2023 IL App (2d) 220379-U
Nos. 2-22-0379 & 2-23-0011, cons.
Order filed September 14, 2023

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

CHARLES D. ATWATER ASSOCIATES INC.,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee and Cross-Appellant,	)	
v.	)	No. 13-LA-155
NORTH STATES STEEL CORPORATION,	)	
Defendant-Appellant and Cross-Appellee.	)	Honorable Thomas A. Meyer, Judge, Presiding.

JUSTICE SCHOSTOK delivered the judgment of the court.
Justices Birkett and Kennedy concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not err in interpreting the contract, finding that there was no modification, and denying the affirmative defenses. The trial court did not err in awarding exemplary damages. The trial court erred in denying the plaintiff's request for prejudgment interest and reducing the award of attorney fees.

¶ 2 The defendant, North States Steel Corporation (NSS), appeals from the judgment in favor of the plaintiff, Charles D. Atwater Associates Inc. (Atwater), in which the circuit court awarded Atwater an amount for unpaid sales commissions in a contract dispute. The judgment included exemplary damages and attorney fees assessed pursuant to the Sales Representative Act (Sales

Act) (820 ILCS 120/0.01 *et seq*. (West 2012)). Atwater cross-appeals, arguing that the trial court erred in not awarding him prejudgment interest. Atwater also challenges, in a consolidated appeal, the amount of attorney fees that he was awarded. We affirm as modified.

¶ 3 I. BACKGROUND

¶ 4 Atwater worked, in the capacity of an independent contractor, as a manufacturer's sales representative for NSS for five years in the 1990s, earning a commission on sales he procured for NSS. At that time, the parties operated under a verbal handshake agreement. NSS supplied various grades of flat rolled steel sheets and steel coils to its customers on a wholesale basis. Atwater's services were terminated when NSS hired a direct sales representative.

¶ 5 In 2003, NSS reached out to Atwater to see if he would resume selling for NSS as an independently contracted manufacturer's sales representative. On June 12, 2003, the parties entered into a two-page written "Contract for Independent Contractor" (Contract). The Contract provided, in relevant part, as follows:

> "2. COMMISSION
>
> [NSS] agrees to pay [Atwater] a commission fee of 3% and no less than 2% per order. This commission will be determined on the profitability of each individual and separate order taken and shipped. Commission will be paid within 30 days from the end of the shipment month.
>
> 3. EXPENSES
>
> *** [Atwater] will also be fully responsible for [his] own federal and state taxes.
>
> 4. EXCLUSIVE REPRESENTATION
>
> The territory agreed upon by [the parties] will be Northern Illinois (all areas north of I-90, including Rockford and Freeport, IL.) and Wisconsin. See Exhibit "A" for a list of "North

> States Steel House Accounts." These house accounts remain exclusive accounts for [NSS] and [Atwater] agrees not to contact /or [*sic*] solicit them.
>
> 5. ORDERS AND COLLECTIONS
>
> It is the responsibility of [NSS] to invoice and ship all material in good order and in a timely fashion. *** Any prior commission paid to [Atwater] on the uncollectible invoices and /or rejected orders, will be given back to [NSS]."

At the end of section 4, there is a handwritten "11/16/04 ADDITION OF MINNESOTA." It was initialed by Atwater and Sandra Myers, NSS's Sales Manager. In addition, section seven of the Contract provided that, in the event the Contract was terminated by either party, Atwater would still be paid commissions for 60 days on all orders that were substantially attributable to his services performed prior to the termination.

¶ 6 On June 10, 2013, Atwater filed a three-count complaint for breach of contract, an accounting, and for statutory relief under the Sales Act (820 ILCS 120/2, 120/3 (West 2012)). On November 20, 2019, Atwater filed a six-count second amended complaint. Counts one through three, respectively, alleged breaches of contract against NSS for (1) failing to pay all commissions due to Atwater based on his sales, (2) failing to pay commissions for orders procured by other sales representatives in Atwater's exclusive territory, and (3) lost orders due to NSS's failure to deliver appropriate goods in a timely fashion. Count four alleged that NSS breached the contract by failing to pay commissions for 60 days post termination. Count five sought an accounting so Atwater could calculate the commissions he should have been paid and count six stated a claim under the Sales Act (820 ILCS 120/3 (West 2012)), for exemplary damages, attorneys fees, and costs.

¶ 7 On August 19, 2020, NSS filed an answer and asserted the affirmative defenses of full payment, waiver, equitable estoppel, and failure to perform condition precedent. NSS asserted that Atwater waived his right to be paid on the commissions set forth in his complaint by accepting payments and cashing commission checks after an alleged October 2008 Contract modification. NSS asserted that Atwater was equitably estopped from asserting his claims because NSS detrimentally relied on Atwater's assertions that he agreed to the Contract modification in exchange for his continued employment as an independent contractor for NSS, and detrimentally relied on Atwater's performance in that Atwater repeatedly accepted commission checks that were issued in compliance with the Contract modification. Finally, NSS alleged that Atwater was not entitled to his commissions because he failed to take any orders or be involved in the sales process on individual orders.

¶ 8 On November 18, 2013, NSS filed its initial counterclaim, which argued only that Atwater breached the Contract by representing competitors and soliciting business in Atwater's territory for NSS's competitors. In a January 2014 amended counterclaim, NSS alleged for the first time that there was a contract modification. On April 19, 2018, NSS filed a second amended three-count counterclaim for breach of contract, fraud, and unjust enrichment. In the counterclaim for breach of contract, NSS alleged the parties reached an oral agreement to modify the Contract on October 3, 2008, such that Atwater would only be paid commissions on orders that had at least a seven percent profit. NSS further alleged that Atwater breached the Contract by failing to return overpaid commissions and taxes, and by soliciting business at NSS's house accounts for a competitor. NSS also alleged that Atwater breached the implied covenant of good faith and fair dealing in not spending appropriate time servicing NSS's customers.

¶ 9 In its counterclaim for fraud, NSS alleged that it discussed with Atwater that it expected Atwater to service its customers on a four- to five- week rotation. NSS alleged that discovery documents showed that Atwater had not contacted customers in compliance with the agreed rotation. In the final count for unjust enrichment, NSS asserted that Atwater was unjustly enriched when he refused to return commissions that were paid to him by mistake.

¶ 10 Atwater filed pretrial motions for summary judgment on NSS's counterclaims and on count two of his second amended complaint. On November 22, 2021, following hearings on the motions, the trial court entered a written ruling. The trial court found that the Contract was drafted by NSS and that any ambiguities in the Contract should be construed against NSS. The trial court further found that the plain language of the Contract did not require Atwater to adhere to a four- to five-week rotation on customer visits. The trial court thus granted Atwater's motion for summary judgment on count two of NSS's second amended counterclaim but denied the motion as to counts one and three of the counterclaim.

¶ 11 The trial court also granted partial summary judgment in favor of Atwater on counts two and four of Atwater's second amended complaint. As to count two, the trial court found that Atwater was entitled to commissions for sales made by other sales representatives within Atwater's territory of northern Illinois and Wisconsin, but that there remained a genuine issue of material fact as to the amount of commissions, if any, due to Atwater from NSS. As to count four, the trial court found that NSS was liable to Atwater for commissions on sales made within 60 days following Atwater's termination of the Contract that were substantially attributable in whole or in part to Atwater's services performed prior to the effective date of termination, but there remained a genuine issue of material fact as to the amount of commissions, if any, due to Atwater. The trial

court denied Atwater's request for summary judgment on the remaining claims in his second amended complaint.

¶ 12 The matter proceeded to a bench trial, which was held on nine days between February and April 2022. Atwater testified that he worked as a manufacturer's representative for NSS for about five years in early to mid-1990s. He operated under a handshake agreement with NSS's owner and was paid commission for sales that he procured. In April or May 2003, he received a phone call from Bob Walsh, Jr., a vice president of NSS, asking him to sell again for NSS. Atwater insisted on a written contract. This resulted in the Contract, which the parties signed on June 12, 2003. He denied that he drafted the Contract.

¶ 13 Atwater testified that, when he signed the Contract, he believed he was getting three percent commission on any orders that had a profit and two percent commission on his orders if there was no profit. He was supposed to get paid at the end of every month for any orders that were shipped in the previous month. He relied on NSS's good faith in calculating the profit. When he originally started receiving commission checks, he would get the check with a bunch of invoices attached that showed the basis for the commissions paid.

¶ 14 Atwater further testified that the first time he received a commission report, rather than a stack of invoices, was in September 2009. The report listed all the invoices for the month of July 2009 that he would be paid commission on. He first became aware that some of his commissions were being zeroed out in early October 2008. He and NSS employees, Myers and Walsh, met with a customer, FabTech, on October 3, 2008. After the meeting with FabTech was over, they went to the parking lot. He handed Myers two invoices that had a "zero" written on them. He asked Myers what the "zero" meant. Myers said there was not enough profit on those sales and that NSS would not be paying any commission on them. He told her that was a violation of the Contract.

Myers said she would look into it and get back to him. Atwater testified that the first time he heard anything about a seven percent contract modification was when he saw NSS's amended counterclaim in January 2014.

¶ 15 Atwater identified Plaintiff's Exhibit No. 5 as an excel spreadsheet that he had created from the data in the commission reports provided by NSS between July 2009 and February 2013. It was 119 pages long. The report showed the commission amounts that should have been paid under the Contract and the actual commission amounts he received. He did not receive commission reports between June 2008 and June 2009. However, he later received, from NSS, a list of sales during that time period for which he received no commission. He also input that data into the subject spreadsheet. In the end, he calculated that he was still due $139,271.93 in commissions, not including any interest or attorney fees.

¶ 16 Atwater identified Plaintiff's Exhibit No. 6 as a list of sales from 2008 to 2012 that he was not paid any commission for even though the customers were located in his exclusive territory. He compared his commission reports to NSS sales reports that were provided during litigation. There were sales to customers in his territory where there was no commission listed on his commission report. The underlying sales report did not always include the percent profit on each listed sale. In those instances, Atwater assumed there was a profit and that he was due a three percent commission. He testified that the commission he should have received on those sales was $25,932.81.

¶ 17 Atwater identified Plaintiff's Exhibit No. 8 as a list of invoices from an NSS customer named Stoughton Trailer between December 2008 and April 2013. Stoughton Trailer was located in Wisconsin within his exclusive territory. He was not paid any commission on these sales. He

testified that he was due $30,366.49 as commission on the sales up to 60 days after he terminated the contract.

¶ 18 Atwater testified that, on December 12, 2012, he sent a certified letter to NSS terminating the Contract. He had many reasons for this. One was broken promises on failing to pay the zero-outs when he was told NSS would catch up and pay him all his commissions. Also, at the time of the termination, NSS was six months behind in paying his commissions. Upon her request, he faxed a copy of the Contract to Myers on December 15, 2012. Atwater identified an email he received from Myers two days later stating that the earliest she could have his commission for June and July 2012 would be the next Friday. Atwater identified Plaintiff's Exhibit Nos. 16, 17, and 18 as the commission reports he received for June through November 2012. Many of the commissions were zeroed out.

¶ 19 Atwater identified Plaintiff's Exhibit No. 20 as containing numerous emails. The emails showed that NSS was not paying commissions regularly. Atwater's testimony, supported by the emails and work notes in Exhibit No. 20, also showed that Atwater repeatedly asked for commissions and reminded Myers that he was due a minimum two percent commission on all orders. The emails and notes were from 2008 through 2012. Atwater testified that Myers never said anything to him about a modification of the Contract and repeatedly told him that she would look into the unpaid commissions. Atwater testified that, on one occasion in October 2011 when he spoke with Myers about unpaid commissions, she told him that he deserved to be paid according to the Contract and that she would look in it.

¶ 20 Myers testified for Atwater that when she signed the Contract she knew what "profit" meant. She did not remember stating that she did not know what "profit" meant in her deposition. Myers acknowledged that the customer, Stoughton Trailer, was located in Wisconsin in Atwater's

territory. She also acknowledged that Plaintiff's Exhibit No. 8 was a list of all the sales to Stoughton Trailer from 2008 through 2013.

¶ 21 Myers identified Plaintiff's Exhibit No. 26 as NSS's tax returns. She acknowledged that, for fiscal year 2007, NSS had gross profit of $3.38 million. The gross profit was $2.24 million, $3.16 million, $3.53 million, and $2.86 million for fiscal years 2008 through 2011. Fiscal year 2011 ended September 30, 2012, about two and a half months before Atwater terminated the Contract. Myers testified that, while Atwater should have received a commission statement with every commission check, she may have sometimes forgotten to do so. She acknowledged that she did not always send the commission checks when she was supposed to because NSS was struggling. She acknowledged that when the Contract was terminated, commissions had only been paid up to May 2012.

¶ 22 Myers testified for the defense that NSS was a family business that was started by her father. At the time of trial, she was the president of NSS. Myers testified that she was not involved in the drafting of the Contract. The only people involved in negotiating the Contract was her father and Atwater. Her father did not know how to use a computer but he had a secretary. She testified that paragraph two of the Contract meant that Atwater would "receive a commission on orders that he ha[d] taken." The term "profitability" in the second sentence of section two referred to NSS's profit.

¶ 23 Myers further testified that, in October 2008, there was a meeting in FabTech's parking lot where Atwater and NSS agreed to a modification of the Contract. They were there to address a customer issue. After, in the parking lot, Atwater showed Myers two sales invoices that had zeros written on them. Myers told Atwater that the market had become very competitive and NSS could not afford to pay him commission on orders that earned less than a seven percent profit. Atwater

agreed to zero commission on any orders under seven percent profit. The modification was never put in writing because they generally did things based on handshakes. Myers testified that, after the Contract modification, she would send Atwater monthly commission reports and he never complained about his commissions. He only complained about the timing of receiving his commissions. She did not see the list of commissions allegedly owed until December 12, 2012, when Atwater sent his termination letter. After that, she went back and reviewed the commission reports to make sure that a commission was paid on any sales with a profit of seven percent or above. When doing so, she found that she had made some errors.

¶ 24 On cross-examination, Myers testified that she could not recall whether the Contract was ever mentioned during the October 2008 discussion with Atwater and Walsh in FabTech's parking lot. If she did not pay commission on a sale that had over seven percent profit or if she did not send a commission report to Atwater, it was human error. When asked whether there was anything that restated or confirmed the alleged modification to the Contract, Myers said it would be the copies of the commission reports and the checks that Atwater cashed.

¶ 25 Walsh testified that he worked for NSS since 1980. Myers was his sister and their father was the founder of NSS. Walsh testified that he had nothing to do with the drafting of the Contract. His father was the main person involved. He first saw the Contract when he heard there was going to be a lawsuit. He testified that he was at the customer meeting in the FabTech parking lot in October 2008 with Atwater and Myers. After the customer visit, he and Myers told Atwater that the economy was bad, the business was struggling, and that there would be zero commissions until further notice. Competition was fierce and they were selling at a loss to keep customers. Walsh said that Atwater was "cocky" at first but that ultimately Atwater said he would do what he could

to help out. When asked by his attorney whether they talked about any type of number with profit, Walsh said "seven."

¶ 26 On September 22, 2022, after the parties entered written closing arguments, the trial court enter a written memorandum of decision and order. The trial court stated that it had assessed the credibility of the witnesses and considered the trial exhibits, pleadings and closing arguments. The trial court found that the plain language of the first sentence of section two of the Contract required payment of a commission of "no less than 2% per order." The trial court found the second sentence, which related to when a three percent commission applied, to be ambiguous. The trial court noted that the Contract made repeated references to "NSS" but not to Atwater and concluded that NSS was responsible for drafting the Contract. The trial court stated that any ambiguities would be construed against NSS. The trial court found that the only logical conclusion was that a minimum commission of two percent would be paid on orders with no profit and a three percent commission would be paid on orders with a profit.

¶ 27 As to the alleged Contract modification, the trial court found that there was no credible evidence to support the alleged modification. The trial court found that the testimony of Myers and Walsh was not credible. The trial court also found that there was no consideration for the alleged modification. The trial court found that NSS's agreeing not to terminate the Contract was not consideration for the modification because NSS always had the right to terminate the Contract before and after the alleged modification. The trial court noted that there were no emails or anything else in writing that supported a Contract modification. The trial court also found that there was no subsequent course of conduct to support the existence of a Contract modification because the evidence showed that Atwater did not regularly receive commission reports and he

continually complained about missing reports and reduced commissions. Finally, the trial court noted that the "zero outs" on commissions began before the alleged modification.

¶ 28 The trial court found in favor of Atwater on count one of his second amended complaint, finding that NSS breached the Contract when it failed to pay a minimum two percent commission. The trial court found Atwater's analysis of his unpaid commissions to be credible and reliable. The trial court entered judgment against NSS in the amount of $139,271.93.

¶ 29 With regard to count two, the trial court noted that it had entered partial summary judgment in favor of Atwater finding that NSS had to pay Atwater commissions for sales by others that took place in his exclusive territory. The trial court noted that Atwater testified and presented evidence from NSS's records showing the amount he believed to be due on these unpaid commissions. The trial court noted that NSS did not challenge the amounts reached by Atwater; NSS only challenged that it was contractually responsible for paying the commissions. The trial court entered judgment in favor of Atwater in his requested amount of $56,299.30.

¶ 30 The trial court denied Atwater's request for prejudgment interest under section 2 of the Interest Act (815 ILCS 205/2 (West 2012)). The trial court found that the statute required Atwater to have provided written notice to NSS that he intended to charge and collect interest.

¶ 31 The trial court entered judgment against Atwater on count three of Atwater's second amended complaint, finding that Atwater failed to introduce sufficient evidence to establish that NSS's alleged failure to ship material in good order and in a timely fashion resulted in the customer's reducing orders or ceasing to do business with Atwater.

¶ 32 As to count four, the trial court noted that it had entered partial summary judgment in favor of Atwater prior to trial finding that he was due commissions for 60 days after his termination for any orders that could be substantially attributed to his services. The trial court noted that Atwater

provided evidence of the amounts he was owed based on his review of the commission reports provided by NSS. The trial court noted that these amounts were already included in the damages award entered on count one. The trial court noted that count five had been dismissed.

¶ 33 In count six, Atwater had requested exemplary damages, attorney fees, and costs under section 3 of the Sales Act (820 ILCS 120/3 (West 2012)). The trial court noted that section two of the Contract provided that commissions would be paid within 30 days of the end of the shipment month of the sale, NSS's alleged cash flow problems did not give it the right to delay commission payments, and NSS quoted the prices to customers and thus controlled the percentage of profit earned on any order. The trial found that the evidence showed that Atwater repeatedly requested commission payments and that Myers repeatedly promised to "look into it." The trial court found that NSS failed to make timely commission payments required under the Contract and that it unilaterally attempted to modify the Contract to avoid paying commissions. The trial court concluded that NSS's conduct was outrageous enough to require payment of exemplary damages, reasonable attorney's fees, and costs. The trial court entered an award in Atwater's favor for exemplary damages of $139,271.93, which was equivalent to the total of Atwater's unpaid commissions. The trial court ordered Atwater's counsel to submit affidavits detailing its attorney fees.

¶ 34 The trial court then addressed NSS's affirmative defenses and counterclaims. The trial court found the affirmative defense of payment to be unsupported by the evidence. The trial court found the affirmative defenses of waiver and equitable estoppel were premised on the alleged Contract modification and thus denied both of them. The trial court denied the fourth affirmative defense, failure to perform a condition precedent, on the basis that the plain language of the Contract and the evidence presented did not support any claim in this regard. The trial court noted

that NSS attempted to raise an affirmative defense of material breach in its written closing argument. The trial court declined to consider this affirmative defense, noting that the case had been pending for nine years and NSS had never filed an affirmative defense alleging that Atwater materially breached the Contract. Finally, the trial court found that NSS failed to provide sufficient evidence to support any of its counterclaims and entered judgment in favor of Atwater and against NSS on all counts of the second amended counterclaim.

¶ 35 NSS filed a timely notice of appeal from the foregoing order and Atwater filed a timely notice of cross-appeal challenging the denial of prejudgment interest. These appeals were docketed in this court as appeal No. 2-22-0379.

¶ 36 On October 13, 2022, Atwater filed his petition for attorney fees with supporting affidavits and timesheets, requesting attorney fees of $938,209.25 and costs of $5,081.52. NSS filed a response, arguing that the costs and fees were excessive and unreasonable. On December 16, 2022, following a hearing, the trial court entered an oral ruling. As to the court costs, the trial court found that the statute only permitted an award of $298. As to reasonable attorney fees, the trial court noted that there was no argument that Atwater's attorneys were padding their time or that the hourly rate was inappropriate. The trial court noted that NSS argued that the attorney fee award could not be higher than the underlying judgment but stated that this was not a hard and fast rule. The trial court found that the spirit of the statute was to compensate Atwater for the expenses associated with recovering his commissions. The trial court found that, of the requested attorney fees, $18,891.50 were not reasonable and, of the requested amount, $924,399 remained. The trial court noted that, between the six counts in the second amended complaint and the three counts in the second amended counterclaim, there were nine issues that had to be addressed. The trial court acknowledged that there was quite a bit of overlap but found that "only six of those [issues] were

directly related to the commissions issue." The trial court thus divided $924,399 by nine and multiplied by six to arrive at an attorney fee award of $628,266.

¶ 37 Atwater filed a timely notice of appeal and NSS filed a timely notice of cross-appeal from this order, which was docketed in this court as case No. 2-23-0011. We subsequently granted Atwater's motion to consolidate the two cases for purposes of appeal.

¶ 38 II. ANALYSIS

¶ 39 A. Appeal No. 2-22-0379

¶ 40 1. Contract Interpretation

¶ 41 NSS's first contention on appeal is that the trial court erred in interpreting section two of the Contract. In construing a contract, our primary objective is to give effect to the intent of the parties. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2001). To this end, we construe the contract as a whole by viewing each provision in light of the other provisions. *Reserve at Woodstock, LLC v. City of Woodstock*, 2011 IL App (2d) 100676, ¶ 39. The best indicator of the parties' intent is the language of the contract when given its plain and ordinary meaning. If the provisions of a contract are unambiguous, we ascertain the parties' intent from the language chosen in the contract. *First Bank and Trust Co. of Illinois v. Village of Orland Hills*, 338 Ill. App. 3d 35, 40 (2003).

¶ 42 While extrinsic evidence may not be used to interpret a contract that is unambiguous on its face, extrinsic evidence may be used to aid in interpreting an ambiguous contract. *William Blair & Co. v. FI Liquidation Corp.*, 358 Ill. App. 3d 324, 334 (2005). A contract is ambiguous if its language is susceptible to more than one reasonable interpretation. *Ritacca Laser Center v. Brydges*, 2018 IL App (2d) 160989, ¶ 15. The mere fact that the parties disagree over the contract's interpretation does not suffice to establish ambiguity. *Intersport, Inc. v. National Collegiate Athletic Association*, 381 Ill.App.3d 312, 319 (2008). Any ambiguity in the language of the

contract should be resolved against the drafter of the document. *Howard A. Koop & Associates v. KPK Corp.*, 119 Ill. App. 3d 391, 398 (1983). The determination of whether a contract is ambiguous is a question of law for a court to decide. *Meyer v. Marilyn Miglin, Inc.*, 273 Ill. App. 3d 882, 888 (1995). However, if the contract is ambiguous and the trial court uses extrinsic evidence to determine the parties' intent, the interpretation of the language is a question of fact (*Chicago Principals Association v. Board of Education*, 84 Ill. App. 3d 1095, 1099 (1980)), and the trial court's decision in this regard will not be reversed unless it is against the manifest weight of the evidence (*Chicago Investment Corp. v. Dolins*, 107 Ill. 2d 120, 124 (1985)).

¶ 43 In the present case, the trial court did not err in interpreting the Contract. The first sentence of section two unambiguously states that Atwater would be paid a commission of no less than two percent per order. The first sentence also indicates that the commission could be as high as three percent. The second sentence modifies the commission rate in the first sentence by explaining that it would be determined based on the profitability of each order taken and shipped. The second sentence is ambiguous to the extent there is no explanation as to what profitability determines whether the commission is two percent, three percent, or somewhere in between. Under these circumstances, extrinsic evidence may be considered.

¶ 44 The trial court's resolution of the ambiguity was not against the manifest weight of the evidence. As noted by the trial court, any ambiguity in a contract should be construed against the drafter. While Myers and Walsh did not know who drafted the Contract, NSS was referenced throughout the Contract in typewritten font while Atwater was only referenced in section one, where his name was handwritten in a blank space and named as an independent contractor. Atwater testified that he did not draft the Contract. As such, the trial court's determination that NSS drafted the Contract was not against the manifest weight of the evidence.

¶ 45 In terms of resolving the ambiguity in the second sentence, Atwater testified that he believed the Contract meant that he would receive a three percent commission on all orders that earned a profit and two percent commission on the orders that did not result in a profit. Myers and Walsh denied being involved in the drafting of the Contract and, thus, there was no evidence from NSS as to its intent with regard to the second sentence at the time of drafting. Myers testified only that the second sentence meant that Atwater would receive commission on orders he had taken and that "profitability" meant profit. Based on the evidence presented, it was not unreasonable for the trial court to construe the second sentence against the drafter, NSS, and in accordance with Atwater's testimony that he would get a two percent commission on unprofitable sales and a three percent commission on profitable sales.

¶ 46 NSS argued in the trial court that section two required NSS to pay commission of two to three percent only on profitable orders. In its appellant brief, NSS argues that this interpretation is supported by the commission reports that were admitted into evidence. However, the commission reports cited were for 2009 through 2012, a time period after the alleged Contract modification, when NSS was zeroing out commissions and only paying according to the alleged modification. As such, these commission reports do not support how commissions were paid under the Contract from 2003 through the alleged 2008 modification. NSS also argues that the trial court's interpretation renders the second sentence of section two meaningless. We disagree because the second sentence modifies the first sentence to the extent it explains when the commission would be two percent and when it would be three percent. Based on the extrinsic evidence presented, the trial court determined that the second sentence meant the commission would be two percent on unprofitable orders and three percent on profitable orders. As such, the trial court's interpretation did not render the second sentence meaningless.

¶ 47 NSS also argues that the trial court's interpretation was erroneous because it essentially determined that "profit" included sales at a loss and that this is at odds with the definition of the terms: "profit" and "profitability." This argument is without merit. The trial court did not find that sales at a loss were profitable. The trial court concluded that, since the first sentence of section two unambiguously stated that a commission of no less than two percent would be paid on every order, the second sentence meant that commission would be three percent on sales with a profit and two percent on sales without a profit.

¶ 48 2. Contract Modification

¶ 49 NSS's next contention is that the trial court erred in finding that the Contract was not modified to require commission payments only when a sale resulted in a profit of at least seven percent. "The issues of the existence of an oral [contract] modification, its terms and conditions, and the intent of the parties are questions of fact to be determined by the trier of fact." *A.W. Wendell & Sons, Inc. v. Qazi*, 254 Ill. App. 3d 97, 105-06 (1993). The trial court's findings with respect to these issues will not be disturbed on review unless they are contrary to the manifest weight of the evidence. *Id.* "A decision is against the manifest weight of the evidence only when an opposite conclusion is apparent or when the findings appear to be unreasonable, arbitrary, or not based on the evidence." *Eychaner v. Gross*, 202 Ill. 2d 228, 252 (2002).

¶ 50 The trial court's determination that there was no contract modification was not against the manifest weight of the evidence. NSS contends that the parties agreed to an oral modification at a meeting in the FabTech parking lot on October 3, 2008, between Myers, Walsh, and Atwater. Atwater testified that, at the subject meeting, he questioned Myers about zeros on two invoices that he had received with a commission check. Myers told him there was not enough profit on those sales and he would not get a commission for those sales. Atwater testified that, when he told

Myers that this violated the Contract, Myers said only that she would look into it and get back to him. While Myers testified on direct examination that Atwater specifically agreed, at that meeting, that he would only take commission on orders that had a minimum seven percent profit, she testified on cross-examination that she could not remember whether the parties discussed the Contract at that meeting. Walsh testified that they told Atwater that there would be zero commissions until further notice and that Atwater said he would do what he could to help out. Walsh made no reference to the alleged modification until his attorney questioned whether they talked about any type of number related to profit, and Walsh responded "seven." Atwater testified that he never heard of a seven percent Contract modification until he saw NSS's amended counterclaim in January 2014. The trial court found that the testimony of Myers and Walsh was not credible. In light of the foregoing testimony, and the trial court's credibility findings, we cannot say the trial court's determination was unreasonable. Moreover, Atwater submitted evidence of various emails, between 2009 and 2012, to Myers questioning the zero commissions and none of Myers' responses specifically mentioned or even alluded to a Contract modification.

¶ 51 NSS argues that, because Atwater acknowledged that he was receiving commission reports with zero commissions since 2009, this demonstrates that there was a Contract modification. NSS notes that the "modification of a contract may be ratified by acquiescence in a course of conduct consistent with the existence of that modification." *Corrugated Metals, Inc. v. Industrial Commission*, 184 Ill. App. 3d 549, 556 (1989). While this proposition of law is true, Atwater's behavior did not show acquiescence to a Contract modification. The evidence showed that Atwater cashed his commission checks based on indications from Myers that she would "look into" the discrepancies in his commissions. Atwater testified that he repeatedly emailed and spoke with Myers questioning the zero commissions and telling her it violated the Contract. According to

Atwater, whose testimony the trial court found credible, Myers repeatedly told him that she would look into his unpaid commissions. The written emails submitted as evidence support this testimony and none of the emails referenced a Contract modification. Moreover, while NSS asserts that the zero commissions were due to the alleged Contract modification, Atwater questioned zero commissions that occurred prior to the October 3, 2008, FabTech meeting (where the Contract was allegedly modified) and testified that he did not see any zero commissions after that meeting until May 2009.

¶ 52 NSS also argues that the trial court erred when it found that, because NSS had the right to terminate the Contract at will both before and after the alleged modification, NSS offered no consideration for the alleged Contract modification. Although the case law in this area is not uniform, there is some support for NSS's argument. There is no dispute that the Contract was an at-will employment agreement. An at-will employment agreement may be modified by the employer as a condition of its continuance. *Geary v. Telular Corporation*, 341 Ill. App. 3d 694, 698 (2003). "This right to modify unilaterally at-will employment terms applies to modifying compensation terms" and, when an at-will employee continues to work after the change, he or she is deemed to have accepted the change. *Id.*; but see *Ross v. May Co.*, 377 Ill. App. 3d 387, 392 (2007) ("mere continued employment, standing alone, does not constitute consideration supporting the unilateral modification of an existing employment contract"). Regardless of how this issue should be resolved, however, this contention of error is not a basis for reversal. Atwater testified that he, Myers, and Walsh never discussed a Contract modification and the trial court found this testimony credible. Further, the record shows that Atwater did not continue to work under any modified terms; rather, he repeatedly questioned Myers about not being paid his commissions as

required under the Contract. As Atwater was unaware of any modification to the Contract, he can not be deemed to have accepted the alleged change.

¶ 53 NSS argues that, even absent express agreement, Atwater's agreement to the Contract modification should be implied at law. In support, NSS relies on *Davison v. Board of Trustees of Carl Sandburg College*, 132 Ill. App. 3d 980 (1985). *Davison* involved a dispute over a written employment agreement that was later modified by oral agreement. The trial court concluded that the plaintiff, a teacher, could not work the entire summer and then later repudiate an oral contract for part-time pay. *Id.* at 982. The reviewing court agreed, holding that "[b]y carrying the modified contract into effect and accepting its benefits, [plaintiff] ratified the new agreement and waived performance of the original contract." *Id.*

¶ 54 NSS argues that, as in *Davison*, Atwater cannot fully perform and accept the benefits of the Contract modification and then later repudiate it and sue for the difference. NSS's reliance on *Davison* is unpersuasive. In *Davison*, plaintiff knowingly continued to perform under the modified agreement. In this case, we concluded that Atwater did not knowingly perform under a modified Contract because the evidence did not support the existence of any modification. Atwater repeatedly questioned why his commissions did not align with the Contract and testified that he never heard of any seven percent rule until after this litigation began.

¶ 55 3. Equitable Estoppel

¶ 56 NSS's next contention is that the trial court erred in concluding that it had failed to prove its affirmative defense of equitable estoppel. Equitable estoppel exists where a party, by his or her own statements or conduct, induces a second party to rely, to his or her detriment, on the statements or conduct of the first party. *In re Marriage of Smith*, 347 Ill. App. 3d 395, 399 (2004). To establish equitable estoppel, the party claiming the estoppel must demonstrate that: (1) the other

party misrepresented or concealed material facts; (2) the other party knew at the time he or she made the representations that they were untrue; (3) the party claiming the estoppel did not know that the representations were untrue when they were made and when they were acted upon; (4) the other party intended or reasonably expected that the party claiming estoppel would act upon the representations; (5) the party claiming estoppel reasonably relied upon the representations in good faith, to his or her detriment; and (6) the party claiming estoppel would be prejudiced by his or her reliance on the representations if the other party is permitted to deny the truth thereof. *Geddes v. Mill Creek Country Club, Inc.*, 196 Ill. 2d 302, 313-14 (2001). Equitable estoppel analyses are fact dependent and "[t]he party claiming estoppel has the burden of proving it by clear and unequivocal evidence." *Id.* at 314. "The circuit court's decision regarding equitable estoppel will not be disturbed on review unless it is against the manifest weight of the evidence, or will be reviewed *de novo* if it is based on a legal conclusion." *In re Parentage of Scarlett Z.-D.*, 2015 IL 117904, ¶ 26.

¶ 57 In the present case, the trial court denied the affirmative defense of equitable estoppel because it was premised on "the claimed [Contract] 'modification' which this [trial] court has expressly rejected." NSS argues that this was an error of law because proof of a valid contract modification is not one of the elements of equitable estoppel. This argument is without merit. In its affirmative defense, NSS specifically stated "[NSS], in good faith, detrimentally relied upon Atwater's assertions that [he] agreed to the modification of paragraph 2 of the [Contract] in exchange for [his] continued employment as an independent contractor of [NSS]." Accordingly, the trial court was correct that the affirmative defense of equitable estoppel was, as a matter of fact, premised on Atwater's alleged agreement to a Contract modification. The trial court did not

find that NSS was required to prove the Contract modification as a legal element of equitable estoppel.

¶ 58 As the trial court's determination was based on an issue of fact, whether NSS proved the affirmative defense of equitable estoppel will not be disturbed unless it was against the manifest weight of the evidence. *Id.* As explained above, the evidence does not establish that Atwater had knowledge of the alleged Contract modification, that he was accepting and cashing checks with knowledge that NSS was applying an alleged Contract modification, or that he accepted a Contract modification in exchange for NSS not terminating the Contract. NSS failed to prove that it was misled or detrimentally relied on an alleged consent by Atwater to the Contract modification. As NSS failed to prove any of the elements of its affirmative defense of equitable estoppel by unequivocal evidence, the trial court properly rejected it.

¶ 59 4. Waiver

¶ 60 NSS also contends that the trial court erred in finding that NSS was required to prove a contract modification to prevail on its affirmative defense of waiver. Waiver is the voluntary and intentional relinquishment of a known right inconsistent with an intent to enforce that right. *In re Nitz,* 317 Ill. App. 3d 119, 130 (2000). "Parties to a contract have the power to waive provisions placed in the contract for their benefit, and such a waiver may be established by conduct indicating that strict compliance with the contractual provisions will not be required." *Id.* "The party claiming the implied waiver has the burden of proving a clear, unequivocal, and decisive act of its opponent manifesting an intention to waive its rights." *Id.* Our standard of review is whether the trial court's judgment was against the manifest weight of the evidence. *Great West Steel Industries, Ltd. v. Northbrook Insurance Company*, 138 Ill. App. 3d 84, 91 (1985).

¶ 61 In the present case, the trial court did not err in denying the affirmative defense of waiver. The trial court did not find that NSS was required to prove a contract modification to establish waiver; it noted that NSS premised its affirmative defense of waiver on the alleged contract modification and that the affirmative defense failed because there was no contract modification. NSS stated in its affirmative defense that Atwater "intentionally relinquished [his] right to be paid on the commissions listed in [his] complaint by repeatedly accepting payments during the term of the [Contract] *** as modified *** without complaint or protest, that were thought to be less than the agreed upon commission rate." As the trial court found that Atwater was not aware of a Contract modification, Atwater could not have intentionally relinquished his right to be paid according to the Contract. Moreover, there was no waiver because Atwater did not repeatedly accept commission checks without complaint or protest. The evidence shows that, starting on October 2008, Atwater repeatedly questioned Myers about the timing and amounts of his commission checks and she told him that she would look into it and that NSS would catch up. On one occasion in 2011, Myers told him that he should be paid according to the Contract. For these reasons, the trial court properly denied the affirmative defense of waiver.

¶ 62 5. Partial Summary Judgment on Count Two of Atwater's Second Amended Complaint

¶ 63 NSS's next contention is that the trial court erred in entering partial summary judgment in favor of Atwater on count two of his second amended complaint. Prior to trial, the trial court found that section four of the Contract unambiguously granted Atwater an exclusive territory except for the house accounts explicitly identified. The trial court also found that, to the extent NSS sent other agents into Atwater's exclusive territory, NSS breached the Contract. The only issue at trial was the amount of commissions earned by other agents in the exclusive territory that would be due to Atwater.

¶ 64 A summary judgment is a drastic remedy that is to be awarded and reviewed with care and caution. *Bloomer Amusement Co. v. Eskenazi*, 75 Ill. App. 3d 117, 118 (1979). A motion for summary judgment should be granted only where the pleadings, depositions, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. 735 ILCS 5/2-1005(c) (West 2020). If the facts are not in dispute but are subject to conflicting inferences, or if a reasonable person can draw different inferences and conclusions from the undisputed facts, summary judgment is not appropriate. *Bloomer*, 75 Ill. App. 3d at 118-19. A grant of summary judgement is subject to *de novo* review. *Id.* at 119. "Contract interpretation is appropriate for disposition by summary judgment." *RDC Case Creek Trails, LLC v. Metropolitan Airport Authority of Rock Island County*, 2020 IL App (3d) 190083, ¶ 14.

¶ 65 Section four of the Contract provided:

> "4. EXCLUSIVE REPRESENTATION
>
> The territory agreed upon by both [Atwater] and [NSS], will be Northern Illinois *** and Wisconsin. See Exhibit 'A' for list of '[NSS] House Accounts.' These house accounts remain exclusive accounts for [NSS] and [Atwater] agrees not to contact /or [*sic*] solicit them."

¶ 66 NSS argues that the trial court erred in interpreting section four of the Contract because the only reference to exclusivity in that section was directed at NSS's house accounts and not at Atwater's territory. This argument is unpersuasive. The title to section four is "Exclusive Representation." Reading the contract as a whole, the plain language of section four is that Atwater has an exclusive right to represent NSS in the named territory, except for the specifically listed house accounts. It is not improper to consider the section title in determining the meaning of a

contract. See *Mosby v. Mutual Life Insurance Company of New York*, 405 Ill. 599, 606 (1950) (using the title of an insurance policy provision in interpreting the meaning of the provision). The title clearly applied to Atwater's exclusive territory and to NSS's exclusive house accounts. Moreover, if the exclusive representation only applied to NSS's house accounts, there would be no need to specify a territory for Atwater. It would have been sufficient to merely bar Atwater from selling to NSS's house accounts. Accordingly, the trial court did not err in concluding that other agents of NSS selling in Atwater's exclusive territory, except for to the house accounts, would be a breach of the Contract.

¶ 67 6. Damages on Count Two of Atwater's Second Amended Complaint

¶ 68 NSS next argues that the trial court erred in admitting Plaintiff's Exhibit No. 6, and in considering the hearsay contained therein, in determining the amount of damages for breach of section four of the Contract. It is within the discretion of the trial court to decide whether evidence is relevant and admissible, and a reviewing court will not disturb the trial court's decision absent a clear abuse of that discretion. *Piser v. State Farm Mutual Auto Insurance Company*, 405 Ill. App. 3d 341, 349-50 (2010). "An abuse of discretion occurs only when the trial court's decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Seymour v. Collins*, 2015 IL 118432, ¶ 41.

¶ 69 Plaintiff's Exhibit No. 6 is a summary of customers within Atwater's territory who purchased products from NSS during his period of exclusive representation, for which Atwater was not paid a commission. Atwater compiled this list from underlying sales reports produced by NSS during discovery. NSS first argues that the underlying sales reports do not indicate whether these customers are actually located in Atwater's territory. However, Atwater testified at trial that

the customers were located in his territory, and NSS had the opportunity to cross-examine Atwater on this issue and attempt to disprove his testimony.

¶ 70 NSS next argues that the underlying sales reports constitute inadmissible hearsay as they were prepared by a third party and not verified or authenticated at trial. This argument fails because the NSS did not contest at trial that the sales reports were produced by NSS during discovery. NSS argues that the trial court erred in admitting the subject exhibit because it was not a summary of data, rather it was a summary of Atwater's argument. This is also without merit because it was a summary of data produced by NSS during discovery that Atwater compiled into a spreadsheet that was easier for the trial court to understand. NSS does not argue on appeal that the summary was erroneous or misrepresented the underlying sales data, which was included with the trial exhibit.

¶ 71 Finally, NSS argues that it was error to admit the exhibit because Atwater did not have all the profit data and, when the profit data was unavailable, he assumed he was owed a three percent commission for the sale. However, NSS failed to challenge Atwater's profit assumptions on cross-examination or in closing argument and did not produce data showing that he was only due a two percent commission. In addition, NSS did not object to the exhibit at trial on the basis that it included assumptions. It only objected on the basis that it had not seen the exhibit prior to trial. Further, NSS fails to cite any authority in support of the assertion that allowing Atwater's assumptions was an abuse of discretion or an error of law. We also note that, to the extent NSS argues that Atwater's summary was inadmissible hearsay, the argument is forfeited because NSS failed to cite any authority in support of this assertion. See *Kic v. Bianucci*, 2011 IL App (1st) 100622, ¶ 23 (a party forfeits review of an issue on appeal by failing to support its argument with citation to authorities).

¶ 72 7. Prior Material Breach

¶ 73 NSS next argues that the trial court erred in ruling that NSS's defense of prior material breach was barred because NSS failed to plead it as an affirmative defense. Generally, an affirmative defense must be set out completely in a party's answer to a complaint and failure to do so results in waiver of the defense. See 735 ILCS 5/2-613(d) (West 2020); *Hanley v. City of Chicago*, 343 Ill. App. 3d 49, 53-54 (2003). Nonetheless, a trial court may allow a party to amend its answer and add new defenses at any time before final judgment is entered in the cause. See 735 ILCS 5/2-616(a) (West 2020); *Ocasek v. City of Chicago*, 275 Ill. App. 3d 628, 637 (1995). Whether to allow an amendment, as well as the key determination of whether prejudice will be suffered, lies within the discretion of the trial court and its determination will not be reversed absent an abuse of that discretion. See *Ocasek*, 275 Ill. App. 3d at 637.

¶ 74 Here, the trial court noted that NSS raised the affirmative defense of material breach for the first time in its closing argument. Under these circumstances, we cannot say that the trial court abused its discretion in refusing to consider the defense. Moreover, NSS alleged breach of contract against Atwater in its counterclaim and the trial court thus considered the issue in ruling on that counterclaim. At oral argument, defense counsel raised the contention that Atwater breached the covenant of good faith and fair dealing implied in the Contract because Atwater allegedly spent over 80% of his time working for a direct competitor. However, NSS did not appeal from the trial court's denial of its counterclaims. As such, the issue has been forfeited. Ill. S. Ct. R. 341(h)(7) (eff. Oct. 1, 2020) (points not argued in an appellant's brief are forfeited and cannot be raised at oral argument).

¶ 75 8. Exemplary Damages

¶ 76 NSS's final contention on appeal is that the trial court erred in awarding exemplary damages on count six of Atwater's second amended complaint. NSS argues that such an award was improper because it acted on a good faith belief that the Contract had been modified, and it was experiencing legitimate cash flow problems. NSS asserts that the evidence did not demonstrate bad faith or outrageous conduct necessary to support an award of exemplary damages.

¶ 77 Section 3 of the Sales Act provides:

> "A principal who fails to comply with the provisions of Section 2 concerning timely payment or with any contractual provision concerning timely payment of commissions due upon the termination of the contract with the sales representative, shall be liable in a civil action for exemplary damages in an amount which does not exceed 3 times the amount of the commissions owed to the sales representative. Additionally, such principal shall pay the sales representative's reasonable attorney's fees and court costs." 820 ILCS 120/3 (West 1012).

Exemplary damages should not be awarded absent a finding of "culpability that exceeds bad faith" and "only for conduct involving an element of outrage similar to that normally found in crime." *Maher & Associates, Inc. v. Quality Cabinets*, 267 Ill. App. 3d 69, 80-81 (1994). A trial court's decision on whether to grant such damages will not be disturbed absent an abuse of discretion. *Installco Inc. v. Whiting Corporation*, 336 Ill. App. 3d 776, 784 (2002).

¶ 78 NSS argues that the trial court abused its discretion in awarding exemplary damages because Myers testified that, in 2008, NSS was having cash flow problems. NSS argues that this shows it was not acting in bad faith when commission checks were late. However, it is the trial court's responsibility to judge the credibility of the witnesses and resolve conflicts in the evidence. *Williams v. Cahill*, 258 Ill. App. 3d 822, 825 (1994). The trial court found that Myers was not a

credible witness and the record showed that, despite alleged cash flow issues, NSS earned significant gross profits year after year. The trial court also noted that there was nothing in the Contract that made commission payments dependent on cash flow.

¶ 79 NSS also argues that it was acting in good faith on the belief that Atwater had agreed to the Contract modification. However, the trial court found the assertion of a Contract modification to be incredible and unsupported by the evidence. The trial court thus concluded that NSS was guilty of "dilatory tactics and ineptness in payment of commissions." The trial court also concluded that NSS's failure "to make timely payments on commissions and attempting to unilaterally alter the provisions of the written [C]ontract" was sufficiently outrageous conduct to warrant exemplary damages. Under the circumstances in the present case, we cannot say the trial court's determination was an abuse of discretion.

¶ 80 9. Cross-Appeal for Prejudgment Interest

¶ 81 On cross-appeal, Atwater argues that the trial court erred in denying his request for prejudgment interest under the Interest Act (815 ILCS 205/2 (West 2012)). Atwater had requested prejudgment interest on all his claims for breach of contract. The trial court denied the request on the basis that there was no evidence that Atwater sent notice to NSS that he would charge and collect interest.

¶ 82 Section 2 of the Interest Act provides:

> "Creditors shall be allowed to receive at the rate of five (5) per centum per annum for all moneys after they become due on any bond, bill, promissory note, or other instrument of writing; *** and on money withheld by an unreasonable and vexatious delay of payment. In the absence of an agreement between the creditor and debtor governing interest charges, upon 30 days' written notice to the debtor, an assignee or agent of the creditor may charge

> and collect interest as provided in this Section on behalf of a creditor." 815 ILCS 205/2 (West 2012).

"To recover under the statute, the party need only show an instrument in writing and that the amount due was fixed and determinable. An amount may be fixed and determinable even where it requires legal ascertainment." *Michigan Avenue National Bank v. Evans, Inc.*, 176 Ill. App. 3d 1047, 1061 (1988). " '[I]f judgment, discretion, or opinion, as distinguished from calculation or computation is required to determine the amount of the claim,' " it is not fixed and determinable. *Certain Underwriters at Lloyd's, London v. Abbott Laboratories*, 2014 IL App (1st) 132020, ¶ 71 (quoting *Dallis v. Don Cunningham & Associates*, 11 F.3d 713, 719 (7th Cir. 1993)). If the requirements of the Interest Act are met, prejudgment interest is statutorily mandated. *Chandra v. Chandra*, 2016 IL App (1st) 143858, ¶ 50. "The existence of a good faith defense does *not* preclude recovery of interest." (Emphasis in original.) *Couch v. State Farm Insurance Co.*, 279 Ill. App. 3d 1050, 1054 (1996).

¶ 83 Generally, we review a trial court's determination on prejudgment interest for an abuse of discretion. *Milligan v. Gorman*, 348 Ill. App. 3d 411, 415 (2004). However, when interest is due under the statute as a matter of right, such as when a creditor seeks payment of a fixed sum due under a written contract, we review the trial court's determination *de novo*. *Chandra*, 2016 IL App (1st) 143858, ¶ 46 (citing *Sheth v. SAB Tool Supply Co.*, 2013 IL App (1st) 110156, ¶ 98 (*de novo* review is required when the Interest Act mandates prejudgment interest as a matter of right)). Moreover, where our review of a prejudgment interest order involves statutory interpretation, we interpret statutory language according to its plain and ordinary meaning (*Lacey v. Village of Palatine*, 232 Ill. 2d 349, 361 (2009)) and our standard of review is *de novo* (*Andrews v. Kowa Printing Corp.*, 351 Ill. App. 3d 668, 672 (2004)).

¶ 84 An "instrument of writing" includes "a variety of written documents, such as contracts, leases, including instruments evincing transactions of a business and commercial nature which created a debtor-creditor relationship." *Kouzoukas v. Retirement Board of Policemen's Annuity and Benefit Fund of City of Chicago*, 234 Ill. 2d 446, 476 (2009). In this case, the Contract is an "instrument of writing" under the Interest Act as it created a debtor-creditor relationship between Atwater and NSS. *Id.*; see also *Evans*, 176 Ill. App. 3d at 1061. Further, the amount due was fixed and determinable. The Contract specified that Atwater would be paid a two percent commission on all orders without a profit and three percent on all orders with a profit that had been "taken and shipped." The evidence showed that the amount due to Atwater was easily computable from NSS's business records. Accordingly, Atwater was entitled to prejudgment interest as a matter of right under the statute. *Chandra*, 2016 IL App (1st) 143858, ¶ 50.

¶ 85 The trial court denied prejudgment interest based on the second sentence of the statute which referenced 30 days' written notice to the debtor. See 815 ILCS 205/2 (West 2012). However, that sentence is not applicable here. The statute requires 30 days' written notice when "as assignee or agent of the creditor" wants to charge and collect interest. *Id.* In this case, Atwater was the creditor, not an assignee or agent, and thus he was not required to provide 30 days' written notice. See 90th Ill. Gen. Assem., Senate Proceedings, March 13, 1997, at 109 (Senator O'Malley stating that the second sentence of section 2 of the Interest Act means that a collection agency or other agent of a creditor may, after 30 days' written notice to the debtor, charge and collect interest "on overdue accounts on behalf of the [creditor]. The [creditor] can already collect this penalty. The bill simply says that the—that now the collection agency can act on behalf of the [creditor] to collect it."). Thus, the trial court's denial of prejudgment interest was error as a matter of law, and the portion of the trial court's judgment refusing Atwater's claim for prejudgment interest is

reversed. Pursuant to the authority granted to this court under Illinois Supreme Court Rule 366(a)(5) (eff. Feb. 1, 1994), we award Atwater prejudgment interest in the requested amount of $110,709.68.

¶ 86 B. Appeal No. 2-23-0011

¶ 87 Atwater appeals from the trial court's order granting him attorney fees in the amount of $628,266. The trial court acknowledged that Atwater requested attorney fees of $924,399 and that there was no challenge to the hourly rate charged or the time billed. Nonetheless, the trial court reduced the attorney fee award by one-third, finding that only six of the nine claims in the amended complaint and the counterclaim were directly related to the unpaid commissions. Atwater argues that all the parties' claims arose from a common core of facts and that the trial court thus erred in reducing the attorney fee award by the number of claims directly related to the unpaid commissions.

¶ 88 The attorney fees were awarded pursuant to section 3 of the Sales Act (820 ILCS 120/3 (West 2020)), which provides that one who fails to timely pay commissions "shall pay the sales representative's reasonable attorney's fees and court costs" incurred to collect the unpaid commissions. "[N]o showing of culpability is necessary for the imposition of reasonable attorney fees and court costs under the Sales Act because these damages are compensatory and not punitive and because the plain language of section 3 of the Sales Act provides that attorney fees and costs 'shall' be imposed for a violation of section 2 of the Sales Act." *Maher*, 267 Ill. App. 3d at 81 (quoting 820 ILCS 120/3 (West 1992)).

¶ 89 Atwater asserts that we should review this issue *de novo* because the trial court improperly applied the Sales Act when it reduced the attorney fee award. We disagree. Here, the trial court recognized that the Sales Act required the imposition of reasonable attorney's fees and costs due

to NSS's failure to timely pay Atwater's commissions in violation of section 2 of the Sales Act. On appeal, Atwater is essentially challenging the trial court's discretion in determining what is reasonable. The trial court has broad discretionary powers in awarding attorney fees and its decision will not be reversed unless the court has abused its discretion. *In re Marriage of Kane*, 2016 IL App (2d) 150774, ¶ 24. This standard of review is appropriate in light of the trial court's "superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983). Nonetheless, a trial court's discretion is not without limits. *Robinson v. Point One Toyota, Evanston*, 2017 IL App (1st) 152114, ¶ 25. An abuse of discretion occurs where no reasonable person would adopt the trial court's view (*Santorini Cab Corp. v. Banco Popular North America*, 2013 IL App (1st) 122070, ¶ 21) and when an improper factor is relied upon (*Robinson*, 2017 IL App (1st) 152114, ¶ 24).

¶ 90 We conclude that the trial court abused its discretion in reducing the attorney fee award. The trial court noted that there were nine claims in total, the six raised in Atwater's second amended complaint and the three raised in NSS's second amended counterclaim. The trial court reasoned that only six of the nine claims were directly related to the commissions issue and thus reduced the attorney fee award by one-third. Upon our own review of the nine claims, however, we conclude that they were all related to the commissions issue. Counts one through four of the second amended complaint were for various breaches of the Contract that all resulted in improperly paid or unpaid commissions. Count five, which was dismissed before trial, requested an accounting so that Atwater could determine the proper amount of commissions owed to him. Count six was for exemplary damages and attorney's fees based on NSS's alleged failure to pay Atwater his commissions as required by section 2 of the Sales Act. In count one of the

counterclaim, NSS alleged that Atwater had breached the contract and that it had overpaid commissions to Atwater. Count two alleged fraud in that Atwater did not service his territory as agreed and that NSS thus overpaid commissions. In count three, NSS alleged unjust enrichment and sought to recover commissions that it had overpaid. As all the claims were related to the commissions issue, the trial court abused its discretion in reducing the attorney fee award. We note that, while Atwater was not ultimately successful on count three of his complaint, a fee award should not be reduced simply because the plaintiff failed to prevail on every contention raised in the lawsuit. *Hensley*, 461 U.S. at 435.

¶ 91 In so ruling, we note that NSS argues, in support of the trial court's determination, that counts two and three of Atwater's second amended complaint involved entirely different sets of facts because those counts alleged that others were allowed to sell in Atwater's exclusive territory and that NSS failed to ship material in a good and timely fashion. This argument is without merit because, even though different actions were involved, the basis of the claims was still that the conduct alleged resulted in Atwater not being paid commissions that were due to him, in violation of section 2 of the Sales Act. Similarly, NSS argues that the claims in its counterclaim also involved different sets of facts. However, as noted, the underlying actions in those claims still went to whether Atwater received all his commissions due under the Contract. Moreover, the Supreme Court has held that, when multiple claims for relief are alleged in one lawsuit and the prevailing party is entitled to attorney fees under a federal fee-shifting statute, the court will award all fees spent on claims involving a "common core of facts." *Id.* Even if a plaintiff alleges multiple claims for relief, in most cases, the claims "will involve a common core of facts or will be based on related legal theories." *Id.* Although Atwater is seeking relief under state law in this case, all the claims involved a common core of facts related to whether or not Atwater was properly paid

his commissions as required by section 2 of the Sales Act. Accordingly, we hold that the trial court erred in reducing the attorney fee award. Under Rule 366(a)(5), we modify the attorney fee award to $924,399.

¶ 92 III. CONCLUSION

¶ 93 For the foregoing reasons, the judgment of the circuit court of McHenry county is affirmed as modified. We grant Atwater's request for prejudgment interest of $110,709.68 and modify the attorney fee award to $924,399.

¶ 94 Affirmed as modified.