

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-1691
Summary Calendar

FLOYD THOMAS,

Plaintiff-Appellee,

VERSUS

OLD WORLD TRADING COMPANY, INC.,

Defendant-Appellant.

No. 92-1815
Summary Calendar

FLOYD THOMAS,

Plaintiff-Appellant,

VERSUS

OLD WORLD TRADING COMPANY, INC.,

Defendant-Appellee.

Appeals from the United States District Court
For the Northern District of Texas
(4:88-CV-880)

(August 10, 1993)

Before HIGGINBOTHAM, SMITH, and DeMoss, Circuit Judges.

PER CURIAM:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

1. FACTS AND PROCEDURAL HISTORY

This appeal urges us to overturn the factual findings and conclusions of law made by the district court following a bench trial on June 1, 1992. At trial Floyd Thomas sought to prove that he was entitled to an annual bonus from his former employer, Old World Trading, Inc., claiming that Old World had orally promised him the bonus as part of his salary when he accepted employment and had impliedly renewed that promise by its conduct. Old World argued that the bonus was never guaranteed, but rather that it was given out annually at the employer's discretion, based on the overall profitability of the company together with the individual performances of the sales personnel receiving the bonuses. Thomas countered that, while the amount of the bonuses to be awarded was discretionary on the part of Old World, nonetheless the giving of the bonus itself was not discretionary, but rather part of the compensation scheme of Old World's sales force.

The district court found that Old World's representatives made promises to Thomas creating an enforceable obligation to pay annual bonuses and that its conduct impliedly renewed the promises for the previously completed fiscal year of employment. Based on this finding, the trial court awarded Thomas an annual bonus in the amount of \$6,880.50. Old World has appealed the trial court's judgment as being "clearly erroneous," claiming that the district court made a mistake in finding that the company promised to pay an annual bonus to Thomas. Old World argues further that, even if such promises were made, they were not sufficiently definite or certain to be enforceable. Thomas has cross-appealed, arguing that the trial court erred in awarding him only \$6,880.50 as his bonus,

instead of the \$30,000 he claimed at trial. After reviewing the record and the findings of the trial court, we hold that the district court did not clearly err in its factual findings, and that it correctly applied Texas law to the facts of the case; accordingly, we affirm.

II. DISCUSSION

Federal Rule of Civil Procedure 52 allow us to overturn a factual finding of the trial court only if such finding is "clearly erroneous." Fed. R. Civ. P. 52(a).¹ Therefore, we can only reverse the district court's findings if after reviewing the record we are "left with the definite and firm conviction that a mistake has been committed." United States v. United States Gypsum Co., 333 U.S. 364, 395 (1948); Hague v. Liberty Mutual Insurance Co., 571 F.2d 262, 264 (5th Cir. 1978). When the evidence will support a conclusion either way, a trial judge's choice between two permissible views of the weight of the evidence cannot be clear error. See United States v. Yellow Cab Co., 338 U.S. 338, 342 (1949); Chaney v. City of Galveston, 368 F.2d 774, 776 (5th Cir. 1966).

The evidence in this case consists almost entirely of testimony, since there was no written contract of employment and no documentation indicating the nature of the disputed bonus. However, the evidence showed that, from 1974 to 1988, Thomas was

¹ The Federal Rules of Civil Procedure dictate our standard of review of the trial court's findings, even though this is a diversity action with substantive law deriving from the State of Texas. See Hanna v. Plumer, 380 U.S. 460, 471-74 (1965).

the only employee ever to have been denied a bonus. Joe Reardon, the vice-president of sales of Old World, as well as Thomas himself testified that the bonus was an important part of the salary structure at Old World, and Reardon testified that in recruiting salesman he told them that "a bonus was payable on an annual basis." Thomas testified that a representative of Old World told him at his initial employment interview that he would be paid an annual bonus, the amount of which would be determined based on his performance and overall company profitability for the preceding fiscal year. On the other hand, Tom Hurvis, chairman of Old World, testified that the company did not guarantee a bonus, but only awarded them if the company's profits allowed it.

After hearing the evidence, the trial court found that Thomas had performed his duties in an "above average" manner, and that he had earned his bonus for his last year of employment. It also found that Old World promised Thomas a bonus and that this promise was impliedly renewed by Old World's course of conduct in paying bonuses every year.² Based on our review of the record, we find that there was sufficient evidence to support a finding for Thomas, and that therefore the trial court's findings were not "clearly erroneous."

As its second point on appeal, Old World contends that

² See Marine Inspection Serv., Inc. v. Alexander, 553 S.W.2d 185, 188 (Tex. Civ. App.--Houston [1st Dist.] 1977) ("A promise to pay additional compensation may be implied from business usage or custom, if the employment agreement was entered into with reference thereto, and where under attendant circumstances it was the reasonable understanding of both parties that extra compensation would be paid.")

assuming it promised to pay Thomas an annual bonus, that promise was too indefinite and uncertain to be enforceable against the company. They argue that the promise was too contingent, being dependent upon company profitability and individual performance, as well as lacking any determinable formula for measuring the amount of the bonus. We review *de novo* the trial court's conclusion of law on this point, and we affirm.

In Lone Star Steel Co. v. Scott, 759 S.W.2d 144 (Tex.App. -- Texarkana 1988), the court wrote, "[i]s recognized [in Texas law] that the failure of a contract to specify the amount of payment does not render it ineffective." There, an employee claimed a right to payment for a cost saving suggestion which he submitted and which the company adopted. In holding that the company had entered a legally-binding obligation to pay for such suggestions if adopted, the court rejected the argument that a contract could not exist merely because the amount to be paid remained uncertain and solely in the discretion of the company. The court held "[a]lthough the determination of what is reasonable was placed in the discretion of Lone Star's suggestion committee, the committee cannot void the contract by refusing to exercise that discretion." Lone Star, 759 S.W.2d at 152-53. In the present case, like in Lone Star, the fact that Old World retained sole discretion to set the amount of bonuses does not allow it to escape its obligation to pay Thomas his bonus, especially where, as here, there was a factual basis--the past relationship of bonus to salary--from which the court could infer what was the reasonable intent of the parties as

to the amount of the bonus.

In a similar vein, we reject Thomas's cross-appeal, wherein he disputes the trial court's measure of the bonus award. The district court rejected Thomas's proposed measure, which was based on the ratio between Thomas's total earnings and the total earnings of Joe Reardon, who was employed as an Old World salesman during Thomas's tenure. The court reasoned that Reardon worked a different sales region and consistently grossed higher sales volumes than Thomas, and also that a bonus of \$30,000 would be nearly three times greater than any bonus Thomas had previously received. The trial court opted to determine Thomas' bonus award as a percentage of his salary, based on the percentage relationship of his bonus to his salary in previous years.

We find that the trial court properly inferred that the parties intended the bonus measure to be "a reasonable amount," in the absence of sufficient evidence from either party showing how the employer actually determined bonuses. Under Texas law, "the failure of a contract to specify the amount of payment does not render it ineffective. In such a case the law will imply that a reasonable amount was intended." Lone Star, 759 S.W.2d at 152. Consequently, the district court's factual determination of what "reasonable amount" was intended by the parties, and which was based on the past actions of the parties must also stand.

III. CONCLUSION

The trial court was not "clearly erroneous" in concluding that Old World promised Thomas it would pay him an annual bonus, and

that Old World impliedly renewed this promise by its actions. Likewise, such a promise is not unenforceable simply because the amount to be paid was left to the discretion of Old World. And absent the exercise of Old World's discretion in determining the amount and absent any evidence as to the intended formula for determining the amount, the trial court properly determined from the evidence a "reasonable amount," which was based on past bonuses.

For the foregoing reasons, the judgment of the district court is **AFFIRMED**.