seidel v. Gordon A. Gundaker Real Estate Co., 904 S.W.2d 357, 361 (Mo. App. 1995). In determining whether a plaintiff has made a submissible case in a contract action, we view the evidence in a light most favorable to plaintiff, presume plaintiff's evidence is true, and give plaintiff the benefit of all reasonable and favorable inferences to be drawn from the evidence. Gateway Exteriors Inc. v. Suntide Homes Inc., 882 S.W.2d 275, 279 (Mo. App. 1994).

Plaintiff adduced evidence of a unilateral contract offered in March, 1991 to pay a bonus under certain conditions at the end of the year. She also adduced evidence that in September, 1991 defendant attempted to revoke that offer and make the bonus contingent upon the agent's remaining until March of the following year.

A unilateral contract is a contract in which performance is based on the wish, will, or pleasure of one of the parties. Klamen v. Genuine Parts Co., 848 S.W.2d 38, 40 (Mo. App. 1993). A promisor does not receive a promise as consideration for his or her promise in a unilateral contract. *Id*. A unilateral contract lacks consideration for want of mutuality, but when the promisee performs, consideration is supplied, and the contract is enforceable to the extent performed. Leeson v. Etchison, 650 S.W.2d 681, 684 (Mo. App. 1983). An offer to make a unilateral contract is accepted when the requested performance is rendered. Nilsson v. Cherokee Candy & Tobacco Co., 639 S.W.2d 226, 228 (Mo. App. 1982). A promise to pay a bonus in return for an at-will employee's continued employment is an offer for a unilateral contract which becomes enforceable when accepted by the employee's performance. *Id.* at 228.

In the absence of any contract to the contrary, plaintiff could terminate her relationship with defendant at any time and was not obligated to earn a certain level of commissions. There was sufficient evidence that the bonus offer induced plaintiff to remain with defendant through the end of 1991 and to earn a high level of commissions for the court to submit the issue of acceptance by performance to the jury.

Defendant next argues that it was free to revoke the first offer with the second offer because, as of the time the second offer was made, plaintiff had not yet accepted the first offer. Defendant maintains that, because plaintiff did not stay until March, 1992, she did not accept the second offer and thus, did not earn the bonus.

Generally, an offeror may withdraw an offer at any time prior to acceptance unless the offer is supported by consideration. Coffman Industries, Inc. v. Gorman-Taber Co., 521 S.W.2d 763, 772 (Mo. App. 1975). However, an offeror may not revoke an offer where the offeree has made substantial performance. *Id.* (citing 1 WILLISTON ON CONTRACTS, Third Edition Section 60A (1957)). *Coffman* set out the general rule of law as follows:

> Where one party makes a promissory offer in such form that it can be accepted by the rendition of the performance that is requested in exchange, without any express return promise or notice of acceptance in words, the offeror is bound by a contract just as soon as the offeree has rendered a substantial part of that requested performance.

1 CORBIN ON CONTRACTS Section 49 (1952), quoted in *Coffman*, 521 S.W.2d at 772. The court stated the rationale for the rule as follows:

> The main offer includes a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promises. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding. (Emphasis supplied.)

RESTATEMENT [FIRST] OF CONTRACTS Section 45 cmt. b (1932), quoted in *Coffman*, 521 S.W.2d at 772. Thus, in the context of an offer for unilateral contract, the offer may not be revoked where the offeree has accepted the offer by substantial performance. *Coffman*, 521 S.W.2d at 771-772.

In this case there was evidence that, before the offer was modified in September, 1991, plaintiff had remained with defendant and had earned over $ 32,400.00 in commissions, making her eligible for the offered bonus. This constitutes sufficient evidence of substantial performance.

Plaintiff adduced evidence that defendant offered to pay a bonus at the end of 1991 if she would continue to work for it, that she stayed through 1991 with an intent to accept the offer, that she sold and listed enough property to qualify for all three bonus levels, that defendant knew of plaintiff's performance, that defendant paid $ 500.00 of the bonus but did not pay the remainder, and that she was damaged. This evidence was sufficient to make a submissible case for breach of a unilateral contract. Point one is denied….

Mary Rhodes Russell, J. and James R. Dowd, J., concur.