

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC.

SUPERIOR COURT

(Filed: January 2, 2014)

JAMES F. NUZZO, JR. :  
*Plaintiff, Counterclaim Defendant* :  
 v. :  
 NUZZO CAMPION STONE ENTERPRISES, :  
 INC. f/k/a CORRIVEAULT HOLDINGS, INC. :  
*Defendant, Counterclaim Plaintiff* :  
 v. :  
 RITA CAMPION :  
*Third Party Defendant* :

C.A. No. PC 08-3664

**DECISION**

**LANPHEAR, J.** This matter was tried, jury waived. By agreement, the parties agreed to sever the issues at trial. At an initial trial, the Court would consider the breach of contract claims contained in the complaint, counterclaim and third party complaint. The issue of unjust enrichment would be deferred. This trial focused on whether Mr. Nuzzo was sufficiently paid for sales commissions by the Corriveauault Company. An initial Decision was issued but then vacated. After supplemental briefs and hearing, this Decision is issued.

**I**

**Findings of Fact**

Plaintiff, James F. Nuzzo, Jr., was an owner and officer of Nuzzo & Campion Stone Enterprises, Inc. His company was initially involved in construction for about twenty years. After 1998, the company successfully concentrated its business in the sale of stone and tile. In

2006, Mr. Nuzzo was contacted by David Corriveau, who expressed an interest in acquiring the business. After several months, their discussions resulted in a closing where the assets of the business were sold to Corriveau Holdings, Inc. The buyer later did business under the name of Nuzzo Champion Stone Enterprises, Inc. As the names of the different entities are similar, the businesses will be referenced as the “Nuzzo Company” and the “Corriveau Company” to avoid confusion.

Each of the entities was represented by attorneys before and at the closing. At the October 2006 closing, the parties executed a number of documents. The Asset Purchase Agreement (Joint Ex. 1) discussed the transfer of ownership of the inventory, computers, records, contract rights and other assets. The Sales Commission Agreement (Joint Ex. 2) defined the ongoing independent contractor relationship between Mr. Nuzzo and the Corriveau Company. Mr. Nuzzo agreed to assist with promoting, developing and procuring sales on a commission basis. A portion of the Sales Commission Agreement states:

**“6. Compensation. (a) General Sales.** Nuzzo will be paid a commission of seven (7%) percent of gross proceeds from all sales generated by Corriveau except for material tiles sales. Commissions shall be deemed to have been earned when an order is paid in full, unless otherwise agreed between the parties. Payment of commissions earned will occur on the 10<sup>th</sup> and 20<sup>th</sup> of each calendar month following the calendar month in which such commission became earned, for all orders that have been paid in full....

**“(b) Material Tile Sales.** Nuzzo will be paid forty (40%) percent of the general profit markup on material tile sales, not to be reduced by any decrease or discount in purchase price. Should an error occur in the bidding process, Nuzzo’s commission will not be affected. Tile commission payments shall be deemed to have been earned when an order is paid in full, unless otherwise agreed by the parties. Payments of commission earned will occur on the 15<sup>th</sup> and 30<sup>th</sup> of each calendar month following the calendar month in which such commission became earned for all orders that have been paid in full....” Joint Ex. 2, unnumbered p. 2.

The Sales Commission Agreement, a bilateral contract, enumerates not only Mr. Nuzzo's compensation, but specifically defines which expenses he was entitled to receive.

“Expenses. During the term of this Agreement, Nuzzo shall pay and shall not be reimbursed by Corriveauault for out-of-pocket expenses...” Joint Ex. 2, ¶ 7.

Mr. Nuzzo actively continued to make sales calls and generate sales to old and new customers. He was paid for some commissions. The Sales Commission Agreement provided that Mr. Nuzzo would serve for one year, but either party could terminate the agreement earlier. On or about April 30, 2007, Mr. Corriveauault handed Mr. Nuzzo a Notice of Termination (Joint Ex. 4) which terminated Mr. Nuzzo's sales contract with the Corriveauault Company.

The Asset Purchase Agreement specifically provided for ongoing projects (which had been started before the sale but not completed),<sup>1</sup> and warranty work (customers' warranty claims for projects completed by, and paid to, the Nuzzo Company before the sale).

“Buyer shall complete the performance of each Contract identified on Exhibit B required to be completed after the Closing Date for the account of Sellers, provided that the Seller shall indemnify Buyer for such costs as are incurred in connection with the performance of any such Contract obligation after the closing date...” (Joint Ex. 1, ¶ 4.6 (c)).

The Corriveauault Company performed work and satisfied customer orders, obligations and commitments for ongoing work<sup>2</sup> and for warranty work. The charges were then invoiced to Mr. Nuzzo pursuant to this contract provision. Mr. Nuzzo reimbursed the Corriveauault Company for some charges and a balance of \$16,898.20 remains due by Mr. Nuzzo to the Corriveauault Company. Even though these invoices were sent to Mr. Nuzzo before his termination and while

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<sup>1</sup> The Asset Purchase Agreement also notes that “Sellers have fulfilled all material obligations required pursuant to each Contract to have been performed by the Sellers prior to the closing date.” (Joint Ex. 1, ¶ 4.6 (c)).

<sup>2</sup> During the trial, this was occasionally referenced as “WIP” or jobs in progress.

working regularly at the Corriveau Company, he did not complain of the accuracy of the exhibits or amounts claimed due.

In February 2007, Mr. Nuzzo was billed for the expenses he incurred (which had been paid by the Corriveau Company). Mr. Nuzzo reimbursed only \$956.07 of the expenses invoiced. A balance of \$10,305.34 remained due and owing by Mr. Nuzzo to the Corriveau Company as of March 25, 2007. (Def.'s Ex. F). It still has not been paid. Mr. Nuzzo failed to pay his full obligations under the Asset Purchase Agreement.

Mr. Corriveau received communications from the Rhode Island Division of Taxation indicating taxes may be due. While Mr. Nuzzo presented a Certificate of Good Standing from the Division of Taxation at the closing, the Division of Taxation continued to make inquiries. The Division sent a payment demand to "Nuzzo & Campion" in March 2008 at the Corriveau Company's business address. Mr. Corriveau therefore opened the letter. Even though it appears to reference an old taxpayer identification number, Mr. Corriveau was reasonably concerned: A significant amount was requested, Mr. Nuzzo assured him the tax obligations were satisfied, the names were similar, and the Tax Division's ire was now raised. The issue appears to have been resolved by Mr. Corriveau's actions in obtaining a new Certificate of Good Standing.

Though Mr. Nuzzo submitted a variety of documents, he never established that he was due monies or compensation for orders placed while he was still acting as an independent contractor/salesperson.

## II Presentation of Witnesses

Our high court encourages hearing tribunals to “articulate [their] assessment of the witnesses’ credibility.” State v. Forbes, 925 A.2d 929, 935 (R.I. 2007). At this trial, only the principals of the two original parties, Mr. Nuzzo and Mr. Corriveau, testified.

Mr. Nuzzo was well prepared, clear and descriptive. He appeared not only educated but knowledgeable of his company’s business, the finances, and how to manage it. He was cooperative and affable with counsel and the Court. On cross-examination, the Court was left to question how forthcoming he was on the tax delinquency issue, as Mr. Nuzzo seemed to minimize the issue on direct examination. Even though the tax notice may have listed Mr. Nuzzo’s employer identification number, it was reasonable for Mr. Corriveau to be concerned. After Mr. Nuzzo’s testimony, the Court was left to question whether Mr. Nuzzo knew of this potential problem even before the closing. The vague response lessened Mr. Nuzzo’s credibility.

Although the negotiated agreement clarified that Mr. Nuzzo was an independent contractor of a company he no longer owned or managed, his testimony continued to focus on how the company was being operated and the manner in which he was dismissed. Obviously, having built the company with his family, he retained a strong emotional commitment to it.

Though well-prepared for his testimony, Mr. Nuzzo was less familiar with many of the documents he was shown on cross-examination. This may, in part, be attributable to being questioned concerning individual financial transactions which occurred over six years ago. However, his credibility was lessened when he claimed he needed to rely on the Corriveau Company’s books to determine how much he was due at the end of the relationship, though he

claimed he kept his own tally.<sup>3</sup> Earlier, Mr. Nuzzo had commented that he received regular spreadsheets identifying the commissions; but, as he testified, “There was a sheet; but I could never make any sense of it.” In spite of his questioning of those records at trial, he relied on those records rather than his own to compute his alleged damages. Mr. Nuzzo was sophisticated enough to verify the reason why he was receiving each check, and know what monies he was due. Generally, Mr. Nuzzo’s credibility was not in doubt but with these matters, credibility was in issue several times.<sup>4</sup>

Mr. Corriveau’s testimony was even less controversial. During a succinct direct examination, he minimally discussed his company’s relationship with Mr. Nuzzo, but focused on specific customer jobs. Mr. Corriveau substantiated that he promptly billed Mr. Nuzzo for warranty work he performed on old projects,<sup>5</sup> for Mr. Nuzzo’s benefit, and was never reimbursed. His testimony was concise, crisp, and direct. He seemed not only prepared on all issues, but familiar with all of the finances involved. On cross-examination, his credibility was never directly attacked. Mr. Corriveau continued to demonstrate a thorough knowledge of his accounts and the closing amounts, and he was able to justify the amounts due his company by language in the agreements. He added that the Corriveau Company continued to get audited for taxes. He credibly testified that he delivered backup information (Def.s’ Exs. A, D, E, F, G and H) for the amounts due to Mr. Nuzzo, while Mr. Nuzzo was in the offices. He voluntarily qualified this answer by noting that he was unsure if the payroll information attached in the

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<sup>3</sup> Mr. Nuzzo did not produce any of these tallies. The only itemization he produced was Plaintiff’s Ex. 1 which does not list the date the commission was earned, and was compiled with the generous assistance of the Corriveau Company employees.

<sup>4</sup> Frankly, Mr. Nuzzo seemed reluctant to respond to any Corriveau Company document presented to him.

<sup>5</sup> This warranty work performed for work and material supplied to customers by the Nuzzo Company was to be reimbursed according to the written agreements. See, e.g., Asset Purchase Agreement, Sec. 4.5 (c).

exhibits had been given to Mr. Nuzzo. This qualification of his answer strengthened his credibility. The Court found Mr. Corriveau to be credible.

### III

#### Analysis

##### A

#### **When Mr. Nuzzo's Commissions Are Earned**

The principal dispute between the parties is the issue of which commissions are still due to Mr. Nuzzo. Boiled to its essence, Mr. Nuzzo claims he was “entitled to commission compensation for sales orders which occurred during plaintiff’s tenure but were paid after plaintiff’s termination.” Pl.’s Post-Trial Mem of Law at 2. Mr. Nuzzo contends that he is due to be paid for a commission when the sale is made; that is, when the sale is written and signed by the customer, the commission is earned by him.

The Sales Commission Agreement speaks directly to the issue. As each of the parties acknowledges there is no ambiguity in the contract language, this dispute may be resolved by interpreting the contract language. Although each party agreed that the contract was not ambiguous, whether or not a contract is ambiguous is a question of law. Beacon Mutual Insurance Co. v. Spino Brothers, Inc., 11 A.3d 645, 648 (R.I. 2011) (citing Irene Realty Corp. v. Travelers Property Casualty Co. of America, 973 A.2d 1118, 1122 (R.I. 2009)), though if an ambiguity does exist, the construction is a question of fact. “In determining whether or not a particular contract is ambiguous, the court should read the contract in its entirety, giving words their plain, ordinary, and usual meaning.” Young v. Warwick Rollermagic Skating Center, Inc., 973 A.2d 553, 558 (R.I. 2009) (quoting Mallane v. Holyoke Mutual Insurance Co. in Salem, 658

A.2d 18, 20 (R.I. 1995)). See also RBS Citizens Bank, N.A. v. Issler, 21 A.3d 293, 298 (R.I. 2011). The Court finds the contract clear on its face and unambiguous.

In construing an unambiguous contract, the Rhode Island Supreme Court has been just as clear:

It is a fundamental principle of contract law, and the settled law of this state, that “clear and unambiguous language set out in a contract is controlling in regard to the intent of the parties to such contract and governs the legal consequences of its provisions.” Sophie F. Bronowski Mulligan Irrevocable Trust v. Bridges, 44 A.3d 116, 121 (R.I. 2012) (quoting Elias v. Youngken, 493 A.2d 158, 163 (R.I. 1985)).

Again, the explicit language of the signed Sales Commission Agreement states that for general sales, “Commissions shall be deemed to have been earned when an order is paid in full, unless otherwise agreed between the parties.” (Sales Commission Agreement, p. 2). For Material Tile Sales, “Tile commission payments shall be deemed to have been earned when an order is paid in full, unless otherwise agreed by the parties.” (Sales Commission Agreement, p. 2). The Sales Commission contract is clear and explicit. Commissions on general sales are earned when an order is paid in full, but paid on set dates. In other words, no commission is due when a sale is worked up, and a customer is tended to, or even when an order is placed. The commission is only due and earned when the customer pays for the order.<sup>6</sup>

Mr. Nuzzo is requesting commissions for orders made after he was terminated. The contract is clear: he is not entitled to such commissions. No document allows for earnings after

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<sup>6</sup> While it may now be questioned whether this arrangement was the fairest possible, or left each party with the best result, that is not a function of contract interpretation. As Justice Holmes once stated in a dissenting opinion, “If the contract is one that ought not to be made, prohibit it. But if it is a perfectly fair and proper contract, I can see no reason why the state should not throw its weight on [one] side....” Bailey v. State of Alabama, 219 U.S. 219, 247-248, 31 S. Ct. 145, 154 (U.S. 1911).



the agreement is terminated. Mr. Nuzzo has not established that Nuzzo Campion Stone Enterprises, Inc. breached the contract.

## **B**

### **Claims of Mr. Nuzzo**

#### **1**

#### **Commissions Due**

For the reasons stated, Mr. Nuzzo has failed to establish that any commission amounts remain due to him.<sup>7</sup> However, Mr. Corriveau openly acknowledged that Mr. Nuzzo is due a commission of \$28,691.03 for unpaid commissions as calculated by Joint Ex. 5.<sup>8</sup>

#### **2**

#### **Severance**

Paragraph 10 of the Sales Commission Agreement says, in part, “In the event that this Agreement is terminated by Corriveau, Nuzzo shall be entitled to severance pay in the amount of twenty five percent (25%) of total commissions earned during the portion of the term hereof prior to such termination. . . .” As indicated above, the Agreement provides that the commissions are not earned until paid by the customer. All of Mr. Nuzzo’s calculations for severance are based on commissions not paid and therefore, not earned. Mr. Nuzzo has not submitted sufficient proof by a preponderance of the evidence to substantiate the amount of severance he claims. Mr. Corriveau, using Joint Ex. 1, substantiates that the Corriveau

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<sup>7</sup> Plaintiff’s Ex. 1 is a purported listing of all sales Mr. Nuzzo made. Though he had broad access to the Corriveau Company’s books through the cooperative staff members, Mr. Nuzzo failed to indicate when the invoices were paid. Dates are included, but they appear to be order dates. For example, Mr. Nuzzo testified that he was not paid for commissions on the Parker Thompson and Ben Field orders. Though these orders were placed before Mr. Nuzzo’s termination, he never established when the invoices were paid. The Court finds Joint Ex. 5 more reliable as it indicates the payment dates, is more detailed, and Mr. Nuzzo admits that he relied upon the Corriveau Company books to prepare his reports.

<sup>8</sup>See Def.’s Proposed Finding of Facts, ¶ 11.

Company owes \$7176.76 for unpaid severance;<sup>9</sup> hence, the Court finds \$7176.76 due to Mr. Nuzzo for unpaid severance. The Court infers that the delay in paying this commission was fueled, at least in part, by Mr. Nuzzo's failure to follow the express terms of the Sales Commission Agreement and his failure to remit expenses he owed.

## C

### **Claims of Mr. Corriveau**

Mr. Corriveau has brought counterclaims against Mr. Nuzzo and a third party action against Rita Champion.

As set forth in the Findings of Fact (at p. 3 herein), Mr. Nuzzo agreed to indemnify the Corriveau Company for ongoing projects, warranty work and for non-reimbursable expenses. While there was no real dispute that Mr. Nuzzo executed this indemnification and that the indemnification is enforceable, here indemnification is reasonable and appropriate. Mr. Nuzzo received the payments in advance and issued the warranties prior to the sale of the business. Mr. Nuzzo was billed for work in progress and warranty work which the Corriveau Company performed, after the closing (Ex. I, full). Although the Nuzzo Company had done the original work and warranted it, the contracts provided that the post-closing warranty work would be performed by the Corriveau Company, and then billed to Mr. Nuzzo. Pursuant to the Asset Purchase Agreement, Mr. Nuzzo was obligated to reimburse the Corriveau Company for ongoing warranty work. At trial, Mr. Nuzzo questioned the value of some of the charges billed for "jobs in progress" or "work in progress."<sup>10</sup> Mr. Nuzzo loosely claimed that some of these items were paid for at the closing table, though no documents or other evidence substantiated this assertion. Mr. Nuzzo claimed he did not understand the invoices of the new company, claimed

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<sup>9</sup> See Def.'s Proposed Finding of Facts, ¶ 12.

<sup>10</sup> A variety of labels for this work were used at trial.

he may not have received some of the invoices and even suggested that his wife may not have told him of some of the billing issues. None of these varied defenses was supported by credible evidence.

Simply put, Mr. Nuzzo's testimony was inconsistent and far less persuasive than the documentary evidence. Mr. Nuzzo never established that the Corriveau Company's invoices for the work in progress were inaccurate. The Court found Mr. Corriveau's testimony concerning the services performed and the invoices submitted to be clear, rational, reliable, comprehensive and highly persuasive.<sup>11</sup> Mr. Nuzzo, therefore, is obligated to the Corriveau Company for failing to pay for the reimbursable expenses and warranty work.

The Court could not find by a preponderance of the evidence that Mr. Nuzzo acted in violation of the agreements by competing, directly or indirectly, soliciting customers or prospective customers, or doing business with any competitors of the Corriveau Company.

Mr. Corriveau failed to establish a claim against Ms. Champion.

#### **IV**

#### **Conclusion**

Mr. Nuzzo is due \$28,691.03 for unpaid commissions and \$7176.76 for unpaid severance from the Corriveau Company. The Corriveau Company is due \$16,898.20 from Mr. Nuzzo for unpaid expenses and warranty work. The net amount due to Mr. Nuzzo is \$18,969.59.

Attorneys' fees have been requested. The Court reserves on this issue preserving the right of the attorneys to submit further memoranda. Such memoranda and supporting documents are due in twenty days of this Decision. Any party objecting to the request for attorneys' fees shall have ten days to respond.

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<sup>11</sup> Mr. Nuzzo claimed, but failed to establish by a preponderance of the evidence that any of the Corriveau Company's accounting or invoices for the URI work was inaccurate.

Judgment shall enter for Plaintiff Nuzzo and against Defendant Corriveau Company on Count One of the Complaint. Judgment shall enter for Defendant-Counterclaimant and against Plaintiff on Count One of the Counterclaim. Judgment shall enter for the Plaintiff Nuzzo against the Defendant-Counterclaimant on Count Two of the Counterclaim. Judgment shall enter for Ms. Campion, the Third Party Defendant, on all claims in the Third Party Complaint. Other counts of the Complaint and Counterclaims were severed.<sup>12</sup>

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<sup>12</sup> While the parties attempted to separate the other counts from the breach of contract trial, the Court notes that the specific issue here was addressed explicitly in the written contract between the parties. Our high court recently declared:

This Court has held that actions brought upon theories of unjust enrichment and quasi-contract are essentially the same.

. . .

[I]t is generally true that there must be no adequate remedy at law for a plaintiff to proceed in equity . . . . Multi-State Restoration, Inc. v. DWS Properties, LLC, 61 A.3d 414, 418-419 (R.I. 2013).

Here, it is difficult to ascertain how Mr. Nuzzo may have any equitable rights for an issue specifically described in an unambiguous contract.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** James F. Nuzzo, Jr. v. Nuzzo Champion Stone Enterprises, Inc.  
f/ka Corriveault Holdings, Inc. v. Rita Campion

**CASE NO:** PC 08-3664

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** January 2, 2014

**JUSTICE/MAGISTRATE:** Lanphear, J.

**ATTORNEYS:**

For Plaintiff: David M. Campbell, Esq.

For Defendant: Andrew J. Tine, Esq.