

**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

CRAIG ROBERTS,	:	APPEAL NO. C-160893
Plaintiff-Appellant,	:	TRIAL NO. A-1505058
vs.	:	<i>OPINION.</i>
JONES LANG LASALLE	:	
AMERICAS, INC.,	:	
Defendant-Appellee.	:	

Civil Appeal From: Hamilton County Court of Common Pleas

Judgment Appealed From Is: Affirmed

Date of Judgment Entry on Appeal: March 21, 2018

*Rebold Larkin Murray, L.L.C., Kyle D. Murray and Andrew J. Ferguson, for
Plaintiff-Appellant,*

*Thompson Hine, L.L.P., Robert P. Johnson and Ellen M. Maniaci, for Defendant-
Appellee.*

ZAYAS, Presiding Judge.

{¶1} Plaintiff-appellant Craig Roberts appeals the trial court’s judgment in favor of defendant-appellee Jones Lang LaSalle Americas, Inc., (“JLL”) on Roberts’s breach-of-contract claim. We affirm the judgment of the trial court because Roberts is not entitled to receive commissions that JLL never collected.

Background

{¶2} In September of 1996, Roberts was a real-estate broker for CB Commercial Real Estate Group, Inc., (“CB Commercial”). At that time, he entered into an exclusive agency agreement with tenant Andersen Consulting Solutions Center, LLP, (“Andersen”) which provided that Roberts would locate office space for Andersen to lease. The agency agreement began on September 19, 1996, and continued on a month-to-month basis until a lease was executed or closed. Shortly thereafter, Roberts left CB Commercial and joined JLL, taking the Andersen contract with him. JLL and CB Commercial agreed that they would split the Andersen commission, and Roberts and JLL agreed that they would split the net commissions that JLL received.

{¶3} Roberts located office space for Andersen in the Atrium One building, and in anticipation of the lease closing, JLL and Atrium One entered into a commission agreement. This contract provided that JLL, as exclusive agent for Andersen, would be paid a commission if the lease contained an option to renew or extend, and a lease was renewed or extended. The commission agreement further provided that the commission “shall be earned and payable at the time the extended term commences or the additional space is occupied, as applicable.”

{¶4} Roberts’ employment with JLL ended before the Andersen lease closed. Roberts and JLL entered into a severance agreement. The severance

agreement provided that JLL would pay Roberts an enhanced commission on transactions that closed after his employment ended. The severance agreement included the following relevant clauses. The portion in bold is a handwritten addition, initialed by Roberts and a representative from JLL. The struck-through portion was struck through by hand and initialed by Roberts and a representative from JLL.

No enhanced commissions are due or payable * * * if the Commission has not been received by [JLL], regardless of any other prior agreements or practices. * * * [Roberts] agrees that [JLL] may waive, reduce, adjust, compromise, or settle with third parties any commission in which [Roberts] is or claims to be entitled to share, **with the exception of commissions due to [Roberts] per the terms of the Agreement between [JLL] and CB Commercial Real Estate, a copy of which is attached hereto as part of Attachment One.** In addition, [JLL] shall have the exclusive right to determine what steps or procedures, if any, should be undertaken to collect or enforce any claim for commission, or share thereof, against third parties, the expense for which shall be charged, pro rata, against commission due [Roberts]. [JLL]’s decision shall be reasonable as to any such matters, but in any event shall be final and binding, ~~incurring no liability to [Roberts] for its decision to waive, reduce, adjust, compromise or settle a claim or failure to collect such commission(s).~~

{¶5} The Andersen lease closed on August 7, 1997, and was for space on the 15th and 16th floors of Atrium One for a term of ten years. The lease included two renewal options. The first renewal option was to extend the lease “for all (but not

less than all) of the then Leased Premises” from January 1, 2008, to December 31, 2012. If the first renewal option were exercised, then the tenant would have the right to a second renewal option for an additional five years beginning January 1, 2013. To qualify as a renewal, the lease must include all of the premises and include the same terms and conditions as the initial lease, with the exception of the rent. JLL paid Roberts his commission from the Andersen lease in accordance with the terms of the commission agreement.

{¶6} On January 31, 1998, the Andersen lease was amended to name Property Ohio OBJLW as the landlord because it had purchased the building from Atrium One. The term of the lease was also amended to reflect a termination date of December 31, 2007. The amendment included the original broker’s clause which stated that the landlord would pay JLL a commission if the tenant subsequently renewed or leased additional space, “all to be provided in a separate written agreement between Landlord and JLL.” JLL never entered into a separate written agreement with the landlord after the lease was signed.

{¶7} In September 2007, the lease was changed to reflect that Accenture, formerly Andersen, was the tenant, and Asset Ohio Fourth Street LLC had succeeded to the property as landlord. This lease was effective from January 1, 2008, to December 31, 2012. Under the terms of the lease, Accenture was vacating the 15th floor premises and modifying the space on the 16th floor. The terms and conditions of this lease were substantially different than the initial lease.¹ The lease further specified that “Landlord and Tenant agree that there are no claims for broker’s commissions or finder’s fees, other than Studley, Inc. (the “Broker”) in connection with the execution of this Amendment.”

¹ The trial court did not address whether the lease amendments qualified as renewal options as defined in the lease or were new leases with different terms.

{¶8} In December 2012, the lease was changed again. The terms were modified effective January 1, 2013, to December 31, 2017. Accenture reduced the premises from 32,246 square feet to 19,092 square feet, and the landlord was required to make various changes to the space. The parties again agreed that Studley, Inc., and Cassidy Turley, (collectively “the Brokers”) had the sole claim for commissions in connection with the execution of the lease.

{¶9} In 2015, Roberts filed a breach-of-contract action against JLL. Roberts asserted that JLL breached the severance agreement by not paying him commissions on the renewals. Roberts alleged that the 2007 and 2012 leases were renewals as contemplated in the severance and commission agreements, and he was entitled to commissions on the renewals. Both parties moved for summary judgment. JLL argued that it was not involved in the 2007 or 2012 lease negotiations, did not earn or have a right to receive those commissions, and was not obligated to pay Roberts a commission it did not receive. The trial court denied the motions, and held a bench trial on September 30, 2016.

{¶10} The evidence at trial established that Accenture amended the lease in 2007 and 2012, neither Roberts nor JLL did any work on these leases, Studley, Inc., and Cassie Turley were the brokers who had the sole claim for commissions, JLL was not paid any commissions for the leases, JLL never sought or received any commissions, and JLL never paid Roberts any commissions on the leases.

{¶11} Following a bench trial, the trial court found that JLL chose not to collect the commissions, and under the terms of the severance agreement, JLL had the sole discretion to determine whether to collect or enforce any claims for commissions. If JLL did not collect a commission, Roberts was not entitled to a commission. Because JLL did not collect any commissions from the 2007 and 2012

leases, it was under no obligation to pay a commission to Roberts. The trial court concluded that JLL did not breach the severance agreement and entered judgment for JLL. Roberts timely appealed.

Assignment of Error

{¶12} In his sole assignment of error, Roberts argues that the court erred in concluding that JLL had the sole discretion to collect the commissions and did not owe any commission to Roberts if it did not collect. Specifically, Roberts argues that JLL is required to pay Roberts his commission, whether it collected the commission or not, because the severance agreement prohibits JLL from waiving, reducing, compromising, or settling the Accenture commissions.

Contract Interpretation

{¶13} Contract interpretation is a matter of law, which courts review de novo. *St. Marys v. Auglaize Cty. Bd. Of Commrs.*, 115 Ohio St.3d 387, 2007-Ohio-5026, 875 N.E.2d 561, ¶ 5, citing *Nationwide Mut. Fire Ins. Co. v. Guman Bros. Farm*, 73 Ohio St.3d 107, 108, 652 N.E.2d 684 (1995). The court's primary objective is to determine the intent of the parties based upon the language they chose to employ. *Wal-Mart Realty Co. v. Tri-County Commons Assoc., LLC*, 1st Dist. Hamilton No. C-160747, 2017-Ohio-9280, ¶ 10.

{¶14} Common words will be given their ordinary meaning unless the entirety of the contract reveals a contrary intent. *Foster Wheeler Enviresponse, Inc. v. Franklin Cty. Convention Facilities Auth.*, 78 Ohio St.3d 353, 361, 678 N.E.2d 519 (1997). If the terms of the contract are clear and unambiguous, courts must give the words their plain and ordinary meaning and may not create a new contract by finding the parties intended something not set out in the contract. *Alexander v. Buckeye Pipe Line*, 53 Ohio St.2d 241, 246, 374 N.E.2d 146 (1978).

Roberts was not Entitled to a Commission under the Severance Agreement

{¶15} Under the plain language of the severance agreement, no commission would be payable to Roberts if JLL did not receive it. JLL could not waive, reduce, adjust, compromise, or settle an Accenture commission. Additionally, JLL had the “exclusive right to determine what steps or procedures, if any, should be undertaken to collect or enforce any claim for commission,” and that decision was “final and binding.”

{¶16} Accordingly, the trial court correctly concluded that Roberts was not entitled to a commission if JLL did not receive a commission. Moreover, JLL had the sole discretion to determine whether to collect a commission or whether to enforce a claim for a commission. Because JLL did not collect a commission in 2007 or 2012 from the Accenture lease, Roberts is not entitled to a commission.

{¶17} Roberts argues that JLL is required to pay him the commission, whether it collected the commission or not, because the hand-written language prohibited JLL from waiving, reducing, compromising, or settling the Accenture commissions. He further argues that by failing to pursue a claim, JLL has violated the waiver provision. We disagree.

{¶18} “A waiver is a voluntary relinquishment of a known right, with the intent to do so with full knowledge of all the facts.” *Linden Med. Pharmacy, Inc. v. State Bd. of Pharmacy*, 10th Dist. Franklin No. 05AP-530, 2005-Ohio-6961, ¶ 9, quoting *N. Olmsted v. Eliza Jennings, Inc.*, 91 Ohio App.3d 173, 180, 631 N.E.2d 1130 (8th Dist.1993). “The party asserting waiver must prove the waiver by showing a clear, unequivocal, decisive act by the other party demonstrating the other party's intent to waive.” *Id.*, citing *N. Olmsted* at 180, citing *White Co. v. Canton Transp. Co.*, 131 Ohio St. 190, 198-199, 2 N.E.2d 501 (1936).

{¶19} The waiver clause prohibited JLL from waiving or reducing any commission that it received from a third party. JLL was not offered an Accenture commission to waive. The record reflects that JLL did not perform any services on the 2007 lease or the 2012 lease, both leases stated that other brokers had the sole claim for commissions, and the landlord did not pay JLL any commissions. Roberts has not alleged or demonstrated any conduct on JLL's part to show that it waived a commission on the 2007 or 2012 lease. Because the language of the severance agreement allowed JLL to refuse to collect or enforce any claim, the exercise of this retained right cannot be construed as a waiver.

{¶20} The dissent notes that the actions of the landlord and tenant conflicted with the commission agreement. The landlord may have breached the commission agreement that it had with JLL. However, the severance agreement provided that “[JLL] shall have the exclusive right to determine what steps or procedures, if any, should be undertaken to collect or enforce any claim for commission, or share thereof, against third parties * * *.” This provision gave JLL the exclusive authority to determine how, when, and if it would collect the Accenture commission.

Conclusion

{¶21} JLL's decision was final and binding. If JLL did not collect a commission, Roberts was not entitled to a commission. JLL exercised its rights under the severance agreement to take no action to collect or enforce any claim for a commission. Therefore, JLL did not breach the severance agreement because it received no commissions from the 2007 and 2012 leases and chose not to collect or enforce a claim for the commissions.

{¶22} Accordingly, Roberts's assignment of error is overruled, and the trial court's judgment is affirmed.

Judgment affirmed.

DETERS, J., concurs in judgment only.

MILLER, J., dissents.

MILLER, J., dissenting.

{¶23} JLL entered a commission agreement with the landlord regarding the underlying lease. The agreement provided:

Lease Renewal: If a lease for which a commission is payable hereunder contains an option(s) to renew or extend, or expand and a lease term(s) is renewed or extended ***whether by virtue of such option or otherwise*** and/or tenant occupies additional space whether by virtue of an option or otherwise, then Owner shall pay a leasing commission of \$4.00 per rentable square foot. Said commission ***shall be earned and payable*** at the time the extended term commences or the additional space is occupied, as applicable.

{¶24} It is immaterial whether JLL “actively developed” the renewals. It was contractually entitled to the commissions regardless. No party to this case argues otherwise. Dividing this potential future income was the purpose of the contract language we now review.

Roberts is Entitled to His Portion of the Commissions on the Lease Renewals

{¶25} Three basic tenants of contract interpretation control the interpretation of the severance agreement in this case. First, hand-written provisions prevail over typed provision. *Love v. Beck Energy Corp.*, 7th Dist. Noble No. 14 NO 415, 2015-Ohio-1283, ¶ 22, citing *French v. Pappalardo*, 8th Dist. Cuyahoga No. 57152, 1990 WL 84278 (June 21, 1990); *Loblaw, Inc. v. Warren Plaza, Inc.*, 163 Ohio St. 581, 127 N.E.2d 754 (1955), paragraph one of the syllabus; R.C.

1303.17(B). Here, the hand-written “no waiver” clause should control over the type-written waiver provisions. Second, specific provisions control over general ones. *Groen v. Childrens Hosp. Med. Ctr.*, 2012-Ohio-2815, 972 N.E.2d 648, ¶ 24 (1st Dist.), citing *Dingledy Lumber Co. v. Erie Railroad*, 102 Ohio St. 236, 131 N.E. 723 (1921), syllabus. Here, the collection provision is general. The hand-written “no waiver” provision is specific to the Accenture lease commission. Third, a contract should be read to give effect to all its provisions, if possible. *Marusa v. Erie Ins. Co.*, 136 Ohio St.3d 118, 2013-Ohio-1957, 991 N.E.2d 232, ¶ 8, citing *German Fire Ins. Co. v. Roost*, 55 Ohio St. 581, 45 N.E. 1097 (1897), paragraph one of the syllabus. A reading that JLL can elect not to collect the commissions at issue renders the hand-written “no waiver” provision meaningless—or perhaps prevents the claim from ripening until the expiration of the statute of limitations on the underlying commission agreement. Either reading is absurd. Accordingly, I would find that the hand-written “no waiver” provision controls.

{¶26} While our standard of review on contract interpretation is de novo, we must defer to the trial court’s factual findings regarding the parties’ actions in this case. *See Seasons Coal v. Cleveland*, 10 Ohio St.3d 77, 79, 461 N.E.2d 1273 (1984). The key factual finding is that JLL “has chosen not to collect any further [Accenture] commissions of which it would have received a percentage.” This finding amounts to a breach of the severance agreement’s “no-waiver” provision. JLL has refused to pursue the commission it is required to pursue for two lease renewals—five and ten years ago. Any determination by the trial court “that taking no steps to collect the commission was not the same as ‘waiving’ the commission” is erroneous, particularly in light of the statute of limitations having likely lapsed for the first renewal. JLL has made clear that it will not ever pursue its rights to the commissions. This is waiver in

breach of the severance agreement.

{¶27} Accordingly, I would reverse the judgment of the trial court, enter judgment in favor of Roberts as to liability, and remand with instructions to ascertain damages.

Please note:

This court has recorded its own entry this date.