

Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2006-104

NOVEMBER TERM, 2006

Jean Moss

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APPEALED FROM:

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v.

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Orange Superior Court

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Bread & Chocolate, Inc.

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DOCKET NO. 88-5-04 Oecv

Trial Judge: Mary Miles Teachout

In the above-entitled cause, the Clerk will enter:

Defendant Bread & Chocolate, Inc. appeals from the trial court=s order granting summary judgment to plaintiff Jean Moss and awarding her damages. Defendant argues that the court erred as a matter of law by reconsidering plaintiff=s motion for summary judgment without first providing notice to the parties. We affirm.

The record indicates the following. Plaintiff sued defendant in May 2004, raising claims of breach of contract, intentional misrepresentation, and unfair trade practices. She also sought a writ of attachment, which the court denied without prejudice in June 2004. In September 2005, plaintiff moved for summary judgment, relying on the following facts. Plaintiff entered into an oral agreement with defendant in November 1994. She

agreed to market defendant's products, and defendant agreed to pay her a commission based on the sales that she generated. In 1999, defendant stopped sending plaintiff invoices, the method by which plaintiff had previously verified her commissions. Defendant also stopped paying plaintiff monthly commissions. Plaintiff calculated that defendant owed her at least \$43,930.88 in unpaid commissions, and she filed several affidavits to support this assertion. Defendant did not respond to plaintiff's motion, and thus the facts alleged by plaintiff were deemed admitted. See V.R.C.P. 56(c)(2). The trial court granted summary judgment to plaintiff in November 2005, noting that there had been no objection filed, and plaintiff had demonstrated her entitlement to relief on all three counts raised in her complaint. The court indicated that it would schedule a telephone conference to determine how much time was needed for a hearing on damages.

A telephone conference was held in January 2006. At that time, plaintiff inquired why a hearing was necessary, given that she had included an affidavit with her motion for summary judgment showing the amount that she was owed. The court indicated its confusion as to whether plaintiff was seeking additional damages on her claims for intentional misrepresentation and unfair trade practices, beyond those specified for breach of contract. Plaintiff informed the court that she was seeking only the amount of damages specified in her affidavit. The court then stated that, with that clarification, it would not need to conduct a hearing on damages because the only purpose of the hearing was to ascertain the unspecified damages on the other two counts raised in plaintiff's complaint. The court issued an order entering judgment in plaintiff's favor and awarding her \$43,930.88 in damages, plus interest and costs. Defendant filed a motion for reconsideration, which was denied. This appeal followed.

On appeal, defendant argues that the trial court erred because it either reconsidered its initial summary judgment decision, or decided a renewed summary judgment motion, without first providing defendant notice and an opportunity to be heard. Defendant suggests that there was a dispute of material fact regarding the amount of damages sought, pointing to evidence introduced at the hearing on plaintiff's motion for a writ of attachment.

These arguments are without merit. The record shows that plaintiff sought both a finding of liability and

an award of damages in her motion for summary judgment. She alleged that defendant owed her at least \$43,930.88 in damages based on her unpaid commissions. By failing to respond to plaintiff=s motion, this fact was deemed admitted by defendant. See V.R.C.P. 56(c)(2) (All material facts set forth in the statement required to be served by the moving party will be deemed to be admitted unless controverted by the statement required to be served by the opposing party.@). While the court indicated that a hearing would be set to determine damages, it did so, as it explained, because there was some confusion as to whether plaintiff was seeking additional damages in connection with the other two claims raised in her complaint. When this point was clarified, the need for a hearing on damages disappeared. There was simply no material fact in dispute as to the amount of damages that plaintiff sought on her breach-of-contract claim. Any evidence of a lesser claim presented at the attachment hearing, which preceded plaintiff=s motion for summary judgment, is irrelevant. We note, moreover, that the attachment hearing was held before discovery was conducted and plaintiff=s claim for \$28,000 in unpaid commission was explicitly based on the unrefuted evidence that she possessed at that time. Thus, while defendant complains that it was denied notice and the opportunity to respond to the court=s ruling, the record shows that it failed to contest the evidence when it had an opportunity to do so. The damages that plaintiff received were established by the court=s initial summary judgment decision, and we fail to see how defendant suffered any harm from the court=s clarification of its decision. Cf. Progressive Ins. Co. v. Wasoka, 2005 VT 76, §§ 20-21, 178 Vt. 337 (even assuming that procedural error occurred in trial court=s consideration of motion for summary judgment, error was harmless where plaintiff failed to show that it suffered any prejudice as a result).

Affirmed.

BY THE COURT:

Denise R. Johnson, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice