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FRAUD

False promises about pay did not result in theft of salesman's labor

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A start-up company induced an experienced salesperson to leave his own company for a job at the start-up, based on promises of compensation that were inconsistent with the terms of the parties' written employment agreements. The start-up fired the employee after it closed its first round of financing. Was its action a breach of contract? Fraud? "Theft" of his labor under the Penal Code?

Start-up hires salesman under false pretenses

In 2010, Richard Morrison and a partner founded Comprehend Systems, a start-up company that develops software designed to assist the pharmaceutical industry in managing and tracking data from clinical drug trials. David Lacagnina operated his own company, e-Clinical Agency, which sells software products from multiple vendors for use by pharmaceutical companies in clinical drug trials. Comprehend retained e-Clinical to sell its software in exchange for a 30 percent commission.

Later, Morrison asked Lacagnina to leave e-Clinical to work for Comprehend, promising that he would be treated as a "partner." The parties signed an employment agreement, with compensation consisting of salary,

sales commissions, and stock options. According to Lacagnina, Morrison promised to increase the compensation package once Comprehend built up its business and obtained funding from investors.

Lacagnina used his business contacts from e-Clinical to promote and sell Comprehend's software and, within his first year, landed Comprehend's first big customer. Based on that sale and the company's progress, a prominent venture capital firm decided to invest in Comprehend. Before that financing transaction closed, Morrison made certain promises to Lacagnina about salary and commissions but then presented him with a far less lucrative amended employment agreement.

Lacagnina wanted a lawyer to review the proposed amendment. Morrison said there wasn't time because the financing transaction was scheduled to close the next day and Lacagnina should "trust" him. Lacagnina signed the amended employment agreement in June 2013. One month after the financing transaction closed, Comprehend hired a friend of Morrison as the new vice president of sales and then ordered Lacagnina to "transition" all his accounts to the new VP. In November 2013, Comprehend fired Lacagnina.

Lacagnina sued. He asserted multiple claims, including fraud, breach of

contract, breach of the covenant of good faith and fair dealing, and breach of Penal Code Section 46 for theft and receipt of stolen property, which he claimed justified an award of triple damages and attorneys' fees. The gist of the fraud claim was that Comprehend promised Lacagnina certain levels of compensation but concealed its intent to employ him only as long as it took to attract enough customers to obtain financing and then replace him with Morrison's friend.

The trial court granted Comprehend's request to dismiss the Penal Code claim. The jury found in favor of Lacagnina on his claims of fraud, breach of contract, and breach of the covenant of good faith and fair dealing and awarded him \$556,446 in damages. Subsequently, the trial court granted Comprehend's motion for judgment notwithstanding the verdict (JNOV) on the fraud claim, let the remainder of the jury's verdict stand, and reduced the damages to \$225,000. Lacagnina appealed.

Trial court erred in granting JNOV

In reviewing a trial court's decision to grant a request for a JNOV, the appellate court must draw all reasonable inferences in favor of the plaintiff and uphold the JNOV only if there is no substantial evidence to support the jury verdict. Here, the court of appeal found that substantial evidence supported the jury verdict—in particular, that Comprehend had engaged in actionable fraud or concealment. Specifically, the jury could have found that Morrison induced Lacagnina to remain at Comprehend and execute the amended employment agreement by representing that he would be fairly compensated for sales for which he was responsible and that Comprehend would "revisit" the terms of the agreement that stated he would not be entitled to commissions unless he remained employed at Comprehend.

There was also sufficient evidence for the jury to find that Comprehend had concealed its plan to replace Lacagnina with Morrison's friend and compel him to "transition" his accounts to the new VP, thereby depriving him of the opportunity to earn commissions on sales to those customers, and then terminate him. In fact, Comprehend's own damages expert conceded that Lacagnina was responsible in varying degrees for certain sales for which he did not receive commissions.

Comprehend argued that the written employment agreements, which provided for at-will employment, superseded any previous discussions the parties had about Lacagnina's terms of employment. The court of appeal rejected that argument, finding an employee may recover damages if an employer induces him to enter into an employment contract by intentionally promising compensation terms it never intended to honor.

Based on those findings, the court of appeal reversed the trial court's decision to grant a JNOV and ordered that the jury's verdict of fraud and damages award be reinstated.

Penal Code claim lacks merit

Lacagnina made the novel argument that he was entitled to recover triple damages and attorneys' fees under the Penal Code because Comprehend and its executives engaged in "theft" or "receipt" of "stolen property" in the form of his labor. The court of appeal rejected that claim, finding that "labor" is not "property" as that term is used in the plain language of the Penal Code. *Lacagnina v. Comprehend Systems* (California Court of Appeal, 1st Appellate District, 8/3/18).

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Bottom line

An at-will-employment agreement cannot serve as an absolute shield against a fraud claim if an employer promises the recruit or employee compensation at odds with the terms of the written agreement. And when an employee can present sufficient evidence of fraud, the court will generally defer to the jury's decision. This case exemplifies the truism that it is never a good idea to reach an oral understanding on certain terms but then enter into a written contract with different terms. It is a recipe for a dispute and a future lawsuit.

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