

The Outdoor Source, Inc.,)
 Plaintiff/Appellant,)
)
v.)
)
Outdoor Entertainment, Inc.,)
 Defendant/Appellee.)

Appeal No.
01-A-01-9702- CH-00053

Chancery Court No.
95-2732-I

FILED

August 13, 1997

Cecil W. Crowson
Appellate Court Clerk

COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CHANCERY COURT OF DAVIDSON COUNTY
AT NASHVILLE, TENNESSEE

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REVERSED IN PART AND REMANDED

SAMUEL L. LEWIS, JUDGE

OPINION

This is an appeal by plaintiff/appellant, The Outdoor Source, Inc. (“TOSI”), from the chancery court’s decision granting the motion for summary judgment filed by defendant/appellee, Outdoor Entertainment, Inc. (“OEI”), and overruling TOSI’s motion for summary judgment. The facts out of which this matter arose are as follows.

TOSI and OEI entered into a Sales Representation Agreement on 1 July 1994. OEI drafted the Agreement under which TOSI agreed to sell advertising on a commission basis for three television programs produced by OEI. In addition, TOSI received an advance of \$5,000.00 against its commissions each week.¹ The Agreement was to end on 31 December 1995 unless one of the parties terminated it earlier. Section 10(a) of the Agreement allowed either party to terminate the Agreement without cause upon thirty days written notice. In addition, sections 6(b) and 10(b) allowed “for cause” terminations based on failure to perform, breach, or default. Finally, section 11(a) required OEI to pay TOSI for advertising “sold by [TOSI] prior to the termination date and actually aired before the termination date” upon termination of the Agreement.²

In early 1995, OEI decided to terminate the Agreement because it wanted to handle its sales in-house rather than through a contractor. OEI sent a letter to TOSI

¹ The general provision regarding commissions and advances provides in part:

7. (a) Upon the condition that [TOSI] shall perform all of the terms and conditions of this Agreement and that [TOSI] shall not be in default or otherwise in breach hereof, [OEI] agrees to pay [TOSI], and [TOSI] agrees to accept, in full consideration of [TOSI’s] performance hereof, a commission equal to (i) seven percent (7.0%) of Net Billings up to \$3,400,000.00; (ii) eight and five tenths percent (8.5%) of Net Billings between \$3,400,001.00 and \$4,100,000.00; and (iii) nine percent (9%) of Net Billings in excess of \$4,100,001.00. As an advance against such commission, [TOSI] shall receive a cash draw from [OEI] in an amount equal to \$5,000.00 per week until such cash advances reach the aggregate amount of \$260,000.00. After the aggregate amount of \$260,000.00 is reached, cash advances shall cease and [OEI] shall pay the amount of any commissions that are due to [TOSI] upon [OEI’s] receipt of payment from the agency or advertiser for the time sale(s) to which such commissions relate.

(b) Payments of commissions to [TOSI] shall be made monthly.

² Section 11(a) provides: “Upon the termination of this Agreement pursuant to the provisions hereof: (a) Commissions, adjusted in accordance with Section 7, shall be payable to [TOSI] with respect to advertising sold by [TOSI] prior to the termination date and actually aired before the termination date”

dated 10 May 1995 terminating the Agreement on 9 June 1995. TOSI continued to sell advertising up to the termination date. After the Agreement terminated, OEI refused to pay any commissions to TOSI for advertising sold prior to the termination date and aired after the termination date.³ In addition, OEI claimed it paid TOSI \$43,020.00 more in advances than it owed TOSI in commissions for advertising sold and aired prior to the termination date.

TOSI filed a complaint on 1 September 1995. TOSI alleged OEI breached the parties' Agreement by failing to pay all post-termination commissions and acted with bad-faith in the negotiations to extend the Agreement. OEI answered and filed a counterclaim for any excess advances. Each party filed a motion for summary judgment after conducting discovery. The court entered an order on 4 September 1996. The court granted OEI's motion, overruled TOSI's motion, and reserved the issue of damages, i.e. the amount of the excess advances. The court awarded OEI discretionary costs of \$1,401.55 on 15 October 1996. Finally, the court entered its final judgment on 5 December 1996. The judgement evidenced an agreed order entered into by the parties setting the amount of the excess advances at \$43,020.00 and reserving TOSI's right to appeal the issue of liability. Thereafter, TOSI filed its notice of appeal and presented the following issues:

1. Whether the Trial Court erred in finding that the Plaintiff was not entitled to commissions for advertising sold prior to termination, where the Plaintiff's contract with OEI was terminated without cause and there was no unequivocal provision to the contrary.
2. Whether the Trial Court misapplied ordinary rules of contract construction in resolving disputes over the Contract in favor of OEI.
3. Whether the Trial Court erred in failing to require OEI to negotiate a contract extension in good faith, where the contract expressly required that it do so.⁴

Standard of Review

When reviewing a trial court's decision on a motion for summary judgment, this court uses the same standard as that used in the trial court. *Clifton v. Bass*, 908

³ Hereinafter, commissions on advertising sold prior to the termination date and aired after the termination date shall be referred to as post-termination commissions.

⁴ Counsel for TOSI withdrew this issue during oral argument.

S.W.2d 205, 208 (Tenn. App. 1995). Thus, this court will affirm the granting of a motion for summary judgment if there are no genuine issues of material fact and the law entitles the movant to a judgment in his or her favor. TENN. R. CIV. P. 56.03 (West 1996). Because the parties do not dispute the facts material to the issues presented by this case, the only issue for this court is whether the law entitled OEI to a favorable judgment. It is the opinion of this court that the law does not entitle OEI to a judgment and that the trial court erred in overruling TOSI's motion.

Issue One

The general rule of law in Tennessee is that "a salesman is entitled to commission for any sale made by him prior to discharge if the order is accepted and shipped after discharge." *Quinnan v. American Hosp. Supply Corp.*, No. 85-195-II, 1985 WL 4076, at *3 (Tenn. App. 29 Oct. 1985). Clearly, this rule of law applies by analogy to the instant case. This rule does not apply, however, when "the parties unequivocally agree otherwise." *Id.* at *4. The term unequivocal means "leaving no doubt." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 1290 (10th ed. 1993).

TOSI insists section 11(a) does not meet the requirements of *Quinnan* while OEI argues the opposite. It is the opinion of this court that TOSI is correct. To explain, the language of section 11(a) clearly obligates OEI to pay TOSI commissions on advertising sold and aired prior to the termination date, but is silent with respect to post-termination commissions. This silence creates doubt as to whether the Agreement entitled TOSI to post-termination commissions. In other words, there is no unequivocal statement that OEI is not obligated to pay TOSI post-termination commissions upon termination of the Agreement. Thus, the general rule of law applies, and TOSI is entitled to its post-termination commissions.

Issue Two

OEI claims section 11(a) only obligates OEI to pay TOSI commissions on advertising sold and aired prior to the termination date upon termination of the Agreement without cause. Thus, it is OEI's contention that TOSI lost any rights it had under the Agreement to the post-termination commissions upon termination of

the Agreement without cause by either party. In response, TOSI argues that such an interpretation of section 11(a) amounts to an unlawful forfeiture. We agree.

OEI's proposed construction of section 11(a) results in an unenforceable forfeiture. Forfeitures are not illegal per se, but are not favored in equity. Generally, courts will enforce forfeitures "unless justice and equity is violated." *Sanders v. Sanders*, 40 Tenn. App. 20, 34, 288 S.W.2d 473, 479 (1955). Thus, courts will not enforce a penalty or forfeiture as written unless it is fairly proportionate to the damages incurred by the party seeking to enforce the penalty or forfeiture. *See Hasden v. McGinnis*, 54 Tenn. App. 39, 43, 387 S.W.2d 631, 633 (1964).

There are no damages in this case to compare with the forfeiture. OEI terminated the Agreement without cause. Moreover, OEI admits that TOSI did not breach the Agreement in any way and that it simply wanted to move its advertising sales in-house. In contrast, TOSI claims it lost approximately \$400,000.00⁵ in commissions. It is the opinion of this court that such a disproportionate forfeiture is inequitable and unjust and should not be enforced as written. Therefore, OEI's proposed construction of section 11(a) must fail.

Conclusion

It is the conclusion of this court that the chancery court erred in overruling TOSI's motion for summary judgment. As a matter of law, the Agreement did not contain an unequivocal provision that OEI was not obligated to pay post-termination commissions upon termination of the Agreement. In addition, the construction of section 11(a) proposed by OEI results in an unlawful forfeiture which the court may not enforce.

Therefore, it follows that the provision in the chancery court's order overruling TOSI's motion for summary judgment is reversed. On remand, the chancery court shall enter an order awarding TOSI any commissions earned pursuant to section 7 of the Agreement. Costs on appeal are taxed against defendant/appellee, Outdoor

⁵ TOSI cited a paragraph in the complaint, which OEI denied in its answer, to support its claim that it lost \$400,000.00 in commissions. OEI did not specifically deny this assertion on appeal.

Entertainment, Inc.

SAMUEL L. LEWIS, JUDGE

CONCUR:

HENRY F. TODD, PRESIDING JUDGE,
MIDDLE SECTION

BEN H. CANTRELL, JUDGE