

69425-1

69425-1

No.69425-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

LOKAN & ASSOCIATES, INC.,

Appellant,

v.

AMERICAN BEEF PROCESSING,

Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2013 JAN 22 PM 2:57

BRIEF OF RESPONDENT

James C. Fowler, WSBA #15560

Attorneys for Respondent

VANDEBERG JOHNSON & GANDARA, LLP

One Union Square, Suite 2424

600 University Street

Seattle, Washington 98101-1192

Telephone: (206) 464-0404

Facsimile: (206) 464-0484

TABLE OF CONTENTS

INTRODUCTION.....	1
ASSIGNMENTS OF ERROR.....	1
ISSUES PRESENTED.....	1
STATEMENT OF FACTS.....	2
ARGUMENT.....	6
1. ABP’s payment obligations to Opti were contingent on ABP obtaining USDA funding.....	6
2. ABP gave Opti consideration for the Addendum.....	9
3. Opti’s forfeiture argument is incorrect.....	12
4. Ms. Lee’s Second Declaration defeats Opti’s argument regarding Kevin Bailey.....	13
CONCLUSION.....	13

TABLE OF AUTHORITIES

CASES

Berg v. Hudesman, 115 Wn.2d 657, 801 P.2d 222 (1990).....8-9

Fisher Properties, Inc. v. Arden - Mayfair, Inc.,
106 Wn.2d 826, 837, 726 P.2d 8 (1986).....8

INTRODUCTION

Respondent American Beef Processing, LLC (“ABP”) requests that the Court affirm the Trial Court’s granting of summary judgment dismissing plaintiff Opti Staffing Group’s (“Opti”) claim for a contingent employee recruiting fee. This is a simple case. Opti agreed that its fees would be contingent upon ABP obtaining USDA funding. It is undisputed that ABP did not receive the funding. As a result, ABP is not liable for any fee.

Opti is now raising multiple strained arguments to renege on its own contract and eliminate the agreed upon contingency. Opti’s strained arguments are inconsistent with the uncontradicted testimony of the two people that negotiated the contract, Opti’s own representative Caryn Binder Lee and ABP President Tony Garwood. Consequently, the Trial Court’s decision to grant summary judgment in favor of ABP should be affirmed.

ASSIGNMENTS OF ERROR

Respondents agree that the assigned errors are the Trial Court’s decisions regarding the competing summary judgment motions.

ISSUES PRESENTED

ABP agrees that Opti’s brief identifies the issues, although ABP disagrees with the factually argumentative assertions therein.

STATEMENT OF FACTS

ABP is a start-up company that sought to develop a unique technology for controlling the amount of fat in different beef products. The technology is the brain child of Tony Garwood. Mr. Garwood has struggled for years to develop this technology into a commercially viable enterprise. Garwood Dec., ¶2, CP 64.

Opti is an executive recruiting firm. It works on a contingent fee basis. Opti earns nothing, no matter how hard it works, if an employer decides not to hire an Opti recruit. The first sentence of its standard fee agreement (CP 38) states “Our service charge is based on the starting salary and is contingent upon hiring a referral from Opti Staffing Group.” The first sentence of paragraph number “1” in the agreement likewise reads: “Our service charge is contingency-based, and is payable if, and only if, you hire, contract, or engage the performance of services of a candidate that is referred to you, directly or indirectly, through our efforts.” See CP 38.

In 2009, ABP had a plant in Clackamas, Oregon. It operated entirely on money that was injected by investors or lenders. It did not produce product or generate any income. Garwood Dec., ¶3, CP 64.

In summer 2009, Opti began soliciting ABP and Mr. Garwood as a potential customer for its employment recruiting services. Opti sought out

Mr. Garwood, not vice versa. Opti Executive Recruiter Caryn Binder Lee was the representative of Opti that dealt with Mr. Garwood. Garwood Dec., ¶4, CP 64.

At that time, ABP and Mr. Garwood were in a conundrum. ABP wanted to use Opti to hire additional personnel to continue, but was short of funding. Until funding was obtained, ABP had no assurance that it could remain open or pay any employees it hired for more than a few months. Garwood Dec., ¶5, CP 65.

ABP's hope was to obtain USDA funding of approximately \$5 million. But ABP was not willing to commit to pay any recruiting fees to Opti for employees unless it was certain that it would get sufficient funds to keep the employees and pay the fees. Garwood Dec., ¶5, CP 65.

Mr. Garwood explained this entire situation to Ms. Lee. He hoped to obtain a multi-million dollar grant from USDA. He told her he wanted to use Opti, and he signed Opti's standard agreement in anticipation of doing so. But he made clear to Ms. Lee that he could not and would not actually hire anyone and thereby be committed to pay Opti unless any payment obligation was contingent on ABP getting that funding. Garwood Dec., ¶6, CP 65.

As a result, ABP and Opti entered into the American Beef Addendum at CP 42. The Addendum was neither drafted (to our knowledge) nor reviewed by lawyers.

Opti's own representative, Ms. Lee, has confirmed both the background facts leading to the Addendum and that both ABP and Opti intended that ABP would not be liable for any fee until ABP received the USDA funding. As is set forth in paragraphs 2 and 3 of Ms. Lee's Declaration:

2. I had numerous conversations with Tony Garwood to solicit ABP's business in late 2009. In those conversations, Mr. Garwood told me that he would like to use OPTI to fill ABP's employment needs. He hoped to obtain a multimillion dollar grant from the USDA, and expected to do so, but it was not yet in place. Mr. Garwood made clear that he could not hire any employee(s) through OPTI unless all parties agreed that ABP would not have to pay OPTI's fees until ABP actually received the USDA grant money or similar funding.

3. As a result of these discussions, OPTI and ABP entered into the November 24, 2009 American Beef Addendum. The purpose and intent of the Addendum, as discussed between Mr. Garwood and me, was to allow ABP to hire Danny Anderson, and possible future employees, through OPTI before ABP received USDA or similar funding, and ensure that ABP would not be responsible to OPTI until the USDA or similar funding was received. That was my and Mr. Garwood's understanding of the meaning of the Addendum based on the discussions we had at that time. Mr. Garwood made it clear that ABP could not hire Mr. Anderson or anyone else through OPTI unless these terms were agreed upon.

Dec. of Caryn Binder Lee, ¶¶ 2 and 3, CP 67-68.

The Addendum made perfect business sense for Opti (as well as ABP). Opti already operated on a contingent fee basis. Its ability to earn a fee was contingent on ABP hiring someone through Opti. The Addendum added a new contingency (funding), but Opti did not have any chance of satisfying the first contingency (hiring) if Opti did not agree to the funding contingency. And there was great upside to Opti - if ABP received the USDA funding, ABP would likely have hired many more people in the future. Garwood Dec., ¶8, CP 65.

After the Addendum was signed, ABP finalized hiring Danny Anderson and, subsequently, Kevin Bailey. Although ABP had previously interviewed Mr. Anderson, it is undisputed that ABP would not have allowed Mr. Anderson (or subsequently Mr. Bailey) to ever start work at ABP absent the Addendum. Mr. Garwood knew that ABP would never be able to pay Opti's fee if it did not receive the USDA funding, and he was not going to enter an agreement he knew he could not honor. Garwood Dec., ¶7, CP 65.

Unfortunately, ABP never received the anticipated funding. Julie Garwood Dec. ¶2, CP 120. Anderson only actually worked for ABP for three months, and Bailey for only about six weeks. Anderson quit because ABP could not pay him. Bailey was laid off both because he lacked the

skills ABP needed and because of the funding crisis. Garwood Dec., ¶9, CP 65.

Approximately a year later, Opti suddenly filed this suit asserting various arguments to escape the contingent nature of the contract, and seeking roughly \$36,000 in recruiting fees. The Trial Court dismissed Opti's claim on summary judgment. This Court should affirm that decision.

ARGUMENT

1. ABP's payment obligations to Opti were contingent on ABP obtaining USDA funding. The contract is a simple contingent fee contract. Opti agreed that its fees would be contingent on two events: a) ABP hiring an employee through Opti; and b) ABP receiving the hoped-for funding. Opti now wants to renege and rewrite the agreement to eliminate the second contingency. It cannot do so after the fact. If Opti had disclosed this intention in 2009, ABP never would have hired Anderson or Bailey, and neither contingency would have been satisfied. And to be clear, while it is unfortunate for everyone that the funding was not received, the lack of funding has been much more damaging to ABP than Opti.

Opti's argument that the Addendum should be interpreted as merely affecting the timing of payment (Opti brief, pp. 11-18) is incorrect for three separate reasons.

First, Opti's entire business model is based on contingent fees. CP 38. Every one of Opti's contracts is based on contingencies. *Id.* The Addendum is another contingency, just like the contingencies in every one of Opti's contracts. Opti erroneously relies on cases such as *Taleghani* involving engineers and contractors. Engineers and contractors don't work on contingent fee bases. Opti, on the other hand, always works on a contingent fee basis. This is not intended as an insult to Opti as Opti's brief suggests at page 17 – it is simply a fact that cannot be ignored.

Second, Opti's interpretation ignores common business sense. At the time of this contract, Opti knew ABP was a start-up company that had little money and needed a cash infusion to stay afloat. Opti knew ABP had applied for a \$5 million USDA grant, and very much hoped to get that funding. But everyone, including Opti, also knew that there were no guarantees. And if ABP did not receive the funding, OPTI knew ABP could not pay Opti's recruiter fees and could not even continue to employ Danny Anderson or Kevin Bailey, and get any real benefit from Opti's work. Garwood Dec., CP 64-66. Opti's interpretation of its own language makes no business sense in these circumstances. It would have

been irrational for ABP to unconditionally agree to pay a fee in circumstances where it knew it could not make the payment. Garwood Dec., ¶7, CP 65. And the outcome that Opti seeks – a \$36,000 recruiting fee for two short-term employees, whose own payrolls totaled less than \$33,000 (CP 97) – is equally irrational. It would make no sense for an almost insolvent company to agree to pay more than double wages for short-term employees. *Fisher Properties, Inc. v. Arden - Mayfair, Inc.*, 106 Wn.2d 826, 837, 726 P.2d 8 (1986) (“When a provision is subject to two possible constructions, one of which would make the contract unreasonable and imprudent and the other of which would make it reasonable and just, we will adopt the latter interpretation.”).

Third, Opti’s argument ignores the undisputed testimony of both participants in the contract, Mr. Garwood and Ms. Lee. Opti cannot ignore this testimony, particularly since Ms. Lee was Opti’s own employee. This undisputed testimony shows that everyone understood that any payment would be contingent on ABP getting the financing. As Mr. Garwood testified, “I explained this situation to Ms. Binder, and made clear that I could not and would not actually hire anyone and thereby be committed to pay Opti unless the payment obligation was contingent on ABP getting that funding.” CP 64-66. This undisputed testimony is admissible under *Berg v. Hudesman*, 115 Wn.2d 657, 801 P.2d 222

(1990), and disposes of any doubts about this case. Opti's attempt to avoid this undisputed testimony by applying technical interpretative arguments regarding conditions and integrated contracts is nonsense. The one paragraph Addendum was (obviously) drafted by laypersons who had never heard of any such interpretative arguments.

ABP's interpretation, however, makes perfect sense for both parties. Opti had no chance of earning any fee at all without the Addendum. They were already in the contingent fee business. It made perfect sense for them to accept this additional contingency, which gave them a chance to earn something where they otherwise would have had no chance.

2. ABP gave Opti consideration for the Addendum. Opti's lack of consideration argument (Section C, pp. 9-11 of Opti's brief) is incorrect. The consideration for the agreement reflected in the Addendum was twofold. First, in exchange for the Addendum, ABP satisfied the initial contingency to Opti earning a fee by hiring Danny Anderson and, later, Kevin Bailey. ABP would never have done so, and Opti would never have had a chance of earning a fee, if Opti had not agreed to the Addendum. CP 65 (¶7). Second, also in exchange for the Addendum, ABP reiterated its promise to pay the fee *if* the financing contingency was met. Unfortunately for everyone it was not met.

Opti's argument is based on a strained and illogical interpretation of its standard fee agreement combined with an erroneous and unsupported "presumption" of fact. With respect to interpretation of its agreement, Opti's agreement (CP 38) states in its first sentence that fees are "contingent upon hiring a referral from Opti", and repeats that statement in paragraph "1". In this case ABP did not hire Anderson and Bailey until after the Addendum was signed – Anderson started work a week after the Addendum, and Bailey several months after that. CP 97. Those undisputed facts defeat Opti's argument.

Opti tries to avoid the facts by erroneously relying on small print at the end of the agreement to say the fee is earned when an "offer is made", and "presuming" (see below) that the offer to Mr. Anderson was made before the Addendum was signed. Opti's reliance on the last sentence of Paragraph 4 to override the other clear statements in the Agreement that fees are "contingent on hiring" would mean that a fee would be owed even if the employee never showed up for work, a nonsensical result.

More importantly, factually, Opti's brief at page 8 asserts the unsupported and incorrect "presumption" that ABP made a binding

“offer” to Anderson on October 6, prior to signing the Addendum.¹ Opti tries to infer that Danny Anderson was conclusively “hired”, and that ABP therefore had a binding obligation to pay Opti’s fee under Opti’s Service Charge Schedule, before ABP (Mr. Garwood) and Opti (Ms. Binder) reached the agreement reflected in the Addendum.

The “presumption” is contrary to the undisputed testimony of the both participants in the contract negotiations, Tony Garwood and Opti’s Ms. Lee. As Ms. Lee admitted, “Mr. Garwood made clear that he could not hire any employee(s) through Opti unless all parties agreed that ABP would not have to pay Opti’s fees until ABP actually received the USDA grant money or similar funding.” And Mr. Garwood likewise testified that he told both Ms. Lee and Mr. Anderson (the prospective employee) that Mr. Anderson could not begin to work at ABP until and unless the funding contingency was agreed upon. With respect to Ms. Lee, “I explained this situation to Ms. Binder, and made clear that I could not and would not actually hire anyone and thereby be committed to pay Opti unless the payment obligation was contingent on ABP getting that funding.” CP 64-68.

¹ Opti’s brief at page 8 reads, “Opti issued an invoice for the placement of Danny Anderson, dated October 6, 2009, *presumably* the day that an offer was made by ABP and accepted by Mr. Anderson.” (emphasis added).

These facts were (and are) undisputed. No binding agreement or offer to hire Anderson (or Bailey) was made until *after* the Addendum was signed, and the undisputed fact is that Danny Anderson was never going to be hired and start work at ABP until and unless Opti agreed to the agreement reflected in the Addendum.

3. Opti's forfeiture argument is incorrect. This contract is also not an inequitable forfeiture. The Addendum is another contingency, just like the contingencies in every one of Opti's contracts. If this is an unenforceable forfeiture, Opti could next claim that an employer's decision not to hire an Opti recruit is also a "forfeiture". That is directly contrary to the clear intent of the parties. The Restatement cited on page 12, line 11 of Opti's brief with the trial court (CP 29) notes that the rule Opti is relying upon does not apply when "the circumstances indicate that he has assumed the risk". Opti's own representative Ms. Lee has testified that Opti knowingly assumed the risk in this case. CP 67-68. And doing so made perfect business sense for Opti – assuming the risk was the only way Opti would earn any fee, and doing so also gave it an opportunity to earn many more fees in the future. It is unfortunate for everyone that it didn't work out. But Opti cannot now transfer its share of the risk back to ABP.

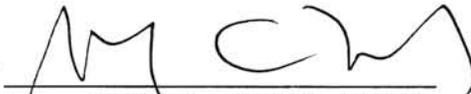
4. Ms. Lee's Second Declaration defeats Opti's argument regarding Kevin Bailey. The argument the Addendum only applies to Danny Anderson fails because Caryn Binder Lee's Second Declaration clarified that she acknowledged that the agreement reflected in the Addendum also applied to Kevin Bailey. CP 119.

CONCLUSION

Opti's arguments are after the fact efforts to renege on the agreement it knowingly made. Although this is an unfortunate situation for everyone, the loss of funding has hurt ABP far more than Opti, and Opti has no ground to shift its small share of the "loss" to ABP. The Court should affirm the trial court's grant of summary judgment dismissing Opti's Complaint.

RESPECTFULLY SUBMITTED this 21st day of January, 2013.

VANDEBERG JOHNSON &
GANDARA, LLP

By 
James C. Fowler, WSBA #15560
Attorneys for Respondent

I hereby declare under penalty of perjury under the laws of the State of Washington, that the following is true and correct. On this day, I caused to be delivered a true and correct copy of Respondent's Brief via email (by agreement) and U.S. Mail, postage prepaid, on:

Kelly Delaat-Maher
Smith Alling
1102 Broadway Plaza, #403
Tacoma, WA 98402
kelly@smithalling.com

SIGNED this 21st day of January, 2013, at Seattle, Washington.



Lorraine Lofton