1978

Clealon Mann v. American Western Life Insurance Company : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

CLEALON MANN, Plaintiff and Appellant,	)	
vs.	)	No. 15506
AMERICAN WESTERN LIFE INSURANCE COMPANY, Defendant and Respondent.	)	

APPEAL FROM THE JUDGMENT OF THE
DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT
IN AND FOR SALT LAKE COUNTY, STATE OF UTAH

Honorable Stewart M. Hanson, Judge

BRIEF OF APPELLANT

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STATEMENT OF THE NATURE OF THE CASE

This is a case for wrongful termination of an insurance salesman.

DISPOSITION OF THE CASE IN THE LOWER COURT

Appellant challenged the termination with three theories -- restitution, contract and tort. The trial court dismissed the restitution claim without receiving any evidence on that issue. Evidence was submitted on the contract and tort issues. After appellant's evidence, the trial court granted a directed verdict in favor of respondent on the contract claim and the tort claim.

RELIEF SOUGHT ON APPEAL

Appellant seeks a new trial.

I. THE BAD FAITH CLAIM

A. Factual Basis for the Bad Faith Claim.

Mann is an insurance salesman. American Western is a life insurance company. Mann worked for American Western for fifteen years. (R. 1251). During part of that time Mann served under a written agreement. (Ex. 1-P and 109-P). During the balance of the time Mann served under an oral agreement. (R. 1184-1186, 1252-1254, 1288, 1324).

American Western is operated basically as a pyramid plan. (R. 1034 and 1038). That sales approach is unique in the entire

insurance industry. (R. 1031). Under this pyramid plan an agent really has two responsibilities: to sell new insurance policies and to recruit new sales agents (called sub-agents).

Agents are paid for recruiting new sub-agents by an override commission on the production of the sub-agent (R. 1034-1037). The sub-agent can in turn recruit a sub-sub-agent. In that case the original agent and the sub-agent both get an override commission from sales made by the sub-sub-agent. Eventually there is a whole pyramid of sales people -- each getting an override on the sales of those under him in the pyramid. (R. 1034-1037).

The ultimate goal for an agent would be to get so many sub-agents and sub-sub-agents that an agent could stop active sales and live off the override commissions of the sub-agents. (R. 1049).

Within the pyramid each agent has a responsibility to supervise sub-agents below him in the pyramid. However, the supervisory duties are minimal. (R. 1046 and 1049).

According to custom and usage, agents have an ownership interest in their sub-agents. The group of sub-agents working under an agent is referred to as a "pedigree". These pedigrees were sometimes bought and sold. (R. 1199, Ex. 108-P). In other words, one agent might sell all of his sub-agents to a fellow agent. The new purchaser would then be entitled to all future overrides. (R. 1205). Sometimes American Western would pur-

such pedigree accounts directly from an agent. (R. 1206, Ex. 79-P).

Mann spent about 89-90% of his time recruiting sub-agents. Moreover, he had to pay his own expenses. He paid for luncheons, advertising, gas, automobile, telephone, secretary, rent, etc. (R. 1292). Mann received no salary for his investment of time and money. His sole compensation was the override if the sub-agents were successful, or indebtedness if the sub-agents were unsuccessful. (R. 1291).

Mann also had the responsibility to help finance his sub-agents. American Western paid advances and loans to the sub-agents, but Mann had to guarantee the advances. If the sub-agent did not repay the loan, Mann had to pay. (R. 1090 and 1294). In this case American Western counterclaimed against Mann for $29,550.58 because of defaults by Mann's sub-agents.

Mann did an excellent job. He received 16 personal letters of commendation from the President of American Western for his work. (R. 1174-1179, Exhibits 12-P, 13-P, 14-P, 17-P, 19-P, 21-P, 23-P, 25-P, 26-P, 28-P, 29-P, 30-P, 31-P, 32-P, 33-P, 50-P). In fact, in 1975 Mann and his sub-agents produced 61% of the business for the entire company. (Ex. 62-P, ¶ 4).

In the spring of 1976 United American Life of Denver took over control of American Western. (R. 1192). One of the first actions of the new owners was to fire Mann. Mann was not told why he was fired. (Ex. 54-P). The new management did not

inform Mann of any alleged shortcomings in his performance. They did not request Mann to make any changes in his performance. They did not warn him, nor did they give him a second chance. (R. 1127-1129). In fact, Mann drove to Denver to talk to the new owners, but they refused to see him. (R. 1312-1313). They just fired him. After he was fired Mann received no further overrides on the production of his sub-agents.

The old management team did not agree with the decision to fire Mann. They thought Mann should stay. (R. 1191). However, they were not even consulted. The decision to fire Mann was made by the new management team in the Denver office of United American. (R. 1104-1106). In fact, the new owners decided to fire Mann without even knowing what the terms of his employment agreement were. (R. 1139).

At trial the new management team was asked why they fired Mann. They testified that the primary reason was lack of "on-site" supervision. (R. 1120). The theory was that Mann could not supervise Schustrin and other California sub-agents from Salt Lake City. (R. 1110). However, after Mann was fired the company still did not provide "on-site" supervision for the California agents. Instead, the California agents were supervised directly from the head office in Denver (R. 1173, cf. 1104). No one explained why it was easier to supervise agents from Denver to California rather than from Salt Lake City to California.

A jury could reasonably conclude that the real reason Mann was terminated was to take advantage of sub-agents which Mann had recruited, trained, and financed, without paying overrides to Mann.

B. The Tort of Bad Faith.

A well established rule of contract law is that, "every contract implies a duty of good faith and fair dealing between the parties ... ." See generally, 17 Am. Jur. 2d Contracts § 256; Zims Properties, Inc. v. Holt, 538 P.2d 1319 (Utah 1975).

Recent cases have recognized that a breach of the covenant of good faith constitutes a tort.

The great landmark case in this area is Gruenberg v. Aetna Ins. Co., 108 Cal. Rptr. 480, 510 P.2d 1032 (1973). That case involved a claim that an insurance company had, in bad faith, refused to pay an insurance claim. The court stated:

> It is the obligation, deemed to be imposed by the law, under which the insurer must act fairly and in good faith in discharging its contractual responsibilities. Where in so doing, it fails to deal fairly and in good faith with its insured by refusing, without proper cause, to compensate its insured for a loss covered by the policy, such conduct may give rise to a cause of action in tort for breach of an implied covenant of good faith and fair dealing . . . . Accordingly, when the insurer unreasonably and in bad faith withholds payment of the claim of its insured, it is subject to liability in tort.

See also: Fletcher v. Western National Life, 10 Cal. App. 3d 376, 89 Cal. Rptr. 78 (1970); Escambia Trading v. Aetna Cas. &

Surety Co., 421 F.Supp. 1367 (N.D. Fla. 1976); Garrett v. American Family Mutual Ins. Co., 520 S.W.2d 102 (1974); Curti Aetna Life Ins. Co., 90 N.M. 105, 560 P.2d 169 (1976).

C. The Standard of Bad Faith in Utah Case Law.

This Supreme Court has had an opportunity to consider the law of bad faith on a number of occasions.

The third case was Butterfield v. Consolidated Fuel C 42 Utah 499 (1913). In that case, plaintiff was a broker. Plaintiff entered into an oral agreement to sell certain bon for a commission. He apparently made presentations to a few potential buyers, including one Mr. Caldwell. Caldwell rejec the proposal. Plaintiff made no further contact with Caldwe and the Caldwell deal was dead.

For a period of several months plaintiff failed to prod any other prospective purchasers. Defendant then wrote to plaintiff and fired him. After plaintiff was fired, defendan contacted Caldwell to renew or rekindle the negotiations. Caldwell agreed to reconsider the situation and did, in fact, purchase $400,000.00 of the bond issue.

Plaintiff sued defendant for the unpaid broker's commission. The lower court granted a non-suit and plaintiff appealed. The Supreme Court of Utah held that the agency between plaintiff and defendant could be terminated at any time without consent of the agent. The Court then held that the agency had been validly revoked before the sale took pl and that plaintiff was, therefore, not entitled to a commiss

However, the Court went to great lengths to explain what the result would otherwise be if there was a showing of bad faith:

> Under the contract in question, respondent had the legal right to terminate appellant's authority at any time, provided it was done in good faith and not for the purpose of preventing him from consummating pending negotiations to deprive him of his commissions. Butterfield v. Consolidated Fuel Co., 42 Utah 499 (1913).

Butterfield is very similar to this case. Both cases involve the relationship of principal-agent. In both cases the agent was working for a commission. In both cases the employment contract was for an indefinite period. Both cases involve termination of the agent.

In Ensign, et al. v. United Pacific Ins. Co., 107 Utah 557, 155 P.2d 965 (1945), Ensign, an insurance broker, sold an insurance policy to Airway Motor Coach Lines. Later, Airway requested a change in the policy terms. Ensign tried one telephone call to secure the new rates, but he was unable to reach the person who could quote them. Thereafter, Airways bought the insurance from the same defendant insurance company but through some new broker. Ensign sued the insurance company for the lost commission.

Ensign lost the case because he had placed only a single telephone call and had not diligently followed through to sell the business. However, the Court noted that,

> Nor ... could it [insurance company] arbitrarily refuse quotations to an agent of a proper rate and

> secure the insurance through another at such rate ... . To do so would evidence a lack of fair dealing which would deprive appellants of the contemplated fruits of their contract with respondent.

The next Utah case is State Automobile & Casualty Underwriters v. Salisbury, 27 Utah 2d 229, 494 P.2d 529 (1972). That case involved the relationship between an insurance company and its general agent. The general agent had written an insurance policy for a client and issued a "binder". The general agent then submitted the policy to the insurance company. The insurance company rejected the policy and returned it to the general agent. However, the insured party had an accident after the "binder" was issued, but before the policy was rejected by the insurance company. The insurance company honored the "binder" by paying $19,758.71 to the insured party. The insurance company then sued its own general agent for wrongfully issuing the binder.

The issue presented for appeal was whether the general agent had a duty (contractual or otherwise) to seek approval before issuing such binders. The Court stated:

> ... each has a right to assume that the other will perform the duties he agrees to with reasonable care, competence, diligence and good faith, even though such terms are not expressly spelled out in the contract. [Emphasis added.]

See also: Ammerman v. Farmers Insurance Exchange, 19 Utah 2d 261, 430 P.2d 576 (1967):

> While the expressions of courts have varied somewhat as to the duty of insurance companies

with respect to making and accepting proposals of settlement to protect its insured, we believe that the best view is that it must act in good faith and be as zealous in protecting the interests of its insured as it would in looking after its own. Whether it discharges that duty may depend upon various considerations including the certainty or uncertainty as to the issues of liability and damages.

D. Bad Faith Termination Cases.

In the trial court, American Western argued that Mann was subject to termination "with or without cause". American Western further argued that the concept "without cause" permits an employer to terminate for any reason -- even in bad faith and with malice.

Defendant's view of the law had its roots in England during the Industrial Revolution. At that time, the employer was indeed King. Women and children worked for paltry wages in pitiful conditions and labor unions were unlawful. The law even permitted a system of indentured servants. However, the law governing relations between master and servant has evolved to reflect more enlightened views of social and economic conditions.

So, also, has the concept of termination "without cause" changed. As recently as twenty years ago the term "without cause" really meant just that. Employees could be terminated for no reason and with malice and bad faith. However, around that time, thoughtful minds began to question the harsh doctrine of termination "without cause". See, e.g., Termination of

Employment at Will - Public Policy May Modify Employer's Right to Discharge, 14 Rutgers L. Rev. 624 (1960); Blumrosen, Employee Discipline: U.S. Report, 18 Rutgers L. Rev. 428, 431-33 (1964); Note, California's Controls on Employer Abuse of Employee Political Rights, 22 Stan. L. Rev. 1015 (1970); Blades, Employment at Will v. Individual Freedoms: On Limiting Abusive Exercises of Employer Power, 67 Colum. L. Rev. 1404, 1418 (1967).

The upshot is that largely within the last decade a new and dominant view has emerged in the law. This view holds that:

> In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two ... . A termination by the employer of a contract of employment at will which is motivated by bad faith, or malice, or based on retaliation is not in the best interest of the economic system or the public good and constitutes a breach of the employment contract. Monge v. Beebe Rubber Company, 316 A.2d 549 (New Hamp. 1974) 1/

A thoughtful law review article makes the following comments on the standard of good faith in the termination of insurance agents:

> Where good faith is implied, more arbitrary terminations of agency may be eliminated ... .
>
> Requirements of fairness and reasonableness in termination of agency are hardly radical departures from the 'well-settled' principles of contract law.

1/ This case was included in the compilation Significant State Appellate Decisions Outline 1976, published by the National College of the State Judiciary.

The operation of the agency agreement itself requires substantial reliance upon good faith and mutual trust between the parties to the working business relationship. To hold that such good faith principles be applied to the termination provisions is only the logical conclusion of careful contractual analysis.

* * *

Even accepting the more traditional approach to the law of contracts, the intricate relationship between the termination of agency and the interests of the policyholder justifies the implications of good faith and reasonableness. There is, as previously noted, a substantial public interest in the continuation of the relationship between the agent and the company. The parties' private contractual agreement allowing arbitrary and unjustified termination of the relationship should not be enforceable where abrupt termination contravenes the public interest.

* * *

The disparity of bargaining power has produced an agreement which operates to substantially favor the interests of the stronger party to the detriment of the weaker. In such case, the agreement deserves the statutory assurance that good faith and fairness will be preserved. Where the interests of the public are so intimately involved, however, inequitable termination provisions must not be tolerated. Independent Insurance Agency Agreements & the Termination of Agency: Antiquated Approach to the Modern Market, 49 Boston Univ. L. Rev. 286 (1969).

The recent case of Randolph v. New England Mutual Life Ins. Co., 526 F.2d 1383 (6th Cir. 1975) is on four squares with the matter sub judice.

This action, primarily for breach of contract. has its origins in a long-time contractual association between the individual plaintiff-appellant (usually hereinafter referred to as "Randolph"), and his father before him, with the defendant-appellee insurance company (usually hereinafter "NEL") ... .

The fruits of the discovery procedures earlier referred to exhaustively chronicle the long and

amicable relationship between the Randolphs and NEL, and include many laudatory statements made by its high officials, concerning the Randolph agency's diligence, initiative and effectiveness.

This long period of amiability ended July 15, 1969, abruptly or otherwise; just how abrupt and unforseen this occurrence was depends upon which party's evidence is credited, but this is an issue which need not be reached here. Be that as it may, an NEL vice-president, by letter of that date, advised Randolph that 'we feel we have no alternative but to make a change in the management of our Cincinnati Agency now', and after some further correspondence another NEL vice-president, by letter dated September 5, 1969, exercised NEL's 'right ... to terminate the agency upon giving sixty days' notice in writing', the termination being effective November 4, 1969.

The sole legal issue which requires resolution is whether the contract executed April 27, 1969, was terminated by unilateral action of either party prior to its April 1, 1989 termination date, which in turn requires an interpretation of Section 15 of that Agreement. That section reads,

> "The agency shall terminate automatically the Normal Retirement Date or on the prior death of the General Agent, but except as provided in Section 14 each of the parties hereto shall have the right to terminate the Agency at any prior time upon giving sixty days' notice in writing." [Emphasis from original].

Although we hold that Section 15 authorizes termination "without cause", we conclude that Section would not permit either party to terminate in "bad fai Even with no definite duration provisions, what we regard as the better reasoned line of cases has imposed a duty of good faith on the exercise of a facially unrestricted termination caluse. [Emphasis added.]

... For the reasons hereinabove stated, the granting of the motion for summary judgment was improper.

Reversed and remanded for further proceedings not inconsistent herewith.

For other bad faith termination cases, see: Atkinson v. Equitable Life Assur. Soc. of United States, 519 F.2d 1112 (5th Cir. 1975); Reese v. Bank Building & Equipment Corp. of America, 332 F.2d 548 (7th Cir. 1964); DeTreville v. Outboard Marine Corp., 439 F.2d 1099 (4th Cir. 1971); Zimmer v. Wells Management Corp., 348 F.Supp. 540 (S.D. N.Y. 1972); Milton v. Hudson Sales Corp., 313 P.2d 936 (Cal. App. 1957); Philadelphia Storage Battery v. Mutual Tire Stores, 159 S.E. 825 (S.C. 1931); J.R. Watkins Co. v. Rich, 254 Mich. 82, 235 N.W. 845 (1931) (dictum); Gellhorn, Limitations on Contract Termination Rights - Franchise Cancellations, 1967 Duke L.J. 465; cf. Merrill v. Continental Assurance Co., 200 Cal. App.2d 663, 19 Cal. Rptr. 432 (1962). (Although the court found no evidence of bad faith, a good faith obligation appears to have been applied.)

E. The Trial Court Erred by Granting a Directed Verdict On the Tort Claim for Bad Faith Termination.

This is a case of first impression for Utah. The issue is whether Utah will follow the lead of other states which impose a duty of good faith on the exercise of contractual termination clauses.

Where the law is unsettled, this court should be more concerned with what the law ought to be than what the law was in the past.

> Although they have not spelled this out in express language, the fact of the matter is that the appellate state courts -- a majority of them at least -- have assumed responsibility for the current condition of the common law of torts -- its proper balancing of competing individual and social interests, its satisfactory response to current needs, and its attaining of current ideals. Recognizing that the common law rules were court-developed, usually some time ago, the courts are consciously assuming the obligation of keeping the rules up to date.
>
> This, I suggest, is essentially to the good. It is better, I think, for the courts openly to assume the duty of being the monitors of the state of the common law and to accept the responsibility for what they are doing, than to make changes covertly by pretending that they are only stating what the law has been all along or are merely declaring a change that has come about by the self-unfolding of a legal idea. Creation of a new exception or expansion of an old one is modifying the rule, as surely as frankly changing it, because it has become outdated and obsolete. If the courts understand that they must bear the accountability for what they do, they may be expected to be more careful and more responsible than if they are able to cast off any censure by the fiction that they are doing no more than declaring what the law is and are not answerable for its condition. Wade*, The Most Important Tort Change in the Third Quarter of the Twentieth Century, 20 Alta L. Rep. 413 (Nov. 1977).

The lower court directed a verdict against Mann. This Court should review the evidence in a light more favorable to Mann. McCloud v. Baum, 569 P.2d 1125 (Utah 1977); Anderson Parson Red-E-Mix Paving Co., 24 Utah 2d 128, 467 P.2d 45 (1

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The jury could easily have concluded that Mann was terminated in bad faith. The fact issue should have gone to the jury. Utah should follow the modern view which holds such bad faith termination to be tortious.

II. THE CONTRACT CLAIMS

A. Factual Basis for the Contract Claim.

Although Mann was fired, American Western kept his sub-agents. After Mann was fired, he received no more override commissions on the sales of his sub-agents. Mann claimed that he had a contractual right to keep receiving overrides even after his termination.

Although American Western had many sales agents, it had (prior to Mann) only one "general agent". That original "general agent" for American Western was called American International Marketing (AIM). The "general agent" agreement between American Western and AIM was executed in 1967 (Ex. 58-P). Mann had access to that "general agent" contract and was familiar with its terms. The AIM contract provides that the "general agent" will continue to receive overrides even after termination.

On January 3, 1975, Mann entered into an oral contract (replacing two earlier written "agent" agreements) to become a "general agent". 2/

Mann testified that he negotiated to get a contract "just like AIM". (R. 1252 & 1287). Mann offered extensive testimony

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2/ The Court made a specific finding that the parties had entered into a new oral contract. (R. 1268-1269).

including an offer of proof [3] that this contract was "just like AIM". (See Appendix "A" for an extract of the relevant testimony). The AIM contract was offered as an exhibit. American Western objected. The objection was sustained.

After plaintiff's evidence, defendant made a motion to dismiss the contract claim on the grounds that no proof had been offered as to the terms of the oral agreement. The motion for a directed verdict on the contract claim was granted.

In summary, Mann claimed that he had a contract which would pay overrides even after his termination. In order to make that theory stick, Mann had to show that his oral contract was "just like" the AIM contract. The trial court refused to admit the AIM contract into evidence. Without the AIM contract in evidence, Mann could not prove the terms of his oral agreement. Directed verdict was granted.

B. The Written AIM Contract Was the Basis for the Oral "General Agent" Contract Between Mann and American Western.

The general rule is that contracts cannot be proved by evidence that one of the parties has made similar contracts with other persons, unless there is a connection between the two contracts, or unless it is probative that the course pursued in one instance would be followed in another. Ogden Commission Co. v. Campbell, 244 P. 1029 (Utah 1926). In this case, there

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[3] The Court erred by not admitting the offer of proof. Kaiser Development Corp. v. Mignot, 279 Or. 151, 566 P.2d 505 (19

is such a connection or probability. Here plaintiff demanded a contract "just like" the AIM contract.

This case is identical to Nelsen v. Farmers Mutual Auto Ins. Co., 4 Wis. 2d 36, 90 N.W.2d 123 (1958). In that case, the agent sued the insurance company for wrongful termination of an oral agency contract. At trial, a company official testified that the agents were offered similar oral contracts and that one agent demanded that his contract be put in writing. The written contract was introduced and accepted by the court into evidence. See also, Williston on Contracts, 3d ed. § 47 ("An offer or agreement may also refer to another agreement for a definition of terms ..."); Schwartz Tailoring Co. v. Petty, 140 A.2d 63 (D.C. 1958) ("it is not necessary that a promise be certain within itself if it contains reference to another agreement ... from which the terms may be made clear."). Peachtree Medical Building, Inc. v. Ked, 130 S.E.2d 530, 70 Ga. App. 438 (1963) ("... A contract may be made sufficiently certain by reference to other documents".)

C. The Trial Court Erred by Failing to Receive the AIM Contract Into Evidence.

The AIM contract (Ex. 58-P) was offered but not received into evidence. (See generally Appendix "A" hereto). It was error for the Court not to receive the contract into evidence.

The general rule of law is that when the existence of an alleged oral contract is in issue, all the acts and declarations of the parties tending to refute or establish it are admissible

together with all the facts connected with the surrounding circumstances. 17A, C.J.S. Contracts § 593 p. 1156. See, e.g. Pre-Fit Door, Inc. v. Dor-Ways, Inc., 477 P.2d 557, 13 Ariz. App. 438 (1970).

An early Utah case is squarely in point, Straw v. Terry, 48 Utah 258, 159 P. 44 (1916). In that case, plaintiff sued under the terms of an oral agreement. Defendant admitted the existence of an oral contract, but alleged that the terms of the oral agreement were "identical" to a written agreement between defendant and a third party. At trial defendant attempted to introduce the written contract. The contract was not received. An appeal resulted. The Supreme Court gave the following analysis:

> For the purpose of proving their claim in that regard, counsel for defendants, in various ways, attempted to introduce the contract and specifications pleaded in their answer. Plaintiff's counsel, however, objected to the proffered evidence upon the ground that the contracts referred to were between other parties, and hence were "immaterial and irrelevant". The court it seems, adopted the view of plaintiff's counsel and excluded the proffered evidence in whatever form it was offered.
>
> * * *
>
> From what he did say it is quite clear that the ruling is erroneous according to the most elementary principles of law. Quite true plaintiff could not be bound by the terms and conditions of contracts made between others with whom he was not in privity, but the defendants by their offer did not seek to so bind him. All they attempted to do was to establish the terms of plaintiff's own contract as the defendants claimed them to be and thus bind him by those terms if the jury should find them to be as contended by the defendants. In order to so bind the plaintiff, the

defendants were required to prove at least two things: (1) What the terms, conditions, and stipulations of the contract they referred to in their answer were; and (2) that the plaintiff and the defendants had adopted such terms, conditions and stipulations as part of the parol contract sued on. To show the first was as necessary as it was to prove the second, and it would be utterly useless to prove one unless the other was also proved.

* * *

The court, therefore, committed manifest error in excluding the defendants' proffered evidence by which they sought to prove the terms, conditions and stipulations of the contracts referred to in the answer.

* * *

... defendants had the right to establish those facts by any competent and material evidence at their command. That right was denied them. We cannot say what conclusion the jury might have reached if the excluded evidence had been admitted. We think, therefore, that the trial court was clearly in error in excluding defendants' proffered evidence, and that the error was prejudicial to the substantial rights of the defendants.

III. THE RESTITUTION CLAIM

Plaintiff's third claim was entitled Termination After Substantial Performance. That claim was dismissed on the face of the pleadings without receiving any evidence on the issues. (R. 1376, 1447).

A. Factual Basis For the Restitution Claim.

Since the claim was dismissed without evidence, this Court must review the allegations in the light most favorable to plaintiff. Barrus v. Wilkinson, 16 Utah 2d 207, 398 P.2d 207 (1965); Hurst v. Highway Dept. 16 Utah 2d 153, 397 P.2d 71 (1964).

The following allegations are pertinent:

The life insurance industry is generally characteriz by a high turnover in sales agents. A substantial cost is required to locate, recruit and train new sales agents. Fur more, new sales agents generally require loans or advances several months until they begin to earn commissions. Thus turnover in agents represents a major expense to insurance companies generally. (R. 198-204, Third Amended Complaint, ¶ 12).

In order to avoid such expenses, defendant developed unique program involving defendant's general agents. The purpose of the program is to shift its high expense of new agent turnover from the insurance company to the general age (R. 198-204, Third Amended Complaint, ¶ 13).

Pursuant to the policy, the general agent bears the administrative costs of finding and training new sub-agents. Defendant sometimes makes loans or advances to help new sub- get started. Howevever, the general agent guarantees all su loans and repays defendant if the sub-agent defaults. (R. 1 204, Third Amended Complaint, ¶ 14).

Plaintiff has acted as a general agent for defendant accordance with the foregoing policy. Pursuant to this pol plaintiff has expended substantial sums to locate, recruit train new sub-agents. Plaintiff has also guaranteed many made by defendant to such new sub-agents. (R. 198-204, Th

Amended Complaint, ¶ 15).

Plaintiff's only compensation for such financial commitments and labors is the override commission which plaintiff receives on future sales made by sub-agents. (R. 198-204, Third Amended Complaint, ¶ 16).

Plaintiff has performed the following services for the defendant:

(a) Conducted advertising programs to solicit new sub-agents for defendant;

(b) Recruited and signed up approximately 300 new sub-agents for defendant;

(c) Provided training programs for new sub-agents;

(d) Provided personal financial guarantees and other financial commitments to the said 300 new sub-agents;

(e) Supervised the sales activities of the said 300 new sub-agents;

(f) Spent his own funds for office, travel and other expenses associated with items (a) through (e) above.

(R. 198-204, Third Amended Complaint, ¶ 29).

Plaintiff has duly performed all of the conditions of the said oral contract alleged in paragraph 9 of the Third Amended Complaint so far as he was permitted to do so by defendant. (R. 198-204, Third Amended Complaint, ¶ 30).

Defendant has in bad faith terminated plaintiff and ordered him to refrain from the performance of any further service under his general agent's contract and by the said acts rendered in impossible for plaintiff to complete performance thereof. (R. 198-204, Third Amended Complaint, ¶ 3

B. The Trial Court Erred in Dismissing Mann's Claim for Restitution.

The facts as pleaded set up a claim for restitution. The cause is governed by § 1109 of Corbin on Contracts.

> One who has rendered service or supplied work, labor, and materials under a contract with another, but who has been wrongfully discharged or otherwise prevented from so far fully performing as to earn the agreed compensation, may regard the contract as terminated and get judgment for the reasonable value of all that the defendant has received in performance of the contract. This rule is applicable to contracts of personal service and to all kinds of construction contracts. The defendant's breach may have been a repudiation, a discharge, a prevention of performance by the plaintiff, or a failure to perform the agreed exchange due from the defendant ... Nevertheless, if the defenant has committed a vital breach that prevents the express contract debt from arising the court will value the performance rendered by the plaintiff and compel the defendant to make restitution of the amount.

Under the contract, a "general agent" has four responsibilities: (1) to recruit new sales agents, (2) to train new sales agents, (3) to finance new sales agents (by loans or guarantees, and (4) to provide on-going supervision of sales agents. In return for these services, the "general agent" is paid an override commission on future sales of his agents.

When Mann was fired, he had completed three of his four responsibilities. He had recruited, trained and financed a

of sales agents. He would have provided the continuing supervision but was fired and denied the opportunity to supervise.

A court of equity might conclude that Mann has already delivered 75% of the value of his bargain -- i.e., he has recruited, trained, financed sales agents. [4/] Since Mann is prevented from completing the remaining 25% of his bargain (supervision) he gets no future override commissions under the contract. But, the court may place a value on the 75% which was already performed and repay Mann for the value of those services.

CONCLUSION

The Court erred by dismissing Mann's claim for restitution. Mann should have been permitted to present his evidence to establish a claim in equity.

The Court further erred by refusing to admit the AIM contract into evidence. Without that contract, Mann could not prove the terms of his oral contract, and a verdict was directed against Mann on the counterclaim.

The Court further erred by directing a verdict on the tort claim of bad faith termination. A jury could reasonable infer that Mann was terminated in bad faith for the purpose

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4/ The remaining duty was supervision, but the record shows that general agents perform only nominal supervisory duties. (R. 1046 lines 5-15).

of cutting him out of his future overrides. The issue should have gone to the jury.

DATED this 2nd day of March, 1978.

Respectfully submitted,

ROBERT J. DE BRY
Attorney for Plaintiff-Appellant

This is to certify that I mailed two copies of the foregoing Brief of Plaintiff-Appellant to Randy L. Dryer, attorney for Defendant-Respondent, 455 South 300 East, Salt Lake City, Utah 84111, this 2nd day of March, 1978, postage prepaid and properly addressed.

APPENDIX "A"

TRANSCRIPT OF RELEVANT TESTIMONY REGARDING ADMISSION OF EXHIBIT 58.

Q Tell the jury what was said by the parties on that occasion.

A Mr. Matheson had written down on paper a proposed general agent's contract starting at 94 percent and, based on volume, working up to 100 percent. I told Frank that was not acceptable at that time, but I wanted a contract just like AIM'S.

Q And who is AIM?

A American International Marketing. And he agreed that he could give me a contract--he could not give me one just like AIM's because of the conflict with the 5 percent. He agreed to give me a hundred percent and make some concessions for the other 5 percent. And that's Item No. 2, which, as it says in his notes, "concessions to his agency," he would advance my agents on submit business and he would advance the managers overrides as a concession.

Q Anything else said during the meeting?

A Yes. We discussed a 1-percent office allowance. We talked about the straight commission on my 988 account, and he was worried about that balance. So was I. He wanted that worked off.

Q What was the 988 account?

A That was the account that goes back to 1961.

Q And what do you mean there was a balance on account?

A They had been advancing me money for business produced, and there was probably two or three thousand dollars there could have been more, that I owed the company on that account. So he wanted me to work it out on a straight commission basis.

Q Anything else said?

A Yes. He indicated that, for me to receive a general agent's contract, that I would have to vacate the office space at the home office.

Q Did he tell you why?

A Yes.

Q What did he say?

A The other general agent felt that I had unfair advantage in that I had a free office space. And they said if you are going to go ahead with this thing, you are going to have to make him get out of there--which I agreed to and subsequently leased office space from the company next door.

Q Do you remember anything else about the meeting?

A Only that in his notes he says, "Clealon will consider."

Q Let me ask you: You notice on the written notes in the upper right-hand corner are some figures, and they have been X'd out.

MR. DeBRY: May I show the jury, your Honor?

THE COURT: Let me see what you are referring to. Any objection?

MR. PRINCE: No.

Q Do you remember why those figures were X'd out?

A Yes. They were the preliminary figures that he had offered and I told him were unacceptable, and so when he said we will go ahead with the 100 percent without having to work our way up, he crossed them out.

Q Okay. Now, was any conclusion reached?

A No.

Q What was--

A I said that I would think it over, and that afternoon I stuck my head in the door and said, "Frank, we have got a deal. I will move next door. We can arrange for the rental of the office space."

(R. 1252-1254).

* * *

Q Now, I'm going to show you what was marked yesterday but not put into evidence as Exhibit 58. Can you identify that?

A Yes, that's the general agent agreement between American Western Life Insurance Company and American International Marketing. It is a general agent's agreement.

Q Okay. Are you generally familiar with the terms and conditions of that agreement?

A Yes.

Q And how did you become familiar with that document?

A As director of agencies I had supervision of American International Marketing branch, district, regional and divisional managers. On occasion, there were questions about the status of American International Marketing and the general agent's contract. I had to be familiar with the so that I could intelligently discuss them.

Q And where was the document located at the American Western Life Insurance Company offices?

A It was located in the file under American International Marketing.

Q And did you have access to that file?

A Yes.

Q And on how many occasions during your employment did you have occasion to get into that file and review that document?

A I can't be certain as to how many times exact Frank had given me a copy of it because he and I had discu it many times, and I had a copy of it in my file in my offi

Q Now, is that the document you were talking a when you said to Mr. Matheson, "I want a contract like AIW

A That's the document. That's the only general agent's contract I am familiar with.

Q Is that the document you were talking about?

A That's the document.

MR. DeBRY: Offer 58.

MR. PRINCE: I will object to that. I don't

think there is a proper foundation at this time.

(R. 1256-1257).

* * *

Q Mr. Mann, this morning you testified about a couple of meetings that took place on a day in January 1974.

A '5.

Q '5. After those meetings, did you think you had a contract?

A Yes.

Q And what was your understanding of the terms and conditions of that contract?

MR. PRINCE: I will object to that. I think he's already testified as to what matters were discussed and what was agreed upon.

(R. 1288).

* * *

MR. DeBRY: May I proceed?

THE COURT: You may proceed.

MR. DeBRY: As I recall, Your Honor, the initial foundation question to Mr. Mann was: Did you think you had a contract after the meeting? The answer was: Yes. The next question was: What was your understanding of the terms and conditions of the contract?

If the witness had been permitted to answer, I anticipate that he will have answered, "My understanding is that the terms and conditions of my contract were exactly like the AIM contract with some exceptions."

The next question would be: What is your understanding of the exceptions? To which he would have answered, "In general, my general agent's contract was exclusive. I would not serve on the executive committee, did not want to use the name American West, and I was not participating in the stock options." His further answer would be that, those were all exceptions to the written AIM agreement which is designated as Exhibit 58. And his testi then would be that his understanding is that he had an agre just like Exhibit 58 with the listed exceptions, at which point I would have offered the AIM agreement into evidence. (R. 1324).

* * *

The record will show the proffer and your acceptance of the Court's ruling and your continuing objecti too. The previous ruling will stand.[1] (R. 1336).

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[1] The court erred in excluding the offered testimony. See: Kabil Development Corp. v. Mignot, 566 P.2d 505 (Ore. 1977) for an example squarely in point.