IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY
CIVIL TRIAL DIVISION

ADVANCED SURGICAL SERVICES, INC. and ROBERT MORRIS	**: AUGUST TERM, 2000**
VS.	**:**
INNOVASIVE DEVICES, INC., MITEK PRODUCTS, ET AL.	**: NO. 1637**

OPINION

BY: VICTOR J. DiNUBILE, JR., J.

This is an appeal from the denial of Post Trial Motions and entry of judgment on a jury's verdict in favor of the plaintiff, Advanced Surgical Services, Inc. (hereinafter referred to as "ASSI" or "plaintiff"), and against defendant, Mitek Products (hereinafter referred to as "Mitek" or "defendant"), in the amount of $400,000.00. The verdict arose from a breach of an implied contract for failure on the part of defendant Mitek to pay a sum of money arising from the termination of this contract. Defendant's main assertion in its Post Trial Motion seeking Judgment NOV is that there was insufficient evidence to support the existence of a contract. In Mitek's request for alternative relief for new trial, it argues that even if a contract did exist, there was insufficient evidence for the jury to have arrived at the sum of $400,000.00 in damages stemming from the breach. In light of the issues presented, this court recites the facts as follows in accordance with Lockwood v. City of Pittsburgh, 751 A.2d 1136 (Pa. 2000) (standard for grant of Judgment NOV) and Pachesky v. Getz, 510 A.2d 776 (Pa. Super. 1986) (standard for grant of new trial).

The plaintiff through its principal, Robert Morris (hereinafter referred to as "Morris"), entered

into an agreement to sell orthopedic medical devices with defendant's predecessor, co-defendant Innovasive Devices, Inc. (hereinafter referred to as "Innovasive"). This sales agency relationship initiated some time in 1997. According to the plaintiff, the medical device company's sales were relatively small when their relationship commenced. It was the intention of the principals of Innovasive to build up sales so that the company could be sold at a profit for its shareholders. To further this end, and to aid in his sales strategy, Morris invested approximately $200,000.00 worth of Innovasive's medical devices. As a result of his efforts, Morris became one of Innovasive's best salespersons, accounting for at least 20% of its sales. In the subsequent years of 1998 and 1999, he made enough sales to generate $400,000.00 in commissions for his company, ASSI.

During the year of 1997, Morris through ASSI attempted to obtain a formal written contract, such as the company had with its other sales representatives, but to no avail. Unsigned written contracts and letters were exchanged between Morris and Rick Simmons, the Vice President and General Manager of Innovasive, in an attempt to enter into a formal agreement. This exchange produced only a letter of February 3, 1998. Although not a formal contract, it did evidence the intention of the parties as to certain aspects of the sales contract. The letter was signed by Morris on behalf of ASSI, Rick Simmons on behalf of Innovasive, and Nick Ansari, Vice President of Sales and Marketing for Innovasive. It is this letter and its purported terms which form the basis of the implied in fact contract issue presented in this case; more particularly the interpretation of a buy out provision and whether it is legally binding upon Innovasive's successor, defendant Mitek. The pertinent provision reads as follows:

> Special Considerations: If there is a change in control of Innovasive Devices, Inc. due to a buy out, the acquiring party shall have the option within 30 days of such change to continue the "contract" as agreed, or take the previous 12 months average sales commissions multiplied by 50% paid to Advanced Surgical quarterly, in arrears, for two years or the remainder of the contract whichever is greater.

Mitek acquired Innovasive in March, 2000, after an extensive due diligence period beginning in October of 1999. During this due diligence time period, Mitek thoroughly reviewed Innovasive's books and accounts as well as all existing contracts. Also, during this period, Morris contacted Dick Lynch, the Vice President of Mitek, to determine whether Mitek would continue with the sales agreement or pay him a termination fee as contained in the letter of February 3, 1998. After Morris made this contact, Lynch, by letter of January 19, 2000, informed Morris that Mitek was reviewing its options. By letter of March 7, 2000, Lynch notified Morris of its decision to terminate the sales agreement, offering $65,000.00 as a settlement.

Dissatisfied with this offer, ASSI sued Innovasive and Mitek under the terms of the February 3, 1998 letter for breach of an implied contract alleging it was owed over $800,000.00 as a buy out sum for the termination of the contract. Morris also instituted suit on his own behalf against Innovasive, Mitek and certain individual defendants. The Honorable John Herron granted summary judgment as to ASSI's breach of contract claim against Innovasive on November 8, 2001.[1] This court granted non-suits as to the other counts against Plaintiffs and in favor of Innovasive and the two individual defendants, Christine Wells and Anthony Dale. The disposition of these nonsuits have not been

[1] Judge Herron in his Order and Opinion of 11/8/01 entered a Summary Judgment in favor of Innovasive on the contract count on the grounds that the buy out clause, if operative, could only apply to the entity acquiring the business of Innovasive, namely Mitek, on the theory of implied contract.

appealed and are not the subject matter of this Opinion.[2] Thus, the case was submitted to the jury solely on plaintiff's implied contract theory against Mitek.

Plaintiff contended at trial that the actions of Mitek obligated it to the terms and conditions of the letter agreement of February 3, 1998. Since Mitek elected not to continue with the contract, Morris construed the buy out clause contained in the letter to obligate Mitek in the amount of over $800,000.00. The key to Morris' calculation was in the interpretation of his last year's average commissions. Morris arrived at this figure by first adding up his two years worth of sales' commissions ($400,000.00) and then divided this amount by two, which equaled about $200,000.00. He then multiplied the $200,000.00 figure by 50% to reach $100,000.00. Since he construed the pay out clause to involve eight monthly installments over two years, he multiplied $100,000.00 by eight, thus reaching the $800,000.00 figure. The defendant, on the other hand, vigorously maintained that no contract in fact existed. The defendant argued that in the event one was found by the jury, the amount of the pay out could only be a little over $76,000.00. This sum was derived by the defense by first obtaining the average monthly commissions paid for the last year (April '99 - March '00); about $19,000.00. It then was divided in half, then multiplied by eight. The latter represented the quarterly pay outs for the two year period.

As stated, the defendant raises two major issues on this appeal. First, there was insufficient evidence presented at trial to obligate Mitek to an implied contract; therefore a Judgment NOV must

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[2] ASSI had sued Innovasive, Mitek, Wells and Dale alleging civil conspiracy. Morris himself also brought an action against Dale for defamation and ASSI against Wells for unlawful interference with contractual relations. All of these actions ended in nonsuit in favor of the respective defendants.

be granted. Even if there was such sufficient evidence, there was no factual basis for the jury to conclude that the plaintiff was owed the sum of $400,000.00. In this latter case, the defendant would argue it is entitled to a new trial. Secondarily, the defense also asserts that there was no basis for this court to allow testimony as to how Innovasive corporate officials construed the payout clause since their interpretations could not be imputed to Mitek. In other words, the defense maintains that it cannot be obligated to terms which it never bargained. The defendant also argues that the testimony of these officials was hearsay and not admissible in any event. The court respectively disagrees.

There was ample evidence in which the jury could have concluded that Mitek was legally obligated by virtue of an implied contract. An implied contract is one that can be imputed from the facts and circumstances surrounding the conduct of the parties. See J.F. Walker Company v. Excalibur Oil Group, Inc., 792 A.2d 1269 (Pa. Super. 2002). Applying this contract principle to the instant case, there was evidence presented that Innovasive and ASSI had agreed to certain essential terms of a sales agency relationship as outlined in the letter of February 3, 1998. For example, there was no dispute that plaintiff would receive 25% commission on gross sales made as long as they constituted at least 20% of Innovasive's total sales. It was clear that there was an agreement as to a buy out in the event of a sale as well. Furthermore, at the outset of dealings with the company, it was evident to Morris that Innovasive's primary desire was to build up sales so that the business could be acquired by a perspective purchaser at a maximum profit. It was also evident Morris wanted some sort of security in the event of a purchase if the acquiring party decided not to continue with the sales contract in order to protect himself. Thus, the termination clause was agreed upon and included in the letter.

Since there was sufficient evidence establishing a legally binding contract between Morris and

Innovasive, the next step in plaintiff's proof was to show that Mitek in purchasing Innovasive adopted and assented to its terms. This latter aspect of proof was established through the testimony of Dick Lynch of Mitek and the deposition of Rick Simmons (his testimony was presented by the defense) that Mitek was well aware during the due diligence period of October, 1999 through March, 2000 of the contractual relationship between ASSI and Innovasive. In fact, in answer to numerous inquiries of Morris, Mitek acknowledged its existence. The plaintiff's evidence made it clear that the principals of Mitek, through its letters to Morris of January and March, 2000, understood that by acquiring Innovasive, it accepted an obligation to either continue with ASSI as a sales agent or terminate the contract. Consequently, there was more than sufficient evidence presented to show that there existed a contractual relationship between ASSI and Innovasive and that Mitek assumed the latter's obligation.

After deciding that a contractual obligation was established, the jury then had to determine the pay out amount. Contrary to defendant's contentions, there was sufficient evidence for the jury to conclude that defendant owed the plaintiff $400,000.00 under the contract. There was no dispute that the buy out clause, although agreed upon by the parties, was ambiguous in nature; therefore evidence of the intent of the parties properly was admitted. Shovel Transfer & Storage, Inc. v. PA Liquor Control Board, 739 A.2d 133, 139 (Pa. 1999). Morris, Mr. Ansari and Karen Mattocks, who was Vice President of marketing at Innovasive in 1997, all testified about a four year deal promised to ASSI by Rick Simmons. This testimony countered Mitek's argument that there was no basis for the jury's award of $400,000.00. The jury, in arriving at this sum, concluded that a four year deal formed the basis of the buy out clause. The jury accepted and there was no dispute, that the plaintiff's average commissions for the two year period from 1997 to 1999 amounted to $200,000.00 a year. Using the

formula provided in the February 10, 1998 letter, the jury divided this sum in half and multiplied it by four. The four multiplier was based upon the jury's conclusion that Morris was entitled to a four year pay out deal. The jury further concluded that Mitek, through its discussions with Simmons, knew and assented to this obligation when it purchased Innovasive's assets. The jury's interpretation of the agreement was not improper merely because it did not accept either side's argument about what the amount should be. Since the buy out term clearly was ambiguous, it was for the jury to determine its meaning after weighing and considering the testimony of the various parties. The jury had every right to conclude that Mitek was obligated to pay $400,000.00 in light of the fact that Morris, through his efforts in the sale of Innovasive's product, made it attractive for purchase by Mitek. Not only had he invested time and energy in developing Innovasive's business, but he had made large expenditures in purchasing some of the devices as well. Since Innovasive profited from the acquisition and Mitek from the purchase, it was only fitting and proper, concluded the jury, that plaintiff should receive a fair buy out for its work in selling Innovasive's products.

It is noteworthy that defendant, in asserting that there was insufficient evidence for the jury to have arrived at the $400,000.00 figure, alternatively argues that if the jury were correct in finding an implied contract, they would be limited to awarding damages only as to either side's interpretation of the amount owed; namely $76,000.00 or $800,000.00. Neither party, however, requested such an instruction. In the absence of any such request, the defense cannot now argue that the jury's figure was improper on this ground. See Pa. R.C.P. 227(b) ("all exceptions to charge to jury shall be taken before jury retires."); compare McNeil v. Owens-Corning Fiberglas Corp., 680 A.2d 1145, 1148-49 (Pa. 1996) (issue of whether trial court failed to instruct jury in accordance with proposed points for

charge waived where party failed to lodge specific objection to charge). See also Pa.R.A.P. 302(b).

Defendant also argues that it was improper to allow testimony as to Innovasive's intent concerning the payout clause from Mr. Ansari, Maddocks and a Lisa Heckman, a former employee of Innovasive who was subsequently hired by ASSI. Interwoven with this argument is Mitek's assertion that the trial court improperly instructed the jury through the charge and the questions submitted to the jury for their consideration. Counsel argues that it is irrelevant what Innovasive's intent was at the time of entering into the sales agency contract since Mitek was not involved nor a party to these negotiations. Although it is true that at the time Simmons made the statements about a "four year deal" pertaining to the buy out clause was well before Mitek entered into discussions with Innovasive for the acquisition, these statements were relevant to determine the intent of the parties on or about February, 1998. In order to determine what obligation Mitek assumed, it was first imperative for the jury to ascertain the nature and extent of the contractual obligation when entered into between ASSI and Innovasive. The court instructed the jury both at the outset of the case and during its charge that the negotiations between ASSI and Innovasive were admitted for the sole purpose of determining the intent of the parties at that time of the entering into of the contract. (See Notes of Testimony, April 30, 2002, pp. 13-21; May 3, 2002, pp. 9, 71-75.) The court then instructed the jury in the charge as well as in questions to be answered by them that they had to determine whether Mitek adopted this interpretation of the buy out clause in order for it to be liable under plaintiff's implied contract theory. (See Notes of Testimony, May 3, 2002, pp. 70-79.) The charge and the questions to be answered made clear to the jury that there was a three step process in analyzing the factual issues presented in the case. The jury had to first find a contractual obligation on the part of Mitek. In doing so, they had to determine that

the February 3, 1998 letter amounted to a contract between ASSI and Innovasive which then was assumed by Mitek. Their second inquiry was whether Mitek was obligated to any extent to a payout for termination of the contract. Once the jury answered these questions or issues in the affirmative, they had to weigh the testimony of the various parties to determine their intent as to the amount to be paid. In summary, the jury was instructed to decide whether Mitek assumed a contractual obligation and if so the amount. It is clear from its verdict that the jury followed these instructions and that there was sufficient evidence to support its conclusion. Therefore, the verdict should not be disturbed.

As stated, the defense, in its Post Trial Motions, objects to the questions that were propounded to the jury. It is submitted that based upon the particular facts and circumstances of this case, this was the only logical method of presenting the factual issues to the jury.

In its brief, Mitek also maintains that the testimony of Simmons' intent was hearsay. It is clear that his statements about a four year deal were not hearsay. They dealt with the ultimate issues to be decided in this case, namely, whether there was a contract and the terms of the buy out clause. Since his alleged statements had legal significance, they were admissible. Pa.R.Evid. 801(c); Edward D. Ohlbaum, Pennsylvania Rules of Evidence, (1998-1999), Sec. 801.10.

Mitek also asserts in its brief that the court in its charge neglected to use the reasonableness standard in interpreting a contract. The defense at the pre-charge conference requested it and the court agreed (See Notes of Testimony, May 2, 2002, pp. 153-154). Although the court in its charge adequately covered all the necessary aspects of implied contract, it forgot to use the term "reasonableness." The defense, however, at the close of the charge, when the court gave the parties an opportunity to take additional exceptions, failed to remind the court of this fact (N.T. 5/2/02, pp. 79-

80). Under these circumstances, the defense cannot now complain. See McNeil v. Owens-Corning Fiberglas Corp., 680 A.2d 1145 (Pa. 1996).

The defense further asserts in its Post Trial Motions that evidence of Innovasive's desire to increase sales so that its principals could sell the business as well as Mr. Morris' investment of equipment were irrelevant and prejudicial. Quite the contrary, this testimony clearly was relevant. This case could not be analyzed by the fact finder without this background information since it formed the basis for the termination clause. The issue in this case involved an implied contract and whether Mitek in purchasing the business assumed the obligation of a payment upon termination of the contract. Therefore, these matters were relevant as to both the initial intent of the parties and the amount of money to be paid upon termination. Consequently, defendant's Post Trial Motions are hereby denied.

BY THE COURT:

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DATED: SEPTEMBER 6, 2002 DiNUBILE, JR., J.