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Order on Motion for Summary Judgment (IRVIN
INTERNATIONAL, INC)

Elizabeth E. Long
Superior Court of Fulton County

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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA



IRVIN INTERNATIONAL, INC)
)
 Plaintiff,)
)
 v.)
)
 RIVERWOOD INTERNATIONAL)
 CORPORATION, RIVERWOOD)
 INTERNATIONAL MACHINERY INC.,)
 And G. PHILIPS JONES)
)
 Defendants.)

Civil Action File No. 2003-CV-65326

ORDER ON MOTION FOR SUMMARY JUDGMENT

On March 27, 2008, Counsel appeared before the Court to present oral argument on Defendants' Motion for Summary Judgment, filed January 20, 2004. After reviewing the record of the case, the briefs submitted on the motion, and the arguments of counsel, the Court finds as follows:

I. Procedural and Factual Background

Plaintiff served as a sales agent/broker for Defendant Riverwood International Corporation ("Riverwood"). Plaintiff placed Riverwood's machinery in third parties' bottling facilities pursuant to lease agreements, sold Riverwood's paperboard packaging products to these third parties, and performed customer service duties with each such account. In exchange, Plaintiff received commissions on a percentage of the paperboard packages sold.

Plaintiff and Riverwood began working together in 1989 under a series of contracts ("Sales Agreements"). At times, however, a Sales Agreement would lapse and the parties would work together without a renewed agreement. For example, between 1997 and 1999, Plaintiff and Riverwood continued their relationship without a formal agreement. At the end of 1999, however, Plaintiff and Riverwood executed a new agreement (the "2000 Agreement"). The 2000 Agreement provided for a reduced commission structure, but otherwise mirrored the earlier agreements between the parties in

terms of payment structures, commissions, etc. During the course of the 2000 Agreement, Plaintiff secured multiple third party lease renewals and new contracts, as well as selling paperboard products. In 2002, upon the expiration of the 2000 Agreement, Defendant terminated its business relationship with Plaintiff.

Plaintiff claims that it is entitled to commissions after the 2000 Agreement expired on all paperboard products sold for use with the equipment leases that Plaintiff secured for the remainder of the leases (“Continued Commissions”). To support its argument, Plaintiff points to the 2000 Agreement and to the parties’ prior course of dealing over the duration of their business relationship.

After surviving a motion to dismiss and experiencing considerable delays in scheduling a motion for summary judgment, on petition of counsel, this case was transferred to the Business Court,.

II. Motion for Summary Judgment Standard

A court should grant a motion for summary judgment pursuant to O.C.G.A. § 9-11-56 when the moving party shows that no genuine issue of material fact remains to be tried and that the undisputed facts, viewed in the light most favorable to the non-movant, warrant summary judgment as a matter of law. Lau’s Corp., Inc. v. Haskins, 261 Ga. 491, 491 (1991). The moving party need only eliminate one essential element of a party’s claim to prevail on summary judgment. Real Estate Int’l Inc. v. Buggah, 220 Ga. App. 449, 451 (1996).

III. Breach of Contract

Plaintiff alleges that Defendants breached the 2000 Sales Agreement by failing to pay Continued Commissions. The language of the 2000 Agreement contains (i) a merger clause, (ii) an express prohibition of “additional compensation” for equipment leases, and (iii) language tying any commissions due under the contract to certain service obligations. In addition, Defendants point to the deposition testimony of Tom Irvin, Irvin’s President, where he describes that the commissions due

under the 2000 Agreement (and previous Sales Agreements) were calculated based upon paperboard invoices, not equipment leases. “No additional compensation shall be paid for the sales or lease of machines,” can only be interpreted as it reads. Thus, the language of the 2000 Agreement does not entitle Plaintiff to receive Continued Commissions. See Vulcan Materials Company v. Douglas, 131 Ga. App. 21, 24 (1974) (holding that an equipment lease requiring a minimum product purchase did not “alone constitute a purchase order per se” entitling the plaintiff to post-termination commissions).

Plaintiff also argues that (i) prior course of dealing, and/or (ii) irrevocable agency interest entitles it to Continued Commissions.

Course of dealing is codified at O.C.G.A. § 11-1-205. Course of dealing, however, cannot conflict with an express written term. Plaintiff points to a billing dispute in 1995 over its right to receive Continuing Commissions on an account with an equipment lease after Plaintiff was removed from the account. Riverwood paid commissions on the account for several months, which it described as an “error”, notified Plaintiff that the commissions would cease, and then agreed to pay 50% of the commission rate to Plaintiff as a compromise to continue the overall business relationship. Additionally, Plaintiff contends that the payment of commissions on paperboard products between 1997 and 1999 when it was operating without a Sales Agreement established a course of dealing which would entitle it to receive Continued Commissions after the expiration of a Sales Agreement.

A single event, which occurred seven years before the facts which form the basis of Plaintiff’s Complaint is insufficient to establish a course of dealing. Unique Designs, Inc. v. Pittard Machinery Co., 200 Ga. App. 647, 653 (1991) (“We can only conclude under the plain and unambiguous language of this statute that a sale of a single lathe from Pittard to Unique, which occurred more than two years prior to the transaction at issue in this action, cannot be deemed to be a sequence of previous conduct’ under OCGA § 11-1-205(1).”). During, the 1997-1999 time period in which Plaintiff

received commissions without a Sales Agreement, Plaintiff continued to service those accounts by performing duties such as order placement, inventory forecasts, and complaint/dispute resolution. After the 2000 Agreement terminated, however, Plaintiff was excluded entirely from Riverwood's sales operations. Entitlement to receive Continuing Commissions would conflict with the express prohibition of "additional compensation" for equipment leases in the 2000 Sales Agreement.

Irrevocable agency interest is codified at O.C.G.A. § 10-6-33. An irrevocable agency relationship is established when the agent has a direct interest in the rental contract, not just in the agency contract. See e.g., Adair v. Smith, 23 Ga. App. 290 (1919) (finding an irrevocable agency relationship where the plaintiff invested time and money in securing a tenant for the rental contract). Here, Plaintiff negotiated the contract with Riverwood for commissions on paperboard products in exchange for its services and sales (purchase orders and equipment leases), with an express prohibition of additional compensation related to the equipment leases. Plaintiff did not anticipate that the business relationship between it and Riverwood would terminate with the expiration of the 2000 Agreement; however, such knowledge now does not permit the Court to change the earlier, agreed-to terms of the contract.

Defendants' Motion for Summary Judgment on the Breach of Contract Claim is **GRANTED**.

IV. Fraud

Plaintiff's Amended Complaint includes a claim for fraud alleging that Defendants induced it to enter into and perform under the 2000 Agreement with the intent to deprive it of commissions due under equipment leases. To recover on a fraud claim, Plaintiff must establish five elements: (1) a false representation of fact, (2) known by the speaker to be false at the time stated, (3) spoken with the intent to deceive the listener (*i.e.*, scienter), (4) justifiable reliance by the listener upon the false statements,

and (5) damages proximately caused by the representations. Todd v. Martinez Paint & Body, Inc., 238 Ga. App. 128, 128 (1999).

Plaintiff cites an internal 1999 Riverwood memorandum regarding their future business relationship with Irvin to support Plaintiff's argument that Riverwood induced Irvin to act without a present intent of continuing the relationship (or paying commissions). In Equifax Inc. v. 1600 Peachtree LLC, 268 Ga. App. 186 (2004), the Court of Appeals held that a present intent to breach a contract, by itself, is insufficient to establish fraud. The Court reasoned that even if Equifax had entered into the agreement with misleading representations and a plan to breach the contract, it would merely establish "hard-nosed business tactics or perhaps a divergent interpretation of the agreement, not fraud." Id. at 195. The Court of Appeals held that "Equifax was under no duty to disclose its own interpretation of its contractual obligations or the fact that it was contemplating asserting the defense of discharge." Id.

Defendants' Motion for Summary Judgment on the Fraud Claim is **GRANTED**.

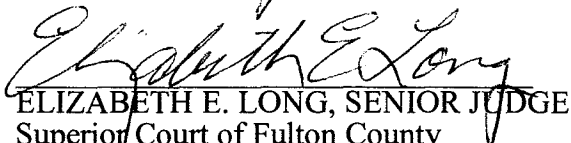
V. Remedies

In conjunction with its Complaint, Plaintiff sought, as remedies, equitable estoppel, attorneys' fees, and punitive damages. In light of the Court's ruling, Defendants' Motion for Summary Judgment on these claims is **GRANTED**.

VI. Conclusion

Defendants' Motion for Summary Judgment is hereby **GRANTED**.

SO ORDERED this 7th day of April, 2008.


ELIZABETH E. LONG, SENIOR JUDGE
Superior Court of Fulton County
Atlanta Judicial Circuit

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