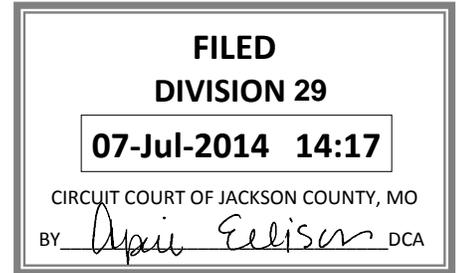


**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI  
ASSOCIATE CIRCUIT DIVISION  
AT KANSAS CITY**

**PATRICK FLYNN,** )  
 )  
 **Plaintiff,** )  
 )  
 v. )  
 )  
 **KEVIN MCGRAW,** )  
 )  
 **Defendant.** )

**Case No. 1316-CV28932  
DIVISION 29**



**JUDGMENT**

On June 25, 2014, this matter came on for bench trial. Plaintiff appeared in person and through counsel, and Defendant appeared in person and through counsel. Plaintiff submitted his case in chief and rested. Defendant then presented his case and rested. The Court took the matter under advisement.

After reviewing all of the evidence presented by both parties, the Court finds in favor of the Defendant, Kevin McGraw. It is undisputed that on May 16, 2011, Plaintiff and Defendant entered into a Partnership Agreement, which was admitted into evidence as Plaintiff's Exhibit 1. The parties agreed that the Plaintiff was to pay advances to the Defendant in the amount of \$2,800.00 on the 20<sup>th</sup> day of every month. The Defendant was to earn a percentage of sales as a commission, which was to be credited against the advances. Defendant agreed to reimburse any remaining advances that were not covered by the commissions he earned if he left the Plaintiff's company before July 1, 2012. The Defendant resigned on March 6, 2012, but he refused to repay any advances. As a result, Plaintiff claims that the Defendant owes him \$13,878.00 in unpaid advances.

In turn, Defendant argues that the Plaintiff breached the contract by the late payment of advances and by failing to pay the advance for February of 2012 at all. Defendant also argues that the Plaintiff frustrated his performance under the contract due to the Plaintiff's poor reputation in the industry. Finally, the Defendant asserts that the Plaintiff is not entitled to damages because the Plaintiff is unable to provide any accounting of the commissions earned. To prevail on a breach of contract claim, "a plaintiff must prove these essential elements: '(1) the existence and terms of a contract; (2) that plaintiff performed or tendered performance pursuant to the contract; (3) breach of the contract by the defendant; and (4) damages suffered by the plaintiff.'" *Hunt v. Estate of Hunt*, 348 S.W.3d 103, 108 (Mo. App. W.D. 2011) (quoting *Keveney v. Mo. Military Acad.*, 304 S.W.3d 98, 104 (Mo. banc 2010)). The Court finds that the Plaintiff failed to perform pursuant to the contract by failing to pay the February advance, and that Plaintiff has failed to carry its burden to prove damages.

Plaintiff provided copies of checks written to the Defendant to prove that the \$2,800.00 advances had been paid pursuant to their agreement. However, there are no advance checks written for the months of October 2011 or February 2012, and the checks for June, July, September, and November of 2011 and January of 2012 appear to be written late, after the 20<sup>th</sup> of the month. In addition, the parties testified at trial that the September advance check bounced, and did not clear until several days later. Plaintiff's counsel argues that the late payments should not be considered a breach of the contract, because the Defendant accepted the late checks and continued on with the agreement. However, the evidence before the Court is that there is no check for February of 2012, and the Defendant resigned shortly thereafter, on March 6, 2012. It is true that his

resignation letter does not state that the Plaintiff's failure to pay the February advance was the reason for his resignation. However, the Court finds Defendant's testimony that he considered Plaintiff's failure to pay to be a breach of their agreement to be credible. This credibility determination is based on the Defendant's resignation shortly after the missed payment, the Plaintiff's erratic payment history, and the Plaintiff's contradictory testimony in regard to the February advance. The Plaintiff first testified that he was "pretty sure" he gave the Defendant something for February but that maybe it was from his personal account. He later testified that he didn't even know where the Defendant was in February because he was not around the office, and if the Defendant would have requested it, the Plaintiff would have paid the February advance. These inconsistencies lead the Court to find that the Plaintiff's testimony in regard to the payment of the February advance was not credible, and that the failure to pay the advance as required in the agreement was a breach of the contract.

Furthermore, the Court finds that Plaintiff failed to provide sufficient proof of the damages that he suffered due to the Defendant's refusal to repay the advances. "A party claiming damages for breach of contract bears the burden of proving the existence and amount of damages with reasonable certainty." *Martha's Hands, LLC v. Rothman*, 328 S.W.3d 474, 480 (Mo. App. E.D. 2010). Here, the only evidence in regard to advances paid were copies of checks written to the Defendant, and moreover, the only evidence in regard to commissions earned were two deposit slips and a document prepared by the Plaintiff. Although the two deposit slips, which appear to have been written by the Plaintiff, list Starwall as the payor, the amounts listed do not add up to the amount of the Starwall commissions received in the document prepared by the Plaintiff. Nothing was

provided to the Court to support the dollar amounts listed in that document other than those two deposit slips. The Defendant testified at trial that he earned commissions beyond what was credited to him by the Plaintiff. The Court would have preferred to see specific invoices or accounting records to support the Defendant's position. However, it is the Plaintiff's burden to prove the damages he suffered, not the Defendant's burden to disprove damages. The Court finds that the Plaintiff failed to carry his burden of proof in establishing the portion of the advances that were still owed to him, because he has provided insufficient evidence to support his calculation of the commissions earned by the Defendant.

In light of the evidence presented at trial and in the pleadings, and in light of the foregoing analysis, the Court finds that the Plaintiff failed to perform pursuant to the contract by failing to pay the February 2012 advance. In addition, the Court finds there is insufficient evidence to support the Plaintiff's claim for damages, and as such, Plaintiff has failed to meet his burden of proof. Therefore, the Court finds in favor of Defendant and against the Plaintiff.

**WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED** that Plaintiff's Petition for Breach of Contract is **DENIED**.

**IT IS FURTHER ORDERED** that each party shall pay his own costs.

**JUDGMENT FOR DEFENDANT.**

July 7, 2014



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**DATE**

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**JUDGE JANETTE RODECAP  
DIVISION 29**