2015 IL App (1st) 141482-U

No. 1-14-1482

Fifth Division
August 7, 2015

IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

TORRENCE BORUM, Plaintiff-Appellant, v. WIDEOPENWEST ILLINOIS, LLC, Defendant-Appellee.	)	Appeal from the Circuit Court of Cook County. No. 2013 M1 149267 The Honorable Cynthia Cobbs, Judge Presiding.

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Palmer and Justice Reyes concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm the trial court's dismissal of plaintiffs complaint where: (1) contracts signed by customers, but not by defendant, were not contracts "obtained" by plaintiff and defendant did not owe plaintiff commission on them; (2) the procuring cause doctrine was preempted by a contractual provision expressly providing for when commissions were to be paid; and (3) plaintiff did not otherwise set out facts sufficient to show that defendant had breached the employment agreement.

¶ 2 The instant appeal arises from the trial court's order dismissing *pro se* plaintiff Torrence Borum's complaint for breach of his employment contract under sections 2-615 and

2-619 of the Illinois Code of Civil Procedure (735 ILCS 5/2-615 (West 2012); 735 ILCS 5/2-619 (West 2012)). On appeal, plaintiff claims that he is entitled to commissions from defendant, his former employer, on contracts he was the "procuring cause" of, and that he pleaded sufficient facts to demonstrate that defendant breached their employment agreement. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On September 5, 2013, plaintiff, Torrence Borum, filed a *pro se* complaint for breach of contract, which was amended several times. It is the fourth amended complaint at issue in the instant appeal.

¶ 5 In the original complaint, plaintiff alleged that he was hired by defendant, WideOpenWest Illinois, LLC, on May 1, 2011. Defendant was a cable provider, and plaintiff was hired to negotiate right of entry (ROE) agreements between defendant and residential condominiums and other multiple dwelling units (MDUs). ROE agreements allowed defendant to install cable lines into the MDUs and provide the MDUs with defendant's services. Plaintiff alleged that the terms of his employment were governed by an employment contract known as the "Residential Development Access Representative Compensation Plan" (Compensation Plan), which provided that plaintiff was to be paid commissions based on the number of units from which he secured ROEs.

¶ 6 Plaintiff alleged that he was the "procuring cause" of several ROEs that defendant executed after his termination because he: (1) contacted MDU owners and visited the properties; (2) drafted and emailed proposed ROEs; (3) submitted ROEs to the MDUs' legal departments; (4) followed up with the MDUs; and (5) did everything else necessary to

complete the transaction. Plaintiff alleged that in this manner he was the procuring cause of ROEs with 10 MDUs, but was never paid commissions for any.

¶ 7 Plaintiff further alleged that during his employment, he used software called Salesforce to track his negotiation process. He alleged that his supervisor deleted the data that he had saved in Salesforce, and that this prevented him from proving that he had communicated with his supervisor about his negotiation process. Plaintiff alleged that he was ultimately terminated for a perceived failure to communicate with his supervisors about non-standard ROE terms he had offered to MDUs.

¶ 8 The complaint had two counts. Count I was for breach of contract, and alleged that defendant had breached its employment contract with plaintiff when it deleted his Salesforce data. Count II was also for breach of contract, and alleged that defendant had breached its employment contract when it refused to pay plaintiff commission on accounts for which he was the procuring cause.

¶ 9 The Compensation Plan was attached to the complaint. The Compensation Plan contained a Bi-weekly Production Commission Clause (Commission Clause), stating that "[b]i-weekly production commissions are calculated and paid based on the number of ROEs obtained *during the two-week pay period*. The [Residential Development Access Representative] will receive their payroll check per the approved payroll calendar." (Emphasis in original.) The Compensation Plan entitled plaintiff to a $6.67 commission per MDU unit. Under a subheading of "Termination," the Compensation Plan stated that "[u]pon termination or transfer of employment initiated by the employee or the company the employee will not be entitled to any further payment of commissions or bonuses beyond the

date of termination or transfer. Commissions earned upon notification of termination will be calculated after the installation is confirmed."

¶ 10 Under the heading of "Performance," the Compensation Plan stated that plaintiff was "[e]xpected to report prior day's sales activities to his/her supervisor," and that "[a]ny special ROE arrangements require supervisor and/or SVP approval."

¶ 11 Under the subheading of "Company Records," the Compensation Plan states that "[a]ny falsification or misrepresentation of company records, documents, or sales orders is considered grounds for immediate termination."

¶ 12 The Compensation Plan provided for changes to the program, stating that "[t]his program can be changed at any time upon 30 days advance notification. Any modifications to the program require the written approval of the Senior Vice-President/General Manager and Human Resources Manager."

¶ 13 Plaintiff also attached a written job description to the complaint, which listed "essential duties" including "[n]egotiating Right-of-Entry Agreements *** containing favorable legal terms and conditions."

¶ 14 Plaintiff also attached a Sales Performance Discipline Record (Discipline Record) to his complaint, which shows that on September 16, 2011, plaintiff's employment was terminated. The Discipline Record referenced a verbal warning on June 22, 2011, and a written warning on September 12, 2011. Both warnings were for "not following right of entry procedure regarding MDU additional compensation."

¶ 15 Plaintiff also attached to his complaint a summary of findings made by an administrative law judge and adopted by the Illinois Department of Labor. The attachment shows that, after his termination, plaintiff filed a claim with the Illinois Department of Labor alleging a

violation of section 5 of the Illinois Wage Payment and Collection Act (820 ILCS 115/5 (West 2012)) for unpaid commissions concerning ROEs executed with two condominiums, Elizabeth Place and Dana Point.[1] Plaintiff claimed that the ROEs were executed after defendant terminated his employment. Plaintiff also claimed that he was the "procuring cause" of several other ROEs executed after his termination.

¶ 16 On April 4, 2013, after both parties had participated in an informal investigative hearing, the Illinois Department of Labor dismissed plaintiff's claim. The Department of Labor found that the Elizabeth Place and Dana Point ROEs had not been signed until after plaintiff's termination, meaning that plaintiff had not earned commissions on those ROEs prior to his termination. The Department of Labor specifically found that commissions were earned when ROEs were signed by both parties, and since defendant had not signed the Elizabeth Place and Dana Point ROEs, plaintiff had not earned commission on them at the time of his termination. The Department of Labor found that it lacked the jurisdiction to consider any claims that became due after plaintiff's termination. Plaintiff protested the decision.

¶ 17 Plaintiff attached a letter from the Department of Labor to his complaint, showing that on April 25, 2013, the Department of Labor denied his protest, stating that "commissions were not due and payable until after the ROEs were signed by Respondent and customer."

¶ 18 On October 8, 2013, plaintiff filed a *pro se* amended complaint. The amended complaint was identical to the original complaint, except for the attached exhibits. The amended complaint alleged the same two counts. Count I alleged that defendant breached the employment contract by deleting the Salesforce data, and count II alleged that defendant breached the employment contract by failing to pay commission on the 10 ROEs for which

[1] In his original complaint, plaintiff lists the Dana Point ROE, but not the Elizabeth Place ROE, as one of the 10 ROEs for which he was the procuring cause.

plaintiff claimed he was the procuring cause. In addition to the exhibits attached to the original complaint, plaintiff attached 15 copies of a digital presentation he emailed to prospective customers, each addressed to a different MDU.

¶ 19 On October 15, 2013, defendant filed a motion to dismiss the amended complaint. Defendant moved for count I of the amended complaint to be dismissed pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2012)), claiming that the amended complaint did not set forth facts sufficient to prove breach. Defendant moved for count II of the amended complaint to be dismissed pursuant to 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), claiming that the procuring cause doctrine was a default rule, which the employment contract had replaced by explicitly setting forth the terms for payment of commissions in the event of termination.

¶ 20 On January 2, 2014, defendant's motion to dismiss the amended complaint was granted. Count I was dismissed without prejudice. Count II was dismissed with prejudice.

¶ 21 On January 8, 2014, plaintiff filed a motion for leave to file an amended complaint, which was granted on January 21, 2014. The *pro se* third amended complaint[2] contained a single count alleging that multiple acts breached the employment contract. The complaint alleged: (1) that defendant had breached the contract by failing to pay commission on the Elizabeth Place ROE; (2) that defendant had changed the terms of the Compensation Plan without notice; (3) that defendant had breached the terms of the Compensation Plan by deleting the Salesforce records; (4) that defendant had breached the contract by failing to pay

[2] The complaint was titled "third amenendent [*sic*] complaint" and is referred to as the "third amended complaint," but was filed directly after the first amended complaint. There is no document in the record titled "second amended complaint." However, this is the nomenclature used in the parties' motions and briefs, and for consistency, it is the nomenclature we adopt throughout this order.

plaintiff commission on the Dana Point ROE; and (5) that defendant had voided the contract by including an unenforceable termination clause.

¶ 22 On February 13, 2014, defendant filed a motion to dismiss plaintiff's third amended complaint with prejudice under sections 2-603, 2-604, and 2-619.1 of the Code (735 ILCS 5/2-603, 2-604, 2-619.1 (West 2012)). Defendant claimed that issues with the form of the complaint warranted dismissal under sections 2-603 and 2-604. Defendant also claimed that the issue of procuring cause was central to plaintiff's complaint, and that theory had already been dismissed with prejudice.

¶ 23 On March 13, 2014, defendant's motion to dismiss was granted. Inasmuch as the complaint relied on the procuring cause doctrine, the complaint was dismissed with prejudice pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2012)), because the trial court had already ruled that the doctrine did not apply. The remainder of the complaint was dismissed without prejudice pursuant to section 2-615 of the Code (735 ILCS 5/2-615 (West 2012)).

¶ 24 On May 6, 2014, the plaintiff filed a *pro se* fourth amended complaint, which is the complaint at issue in the case at bar. The complaint has three counts. Count I alleges that defendant had breached the employment contract by failing to pay commissions earned on the Elizabeth Place and Dana Point ROEs before plaintiff's termination. Count II alleges that defendant had breached the employment contract by failing to pay commissions on ROEs of which plaintiff was a procuring cause. Count III alleges that defendant had breached the employment contract by changing the terms of the Compensation Plan without giving written notice, and by terminating plaintiff's employment without conducting a human resources review. As part of count II of the fourth amended complaint, the complaint also contained a

motion to reconsider the January 2, 2014, order denying count II of the amended complaint with prejudice.

¶ 25 On May 16, 2014, defendant moved orally for the complaint to be dismissed pursuant to sections 2-603, 2-604, and 2-619.1 of the Code (735 ILCS 5/2-603, 2-604, 2-619 (West 2012)). The court dismissed the complaint with prejudice and struck plaintiff's motion to reconsider as improperly pleaded with the complaint.

¶ 26 On May 20, 2014, plaintiff filed a notice of appeal, appealing the order dismissing the complaint with prejudice and denying his motion to reconsider the use of the procuring cause doctrine. This appeal followed.

¶ 27 ANALYSIS

¶ 28 On appeal, plaintiff argues that: (1) count I of the complaint was improperly dismissed under section 2-615 because he had set forth sufficient facts to show that he was owed commission on ROEs obtained before his termination; (2) count II of the complaint was improperly dismissed under section 2-619 because the procuring cause doctrine was not superseded by the employment contract and he therefore was entitled to commissions on ROEs obtained after his termination; and (3) count III of the complaint was improperly dismissed because he had set forth sufficient facts to show that defendant breached the Compensation Plan on multiple occasions.

¶ 29 I. Dismissal Under Sections 2-615 and 2-619

¶ 30 A motion to dismiss under section 2-615 "challenges only the legal sufficiency of a complaint and alleges only defects *on the face of the complaint*." (Emphasis in original.) *Neppl v. Murphy*, 316 Ill. App. 3d 581, 584 (2000). "In ruling on a section 2-615 motion, a

court must accept as true all well-pled facts in the complaint and all reasonable inferences that can be drawn therefrom." *Neppl*, 316 Ill. App. 3d at 584.

¶ 31 "A court of review must determine whether the trial court correctly granted a section 2-615 motion to dismiss when the allegations of the complaint are viewed in the light most favorable to the plaintiff." *Seitz-Partridge v. Loyola University of Chicago*, 409 Ill. App. 3d 76, 88 (2011). We review dismissal under section 2-615 *de novo*. *Seitz-Partridge*, Ill. App. 3d at 89. *De novo* consideration means we perform the same analysis that a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 32 "A section 2-619 motion to dismiss admits the legal sufficiency of the complaint and raises defects, defenses, or other affirmative matters that appear on the face of the complaint." *Krilich v. American National Bank & Trust Co. of Chicago*, 334 Ill. App. 3d 563, 569-70 (2002). An affirmative matter is "a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint." *Krilich*, 334 Ill. App. 3d at 570. The trial court may dismiss a complaint under section 2-619 after considering issues of law or easily proved issues of fact. *Krilich*, 334 Ill. App. 3d at 570. The trial court may consider pleadings, depositions, and affidavits. *Krilich*, 334 Ill. App. 3d at 570.

¶ 33 We review a motion to dismiss under section 2-619 of the Code *de novo*. *Krilich*, 334 Ill. App. 3d at 569. "The question on appeal is ' "whether the existence of a genuine issue of material fact should have precluded the dismissal or, absent such an issue of fact, whether dismissal is proper as a matter of law." ' " *Krilich*, 334 Ill. App. 3d at 570 (quoting *Zedella v.*

Gibson, 165 Ill. 2d 181, 185-186 (1995), quoting *Kedzie & 103rd Currency Exchange, Inc. v. Hodge*, 156 Ill. 2d 112, 116-17 (1993)).

¶ 34 II. Breach of Contract

¶ 35 All three counts of plaintiff's fourth amended complaint allege breach of contract. "To establish a breach of contract, the plaintiff must show the existence of a valid and enforceable contract, performance of the contract by the plaintiff, breach of the contract by the defendant, and resulting injury to the plaintiff." *Sherman v. Ryan*, 392 Ill. App. 3d 712, 732 (2009).

¶ 36 Interpreting a contract "is a question of law subject to *de novo* review." *Loyola University of Chicago v. Illinois Workers' Compensation Comm'n*, 2015 IL App (1st) 130984WC, ¶ 23. "The principal goal in constructing a contract is to ascertain and give effect to the intent of the parties at the time they executed the document," and in doing so "the contract must be constructed as a whole, viewing each provision in the light of the other provisions." *Loyola*, 2015 IL App (1st) 130984WC, ¶ 23. "A contract is binding and enforceable only if its material terms are definite and certain." *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888-89 (1995). However, "[t]he parties' disagreement regarding how to interpret the terms of a contract does not, in itself, render the contract ambiguous." *Meyer*, 273 Ill. App. 3d at 888.

¶ 37 III. Count I

¶ 38 Plaintiff argues that count I of his fourth amended complaint was improperly dismissed under section 2-615 (735 ILCS 5/2-615 (West 2012)). Plaintiff claims his complaint establishes that defendant breached the employment contract when it failed to pay plaintiff earned commissions for the ROEs obtained from Dana Point and Elizabeth Place. Plaintiff argues that because the Compensation Plan does not explicitly define when an ROE is

considered "obtained," the Compensation Plan should be interpreted so that an ROE signed by the customer, but not by the defendant, is considered "obtained" for the purpose of calculating commissions. Defendant argues that since it did not sign ROEs with the condominiums until after plaintiff's termination, the ROEs were therefore not obtained by the plaintiff during the time of his employment.

¶ 39 A. *Res Judicata* and Collateral Estoppel

¶ 40 Defendant claims that this issue was already decided when the Illinois Department of Labor construed the contract in such a way that ROEs would be considered "obtained" only after they were signed by both the customer and defendant. Defendant argues that *res judicata* prevents plaintiff from relitigating the issue.

¶ 41 Three requirements must be satisfied for *res judicata* to apply: " '(1) there was a final judgment on the merits rendered by a court of competent jurisdiction, (2) there is an identity of cause of action, and (3) there is an identity of parties or their privies.' " *Bagnola v. SmithKline Beecham Clinical Laboratories*, 333 Ill. App. 3d 711, 717 (2002) (quoting *River Park Inc. v. City of Highland Park*, 184 Ill. 2d 290, 302 (1998)). At issue here is the first requirement, specifically whether the Department of Labor can be considered a "court of competent jurisdiction."

¶ 42 "It is well established that *res judicata* can preclude litigation of causes of action or issues already addressed in an administrative proceeding that is judicial in nature." *Osborne v. Kelly*, 207 Ill. App. 3d 488, 491 (1991). In *Osborne*, the hearing was described as "extensive and adversarial ***, conducted under oath and on the record," and reviewed by the circuit court. *Osborne*, Ill. App. 3d at 491. In *Bagnola*, the main case cited by defendant to support the argument that *res judicata* applied, the hearing was similarly described as "an extensive

adversarial hearing *** under oath and on the record," and the findings of the agency were reviewed by the circuit court. *Bagnola*, 333 Ill. App. 3d at 718. It was the circuit court's final judgment on the merits that satisfied the first element of *res judicata*. *Bagnola*, 333 Ill. App. 3d at 718 ("Here, there was a full hearing on the merits by the [Police] Board and the circuit court entered a final judgment on the merits of plaintiff's administrative review action. Thus, the first prong of the *res judicata* doctrine was satisfied.").

¶ 43 Unlike the agencies in *Osborne* and *Bagnola*, the Department of Labor conducted an "Informal Investigative Hearing" which did not allow cross-examination by an attorney (56 Ill. Adm. Code 300.980, repealed at 38 Ill. Reg. 18517 (eff. July 20, 2011)) or require testimony to be under oath (56 Ill. Adm. Code 300.970, repealed at 38 Ill. Reg. 18517 (eff. July 20, 2011)) or on the record (56 Ill. Adm. Code 300.980, repealed at 38 Ill. Reg. 18517 (eff. July 20, 2011)). In this capacity, "[t]he Department of Labor has no binding adjudicatory power and can only investigate wage claims and 'attempt equitably to adjust controversies between employees and employers.' " *Zabel v. Cohn*, 283 Ill. App. 3d 1043, 1052 (1996) (quoting 820 ILCS 115/11(a) (West 1992)). "Actual liability, if contested, must be determined by the trial court on a *de novo* basis." *Zabel*, 283 Ill. App. 3d at 1052.

¶ 44 The informal, investigative proceeding carried out by the Department of Labor was not an administrative proceeding judicial in its nature. Accordingly, *res judicata* does not apply to the agency's findings. See also *Rekhi v. Wildwood Enterprises, Inc.*, 219 Ill. App. 3d 312, 316 (1991) (finding that the Department of Labor's proceedings under the Wage Payment and Collection Act were not judicial in nature and therefore had no *res judicata* effect).

¶ 45 Defendant also argues that collateral estoppel prevents plaintiff from relitigating the issue of when commission was "obtained." Collateral estoppel applies when "(1) the issue decided

in the prior adjudication is identical to that presented in the current action; (2) the party against whom the estoppel is asserted was a party to or in privity with a party to the prior adjudication; and (3) the prior adjudication resulted in a final judgment on the merits." *Bagnola*, 333 Ill. App. 3d at 723. However, like *res judicata*, collateral estoppel is only applicable to the decisions of administrative agencies "as long as the agency was acting in an adjudicatory, judicial or quasi-judicial capacity and the disputed issue is identical to the issue presented in the new claim." *Gallaher v. Hasbrouk*, 2013 IL App (1st) 122969, ¶ 21.

¶ 46 As discussed above, the Department of Labor conducted an informal, investigative hearing which was not recorded and in which testimony was not given under oath. The agency was not acting in a sufficiently judicial capacity for collateral estoppel to apply.

¶ 47 B. Obtained Commission

¶ 48 Turning, then, to the merits of plaintiff's argument and interpreting the Compensation Plan *de novo*, we come to the same conclusion as the Department of Labor. The Compensation Plan states that "commissions are calculated and paid based on the number of ROEs obtained *during the two week pay period*." (Emphasis in original.) The Compensation Plan does not explicitly define when an ROE is considered "obtained." Plaintiff argues that once an ROE is signed by a customer, that ROE has been "obtained." Defendant argues that an ROE is only "obtained" once it has been signed by both the customer and defendant.

¶ 49 An ROE is a contract between defendant and a customer. "It is well established that a contract forms when there has been an offer, acceptance of that offer, and consideration." *Chicago Limousine Service, Inc. v. City of Chicago*, 355 Ill. App. 3d 489, 495 (2002). By presenting defendant with a signed ROE, the customer made an offer, which defendant could

accept by adding its signature. Until defendant signed the ROE, the offer had not been accepted and no contract had been formed.

¶ 50 The Compensation Plan did not entitle plaintiff to a commission when a customer made an offer for an ROE. The Compensation Plan entitled plaintiff to a commission when an ROE was obtained, which implied that the offer must be accepted. Interpreting the word "obtained" in light of the entire Compensation Plan supports this meaning. The Compensation Plan states that "[a]ny special arrangements require supervisor and/or SVP approval." This requirement would be meaningless if an employee could earn commissions by obtaining customer signatures on ROEs containing terms that defendant would not approve.

¶ 51 Because defendant did not sign the ROEs prior to the termination of plaintiff's employment agreement, the ROEs were not obtained while plaintiff was employed by defendant. Since the ROEs were not obtained by the time of plaintiff's termination, he was not owed commissions on them, and defendant did not breach the contract by failing to pay commissions to defendant. Count I of the fourth amended complaint, therefore, does not plead facts sufficient to support a cause of action for breach of contract, and dismissal was proper under section 2-615.

¶ 52 IV. Count II

¶ 53 Plaintiff argues that count II of his amended complaint, which relied on the procuring cause doctrine, was improperly dismissed under section 2-619 (735 ILCS 5/2-619 (West 2012)) because the Compensation Plan did not preclude the procuring cause doctrine.

¶ 54 A. Procuring Cause

¶ 55 Count II of plaintiff's fourth amended complaint relies on the doctrine of procuring cause, despite the trial court having earlier ruled that the doctrine of procuring cause did not apply to the facts of this case when it dismissed count II of plaintiff's amended complaint with prejudice under section 2-619.

¶ 56 Under the doctrine of procuring cause, "a party may be entitled to commissions on sales made after the termination of a contract if that party procured the sales through its activities prior to termination." *Technical Representatives, Inc. v. Richardson-Merrell, Inc.*, 107 Ill. App. 3d 830, 833 (1982). The doctrine is "designed to protect a salesperson who, although no longer an agent or employee when the sale is made, has done everything necessary to effect the sale." *Solo Sales, Inc. v. North America OMCG, Inc.*, 299 Ill. App. 3d 850, 852 (1998). In employing the doctrine, courts "are attempting to remedy the harsh nature of 'at will' contracts." *Scheduling Corp. of America v. Massello*, 151 Ill. App. 3d 565, 570 (1987). However, the procuring cause rule is a default rule, and applies "only if the contract does not expressly provide when commissions will be paid." *Technical Representatives*, 107 Ill. App. 3d at 833.

¶ 57 Defendant argues that the termination clause in the Compensation Plan expressly provides for when commissions will be paid, and therefore replaces the procuring cause default rule. The Termination Clause states that:

> "Upon termination or transfer of employment initiated by the employee or the company the employee will not be entitled to any further payment of commissions or bonuses beyond the date of termination or transfer. Commissions earned upon notification of termination will be calculated after the installation is confirmed."

Defendant claims that this language is unambiguous, and that it expressly provides for when commissions are to be paid.

Plaintiff responds that: (1) the Termination Clause is unenforceable; and (2) the Compensation Plan does not explicitly provide for when commissions are earned.

¶ 58 B. Enforceability of Termination Clause

¶ 59 Plaintiff claims that the termination clause is unenforceable under section 5 of the Illinois Wage Payment and Collection Act (Wage Payment Act) (820 ILCS 115/5 (West 2012)). Section 5 of the Wage Payment Act states in relevant part that:

> "Every employer shall pay the final compensation of separated employees in full, at the time of separation, if possible, but *in no case later than the next regularly scheduled payday for such employee*. Where such employee requests in writing that his final compensation be paid by check and mailed to him, the employer shall comply with this request." (Emphasis added.) 820 ILCS 115/5 (West 2012).

Section 2 of the Wage Payment Act includes "earned commissions [and] earned bonuses" in its definition of "final compensation." 820 ILCS 115/2 (West 2012).

¶ 60 The first sentence of the Termination Clause states that the former employee "will not be entitled to any further payments of commissions" after termination. If the parties truly intended to end "any" commission payments, this section would violate the Wage Payment Act, which requires earned commissions to be paid even after termination, as part of final compensation (820 ILCS 115/5 (West 2012)). However, "where a contract appears innocent on its face there is a presumption of legality." *Guzell v. Kasztelanka Cafe & Restaurant, Inc.*, 87 Ill. App. 3d 381, 387 (1980). Additionally, if the first sentence of the Termination Clause

was interpreted to preclude all further payments of commission, the second sentence, which calculates commission on ROEs obtained upon notification of termination, would be rendered meaningless. "A court will not interpret a contract in a manner that would nullify or render provisions meaningless." *Downs v. Rosenthal Collins Group, L.L.C.*, 2011 IL App (1st) 090970, ¶ 24 (quoting *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011)). The best interpretation of the Termination Clause is that it prevents the employee from *earning* commissions after termination, but commissions earned during employment or "upon notification of termination" will still be paid.

¶ 61 The final sentence of the Termination Clause states that "[c]ommissions earned upon notification of termination will be calculated after installation is confirmed." Plaintiff argues that because cable installation usually occurred well after the end of the two-week pay period, this sentence contradicts section 5 of the Wage Payment Act which states that final compensation be paid "in no case later than the next regularly scheduled payday for such employee" (820 ILCS 115/5 (West 2012)).

¶ 62 However, in a case involving a bonus conditional on yearly sales, the court found that when the amount of the bonus could not be known before the end of the pay period, "the mandatory payment date in section 5 would be rendered meaningless." *McLaughlin v. Sternberg Lanterns, Inc.*, 395 Ill. App. 3d 536, 544 (2009). Because treating an uncertain bonus as an "earned bonus" would render a section of the statute meaningless, the court held that uncertain bonuses were not characterized as "earned" for purposes of section 5 of the Wage Payment Act and were not a part of final compensation. In this respect, we see no difference between uncertain bonuses and uncertain commissions. Because the second sentence of the termination clause describes commissions earned but not yet calculated, the

amount of those commissions would be uncertain at the time of termination and would need not be paid by "the next regularly scheduled payday" (820 ILCS 115/5 (West 2012)).

¶ 63 The Termination Clause, therefore, does not violate the Wage Payment Act. It is an enforceable provision of the Compensation Plan.

¶ 64 C. Compensation Plan Expressly Provides When Commissions are Paid

¶ 65 The plain language of the Termination Clause demonstrates that the parties did not intend for commissions to be earned after termination of the agreement. This is supported by the provision earlier in the Compensation Plan which provided that plaintiff was entitled to a per-unit commission on "ROEs obtained *during the two-week pay period*." (Emphasis in original.) In *Technical Representatives*, "[t]he contract provided that plaintiff was entitled to a seven percent commission 'on sales *during the period of this agreement*.' " (Emphasis added.) *Technical Representatives*, 107 Ill. App. 3d at 834. The court held that this provision precluded the application of the procuring cause rule. *Technical Representatives*, 107 Ill. App. 3d at 833-34.

¶ 66 The language used in the Compensation Plan is functionally similar to the language used in the contract at issue in *Technical Representatives*. *Technical Representatives*, 107 Ill. App. 3d at 834. In *Technical Representatives*, that language was found to preclude the procuring cause doctrine because it "expressly provided that plaintiff would receive commissions 'on sales during the period of this agreement.' " *Technical Representatives*, 107 Ill. App. 3d at 833. The Compensation Plan, likewise, expressly provided that plaintiff would receive commission only on ROEs obtained while the employment agreement was in effect. This precluded application of the procuring cause doctrine.

¶ 67 V. Count III

¶ 68 Plaintiff argues that count III of his fourth amended complaint was improperly dismissed under section 2-615 (735 ILCS 5/2-615 (West 2012)). Plaintiff claims his complaint establishes that defendant breached the employment contract when: (1) it deleted plaintiff's records on Salesforce and falsified his Discipline Record; (2) it changed the terms of the Compensation Plan without 30-day written notice; and (3) it terminated plaintiff's employment without conducting a human resources investigation.

¶ 69 A. Company Records

¶ 70 Count III of plaintiff's fourth amended complaint lays out several theories for breach of contract. The first is that defendant, by deleting plaintiff's digital records from Salesforce, breached a provision in the Compensation Plan which stated that "[a]ny falsification or misrepresentation of company records, documents or sales orders is considered grounds for immediate termination."

¶ 71 That provision is contained under the heading of "Governing Commission Plan Policies," and viewing the provision in light of the entire Compensation Plan, we conclude that the parties did not intend the provision to bind defendant. The provision is listed alongside a number of other provisions which set forth plaintiff's responsibilities under the Compensation Plan, including provisions involving eligibility, performance standards, sales quotas, and transportation.

¶ 72 Furthermore, a plain reading of the language "grounds for immediate termination" implies termination of plaintiff's employment by defendant. Numerous cases reference employment contracts where "grounds for immediate termination" was used in the contract to indicate that the employer could terminate the employee, but where the employer was not

reciprocally bound. See, *e.g.*, *Pesoli v. Department of Employment Security*, 2012 IL App (1st) 111835, ¶ 14 (accessing a patient's information on the computer was "grounds for immediate termination"), *Farris v. Department of Employment Security*, 2014 IL App (4th) 130391, ¶ 12 (violating biosecurity procedures was "grounds for immediate termination"). Plaintiff failed to cite a single case where an employment contract used similar language to bind the employer.

¶ 73 Plaintiff argues that because the provision describing falsification of company records was sufficiently definite to constitute an enforceable term, it must bind both the employee and the employer. This argument predicates enforceability on mutuality of obligation. However, " 'where there is any other consideration for the contract mutuality of obligation is not essential.' " *Carter v. SSC Odin Operating Co., LLC*, 2012 IL 113204, ¶ 21 (quoting *Armstrong Paint & Varnish Works v. Continental Can Co.*, 301 Ill. 102, 108 (1921)). Defendant's promise to pay commissions based on plaintiff's sales records was consideration for defendant's promise not to falsify those same records. Because this consideration existed, mutuality of obligation is not necessary for the provision to be enforceable.

¶ 74 Plaintiff additionally argues that interpreting the provision as binding only himself violates the implied covenant of good faith and fair dealing. " 'Every contract implies good faith and fair dealing between the parties to it, and where an instrument is susceptible of two conflicting constructions, one which imputes bad faith to one of the parties and the other does not, the latter construction should be adopted.' " *Mid-West Energy Consultant, Inc. v. Covenant Home, Inc.*, 352 Ill. App. 3d 160, 163 (2004) (quoting *Martindell v. Lake Shore National Bank*, 15 Ill. 2d 272, 286 (1958)). "This good-faith principle is used only as a

construction aid in determining the intent of the contracting parties." *Mid-West Energy Consultant*, 352 Ill. App. 3d at 163.

¶ 75 As noted above, the provision is not ambiguous and is not susceptible to two conflicting constructions. The evident intent of the parties was to bind plaintiff, but not defendant, to the language of the provision. Furthermore, nothing about this result imputes bad faith. It is reasonable and fair for an employer, who relies on accurate reporting of sales records to calculate commissions, to contract with its employee to ensure those records are not falsified.

¶ 76 Finally, we note that the provision about company records in the Compensation Plan stated that falsifying the records would be "grounds for immediate *termination*." (Emphasis added.) Assuming, *arguendo*, that the provision applied to defendant and defendant had falsified its records, this would not be a breach of the Compensation Plan. It would merely give plaintiff cause to terminate the agreement.

¶ 77 Defendant did not breach the Compensation Plan with respect to its actions regarding the Salesforce records and the Discipline Record

¶ 78 B. Changes to the Program

¶ 79 Count III also alleges that defendant breached the Compensation Plan by changing the terms of the plan without 30-day written notice. Under the subheading "Changes to the Program," the Compensation Plan states that "[t]his program can be changed at any time upon 30 days advance notification. Any modifications to the program require the written approval of the Senior Vice President/General Manager and Human Resources Manager."

¶ 80 "Modification of a contract is a change in one or more respects that introduces new elements into the details of the contract and cancels others, but leaves the general purpose and effect undisturbed." *Ross v. May Co.*, 377 Ill. App. 3d 387, 391 (2007). Plaintiff argues

that by requiring preapproval of special ROE arrangements, defendant had modified the program as described in the Compensation Plan. However, the Compensation Plan had always provided that "[a]ny special ROE arrangements require supervisor and/or SVP approval." Defendant did not introduce new elements into the contract, but instead explained an existing term to plaintiff. By explaining to plaintiff that approval had to come before the ROEs were presented to customers, defendant did not modify the program. Defendant merely clarified a misapprehension held by plaintiff. Since the program was not modified, defendant did not breach the Compensation Plan by failing to give 30 days of notice.

¶ 81 C. Employment at Will

¶ 82 Finally, count III alleges that defendant breached the Compensation Plan by terminating plaintiff's employment without conducting a human resources investigation.

¶ 83 In Illinois, "an employee hired without a fixed term is presumed to be an at-will employee whose employment may be terminated for any cause or reason, provided the employer does not violate clearly mandated public policy." *Ross*, 377 Ill. App. 3d at 389. However, there is "an exception to this rule where 'an employee handbook or other policy statement creates enforceable contractual rights if the traditional requirements for contract formation are present.' " *Ross*, 377 Ill. App. 3d at 389 (quoting *Vickers v. Abbott Laboratories*, 308 Ill. App. 3d 393, 407 (1999)). There are three requirements for an employee manual to form an employment contract:

> " 'First, the language of the policy statement must contain a promise clear enough that an employee would reasonably believe that an offer has been made. Second, the statement must be disseminated to the employee in such a manner that the employee is aware of its contents and reasonably believes it to be an offer.

> Third, the employee must accept the offer by commencing or continuing to work after learning of the policy statement.' " *Ross*, 377 Ill. App. 3d at 389 (quoting *Duldulao v. Saint Mary of Nazareth Hospital Center*, 115 Ill. 2d 482, 490 (1987)).

¶ 84 Plaintiff claims that an employee manual existed which required human resources to investigate employee grievances before termination. However, plaintiff admits that he did not have a copy of the employee manual. Based on the facts pleaded in the fourth amended complaint, plaintiff was not aware of this policy before receiving the Discipline Record on the day of his termination. In order for an employee manual to form an employment contract, the employee must be aware of its contents and reasonably consider them an offer. *Ross*, 377 Ill. App. 3d at 389. Here, plaintiff was not aware of the employee manual and could not reasonably believe the policies therein to be an offer.

¶ 85 Since the policies of the employee manual did not form a contract governing plaintiff's employment, defendant did not breach the agreement by terminating plaintiff without conducting an investigation.

¶ 86 Plaintiff argues defendant breached the implied covenant of good faith and fair dealing by terminating his employment. However, "[t]he covenant of good faith and fair dealing does not enable a [party] to read an obligation into a contract that does not exist." *Northern Trust Co. v. VIII South Michigan Associates*, 276 Ill. App. 3d 355, 368 (1995). Instead, the covenant "is essentially used to determine the intent of the parties where a contract is susceptible to two conflicting constructions." *Northern Trust Co.*, 276 Ill. App. 3d at 367. Plaintiff does not argue that the Compensation Plan is susceptible to two conflicting constructions. Instead, he argues that the implied covenant of good faith and fair dealing

created an obligation for defendant to conduct a human resources review. No such obligation existed in the Compensation Plan.

¶ 87 None of the alleged breaches of the Compensation Plan set forth in count III of the fourth amended complaint are supported by facts sufficient to support a cause of action for breach of contract, and dismissal was proper under section 2-615.

¶ 88 CONCLUSION

¶ 89 For the foregoing reasons, we affirm the trial court. With respect to contracts for contracts for which plaintiff was the "procuring cause," plaintiff's employment agreement precluded the doctrine of procuring cause. With respect to plaintiff's other claims, he did not allege sufficient facts to support a cause of action.

¶ 90 Affirmed.