IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

MARK WEST,	)	
Plaintiff,	)	
v.	)	**Case No. 10-CV-2377-JAR**
GENERAL SPORTS VENUE, L.L.C., et al.,	)	
Defendants.	)	

MEMORANDUM AND ORDER

This matter currently comes before the Court on Plaintiff's Motion to Alter or Amend Judgment (Doc. 76) and Defendants' Renewed Motion for Judgment as a Matter of Law, Motion for New Trial, and/or Motion for Remittitur (Doc. 74). Both motions are fully briefed and the Court is prepared to rule. As explained more fully below, the Court denies both motions.

I. Background

Plaintiff Mark West filed this action seeking to recover the additional commission payments that he claimed entitlement to, in addition to statutory penalties for Defendant General Sports Venue, LLC's ("GSV's")[1] failure to pay him sales commissions owed on the contract for the Lawrence public school district's multi-field project (the "Lawrence Contract"). Plaintiff also sought damages for a golf trip and a pair of Lucchese brand cowboy boots the Defendants promised, but never provided to him. The parties disputed whether their agreement was for

[1]GSV is now named AstroTurf, LLC.

Plaintiff to receive a commission on the entire Lawrence Contract or only a portion of the Lawrence Contract.

The matter was tried to a jury and at the close of evidence, Defendants moved for judgment as a matter of law under Fed. R. Civ. P. 50(a),[2] which the Court took under advisement. The jury returned a verdict for Plaintiff on his breach of contract claim for unpaid sales commissions, and found the amount of unpaid sales commissions to be $235,247.69.[3] The jury further found that Defendants "knowingly" failed to pay Plaintiff $124,000 in sales commissions that were earned but unpaid as of November 30, 2009, within thirty days after that date.[4] The jury also awarded Plaintiff $3,709.14 in damages for the golf trip and $1097.35 in damages for the Lucchese brand cowboy boots.[5] The Court denied Defendants' motion for judgment as a matter of law.[6] Plaintiff moved the Court for an award of prejudgment interest as additional damages. The parties agreed to have the Court determine entitlement to prejudgment interest, and on January 19, 2012, the Court entered an Order Deferring Judgment, giving the parties their requested four week period to submit briefs on the issue of prejudgment interest.[7] The Court granted Plaintiff's request for prejudgment interest in the amount of $25,205.74.[8] Defendants filed the instant motion, renewing their motion for judgment as a matter of law

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[2]Doc. 60.

[3]Doc. 64.

[4]*Id.*

[5]*Id.*

[6]Doc. 65.

[7]Doc. 66.

[8]Doc. 72.

pursuant to Fed. R. Civ. P. 50(b) and requesting a new trial pursuant to Fed. R. Civ. P. 59(a). Plaintiff filed its instant motion pursuant to Fed. R. Civ. P. 59(e), moving the Court to alter or amend its August 29, 2012 Judgment to include additional prejudgment interest.

II. Rule 60: Correction Based on Clerical Mistakes; Oversights and Omissions

Before examining the parties' motions, the Court corrects a clerical mistake in the Judgment. Under Federal Rule of Civil Procedure 60(a), "[t]he court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record." The Judgment failed to specify which parts of the judgment applied to the individual Defendants. Although the entire judgment applies to Defendant General Sports Venue, LLC, the parties agree that individual Defendants Michael Dennis and Bryan Peeples are not personally liable for the unpaid sales commissions, the statutory penalty or the prejudgment interest.[9] Defendant Peeples is personally liable for the damages for the Lucchese brand cowboy boots in the amount of $1,097.35; and Defendant Dennis is personally liable for the damages for the golf trip in the amount of $3,709.14.[10] The Court thus corrects the Judgment by entering a *nunc pro tunc* Judgment specifying each Defendant's liability as set forth above.

III. Discussion

A. Defendants' Renewed Motion for Judgment as a Matter of Law

A court may grant a renewed motion for judgment as a matter of law under Federal Rule

[9]*See* Doc. 77 at n. 2. Although the parties did not object to the verdict form that was submitted to the jury, they have acknowledged in their briefs that there is no dispute as to the liability of each Defendant.

[10]Defendants are not challenging the jury's verdict with respect to the golf trip and the Lucchese boots. *See* Doc. 75 at n. 21.

of Civil Procedure 50(b) if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue."[11] "[A] party is entitled to judgment as a matter of law only if all of the evidence, viewed in the light most favorable to the nonmoving party, reveals no legally sufficient evidentiary basis to find for the nonmoving party."[12] "Judgment as a matter of law 'is warranted only if the evidence points but one way and is susceptible to no reasonable inferences to support the party opposing the motion.'"[13] The Court must consider all of the evidence in the record, construing it in the light most favorable to the jury's verdict, and keeping in mind that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge."[14] If, after examining the evidence, the Court finds that the trial contained evidence upon which a jury could have properly returned a verdict against the movant, the Court must deny the motion for judgment as a matter of law.[15]

Defendants argue that they are entitled to judgment as a matter of law because 1) Plaintiff failed to present sufficient evidence that the parties reached an agreement as to all the essential terms of the alleged agreement to pay Plaintiff commissions on the entire Lawrence Contract; 2) Plaintiff failed to present sufficient evidence that GSV "knowingly" failed to pay any

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[11]Fed. R. Civ. P. 50(a)(1).

[12]*Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1195 (10th Cir. 2012) (citing *Burrell v. Armijo*, 603 F.3d 825, 832 (10th Cir. 2010)).

[13]*Id.* (citing *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1999)) (citation and quotation omitted).

[14]*Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 150 (2000) (citation omitted); *see also Rocky Mountain Christian Church v. Bd. of Cnty. Commr's*, 613 F.3d 1229, 1235 (10th Cir. 2010).

[15]*See Cooper v. Asplundh Tree Expert Co.*, 836 F.2d 1544, 1547 (10th Cir. 1988).

commissions to Plaintiff that were earned, but unpaid, as of November 30, 2009; and 3) Plaintiff failed to present sufficient evidence that Defendants Dennis and Peeples agreed to pay commissions to Plaintiff or breached any such agreement. The Court has already corrected the Judgment to clarify that Defendants Dennis and Peeples are not liable for the commissions, statutory penalty or prejudgment interest. Thus, Defendants' third argument is moot. The Court will address Defendants' remaining arguments.

1. Sufficient evidence that the parties reached an agreement as to all the essential terms.

Defendants argue that although Plaintiff testified that he believed he was to be paid commissions on the entire Lawrence project, in light of other testimony and documentation, at most Plaintiff's contention establishes that the parties never had a "meeting of the minds" on this threshold issue. The Court finds that there was sufficient evidence for the jury to find that the parties reached an agreement as to the scope of Plaintiff's commissions on the Lawrence Contract. Plaintiff testified that he was to receive commissions on the entire Lawrence Contract. The only person negotiating with Plaintiff on behalf of GSV was Jon Pritchett. Pritchett's testimony fully supports Plaintiff's contention that an agreement was reached, and that Pritchett merely could not recall the details of the agreement. Pritchett's testimony does not suggest that an agreement was never reached, and even refers to the "final deal."

Plaintiff testified that Pritchett, CEO of GSV at that time, approached him in May of 2008 about changing their arrangement. Pritchett asked Plaintiff to join their sales management team and to manage other salespeople in his current four-state territory plus an additional two states. He proposed that Plaintiff would become a full W-2 employee under the new arrangement. Plaintiff testified that he did not want to give up commissions on the seven

projects (six projects plus the Lawrence project) he was currently working on. Plaintiff testified that from the time he first started working on the Lawrence project until the contract was signed was approximately 10-12 months. Plaintiff testified that he expressed his concern to Pritchett about walking away from commissions and Pritchett responded by asking Plaintiff if he would be interested if Plaintiff would come on as salaried but receive the commissions on all signed contracts plus the Lawrence Contract. Plaintiff testified that Pritchett proposed to pay Plaintiff on the first six projects plus all of the Lawrence project. Plaintiff testified that at that time, the Lawrence project was not broken down into parts, but was one project. Plaintiff testified that the project was later broken down into parts due to GSV's inability to secure a bond for the entire $8.7 million project—the largest project that GSV had engaged in at that time. Plaintiff testified that in June of 2008 he and Pritchett reached an agreement that Plaintiff would be paid full commission on all seven projects. Plaintiff presented evidence of a July 8, 2008 email to him from Pritchett stating "Here you go . . . you drive a hard bargain. I hope you negotiate this hard on contracts in our favor with customers!"[16]

Plaintiff also testified that in all the projects he had worked on with GSV, he had never received a commission on only part of a project. Plaintiff in fact received his full commissions on the first six projects. Plaintiff testified that GSV never presented him with a document indicating that he would not receive commissions on all of the Lawrence project.

Plaintiff testified that the Lawrence Contract was entered into in October of 2008, with the first amendment in November of 2008, and the second amendment in December of 2008. In responding to the fact that the Lawrence Contract was not signed when he reached his agreement

[16]Trial Ex. 35.

with Pritchett, Plaintiff testified that he had received commissions on contracts that were not yet signed, including the Lawrence Contract.

When Pritchett was asked whether the agreement attached to Pritchett's July 8th, 2008 email to Plaintiff[17] represented the final deal with Plaintiff, he testified: "You know, I don't recall precisely what the final deal is, but this looks pretty close to that if it's not the final deal."[18] When asked whether he remembered having conversations with Plaintiff about what commissions he would receive on the Lawrence Contract, he testified:

> I don't remember having specific conversations about it until after there was a controversy or a question about it that we ended up having to go through in detail with our controller to figure out. I do remember, however, talking about basically anything that was delivered to the company while he was an independent rep he would receive a commission for when those monies came in. And anything that he brought to the company once he became an employee, any contracts that were delivered then would have to go towards his bonus compensation because he was then receiving income as –in his base employment and you can't double dip. That's not a fair deal for the company. So I remember having that general conversation, but I don't remember the specifics of it with regard to this particular project.[19]

When asked whether he recalled that as of February 10, 2009 he was still working through the commission issue with Plaintiff, Pritchett testified that:

> Yes. Unfortunately, I don't have a great level of detail in my memory bank about this, but obviously this jars it somewhat that there was some ongoing discussion in a period of time in order to calculate the commissions. And I don't remember specifically

[17] *Id.*

[18] Videotaped Deposition of Jon Pritchett dated December 13, 2011, at p. 16, ln. 16–18.

[19] *Id.* at p. 21, ln. 3–19.

why, can only speculate as to why it took some period of time.[20]

Again, when asked whether he recalled that in February of 2009 there were discussions of how the Lawrence project was being treated for commission purposes, Pritchett testified that: "I don't remember the specifics, but I'm sure we talked about Lawrence, obviously, because that was a large project."[21] Pritchett testified many times that he did not remember the "specifics" of the deal he made with Plaintiff. He did testify that he was the one that negotiated the deal with Plaintiff, but that he did "not recall specifics of the commission or the bonus payments relative to the Lawrence project."[22] Pritchett left GSV around April of 2009.

Plaintiff claimed that the parties agreed that he would be paid sales commissions on the entire Lawrence Contract, while Defendants claimed that the parties agreed that Plaintiff would be paid sales commissions on only part of the project. The evidence showed that Plaintiff and Jon Pritchett were the only two people involved in the negotiations over Plaintiff's commissions for the Lawrence Contract.[23] The jury heard Plaintiff's testimony at trial that he and Pritchett specifically agreed that Plaintiff would receive commissions on the entire Lawrence Contract. The jury also heard the videotaped deposition testimony of Pritchett, who essentially testified that he did not remember the details of his agreement with Plaintiff. It was the province of the jury to judge the credibility of Plaintiff and Pritchett and weigh all the evidence.

Defendants then argue that even if there was an agreement as to the scope of the

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[20] *Id.* at p. 29, ln. 22 through p. 30, ln. 3.

[21] *Id.* at p. 33, ln. 11–17.

[22] *Id.* at p. 61, ln. 2–4.

[23] *See also* Pretrial Order, Doc. 24 at ¶ 4a.5.

Lawrence Contract for which Plaintiff was to receive commissions, there was no agreement as to how those commissions would be calculated. Defendants point to the conflicting testimony of Shonk and Strom regarding the meaning of "gross profit," and to the fact that Plaintiff presented several different calculations throughout the case. However, as discussed further below, Shonk's testimony was properly admitted and supported Plaintiff's testimony as to how the commissions were to be calculated. Plaintiff's commissions were subject to the same commission agreement from which all of Plaintiff's prior commissions on previous contracts were calculated.[24] Furthermore, the end numbers from Plaintiff's calculations changed over time as a result of when he received the underlying documentation from Defendants to calculate the numbers. Plaintiff testified that two weeks prior to trial he received GSV documents from Shonk.[25] Prior to that time, Plaintiff had not seen the actual source documents to do his own calculations, and had to rely on the calculations given to him by GSV. Based on these recently-acquired documents, Plaintiff discovered that the turf gross profit percentage on the Lawrence Contract was actually 25%, instead of 20%, and the gross profit for site was actually 11.41%, instead of 5.57%.

2. Sufficient evidence that GSV "knowingly" failed to pay commissions.

Plaintiff also testified that Defendants knew that they owed him money and presented evidence of correspondence from Plaintiff to Defendants stating that as of December 1, 2009, Plaintiff believed that the amount of unpaid commissions totaled $124,000.[26] Defendants argue that even if Pritchett agreed to pay commissions on the entire project, but then misrepresented

[24]*See* Trial Ex. 21A.

[25]Trial Ex. 218.

[26]Trial Ex. 426.

the "deal" to GSV, then GSV did not "knowingly" refuse to pay commissions. Viewing the evidence in the light most favorable to Plaintiff, the evidence supports the jury's verdict.

Plaintiff testified that he became concerned about the payment of his commissions in the fall of 2008, and he introduced evidence of emails he sent to Pritchett in January and February of 2009, attempting to get the analysis and numbers/spreadsheets for determining commissions.[27] Plaintiff testified that March 14, 2009 was the first time since his first request back in November that Pritchett and Strom finally talked with Plaintiff about the commission numbers. This was done in a phone call in which Pritchett and Strom referred to a document that was in their possession, but Plaintiff did not have. Plaintiff emailed them following the call, asking if they would "send the same document of how the numbers flowed, so [he] could read the same document that [they] were reviewing."[28] Plaintiff received the documents days later.[29] Plaintiff submitted evidence of an email from Strom to Plaintiff dated September 24, 2009, stating that Strom and Pritchett had explained to Plaintiff in their February 27, 2008 conference call that "your commissions for the Lawrence Project would only be on the first half of the project because that portion of the contract was in place prior to you becoming an employee."[30]

The jury certainly could have concluded that Strom was either untruthful or uneducated on the subject. The September 11, 2008 email from Strom to Plaintiff sets forth Plaintiff's commissions that are being paid on "the projects that [Plaintiff] Jon and [Strom] agreed to in

[27]Trial Exs. 164, 16, 13.

[28]Trial Ex. 166.

[29]Trial Ex. 6.

[30]Trial Ex. 420.

July," and states that "Lawrence Freestate is an estimate because we do not have a contract as yet."[31] Plaintiff testified as to the golf trip and boots that were also promised, but not provided. The jury could have concluded that the delay in providing Plaintiff with documentation, the failure to deliver the earned golf trip and boots, and GSV's shifting position on what part of the Lawrence Contract Plaintiff was entitled to commissions on, supported Plaintiff's testimony that GSV knew Plaintiff was owed commissions. The Court finds that the trial contained evidence upon which a jury could have properly returned a verdict against Defendants, and therefore the motion for judgment as a matter of law must be denied.

B. Motion for New Trial

Defendants argue that even if the Court declines to grant judgment as a matter of law, the Court should order a remittitur or, in the alternative, a new trial on the issue of damages. Under Fed. R. Civ. P. 59(a), a court may grant a new trial on all or some of the issues on motion of a party "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court."[32] Motions for new trial are committed to the sound discretion of the district court.[33] Courts do not regard motions for new trial with favor and only grant them with great caution.[34]

"If 'a new trial motion asserts that the jury verdict is not supported by evidence, the verdict must stand unless it is clearly, decidedly, or overwhelmingly against the weight of the

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[31]Trial Ex. 34.

[32]Fed. R. Civ. P. 59(a)(1)(A).

[33]*See Unit Drilling Co. v. Enron Oil & Gas Co.*, 108 F.3d 1186, 1193 (10th Cir. 1997).

[34]*Franklin v. Thompson*, 981 F.2d 1168, 1171 (10th Cir. 1992).

evidence.'"[35] If a new trial motion is based on an error at trial, the court must not grant the motion unless the error prejudiced the party's substantive rights.[36]

Defendants argue that the jury's award was clearly excessive and against the weight of the evidence and/or was the product of prejudicial error. Defendants argue that the jury's damage calculation was based on the erroneously admitted testimony of Craig Shonk, and that the admission of this testimony was prejudicial error. Defendants argue that the Court erred in allowing into evidence the deposition testimony of Shonk relating to the determination of profit for purposes of the calculation of commissions. Defendants argue that Shonk admitted that he had no involvement in commission calculations.

Shonk was the former Director of Operations for the Central Region for GSV. During his testimony, Shonk performed calculations with GSV numbers to determine commissions. Defendants disagree with Shonk's calculations because he added site profit and general conditions. Defendants argue that these erroneous calculations provided the basis for the jury's damage award. However, Shonk testified that, with regard to his calculations, he was being directed by Jon Pritchett. In addition, Plaintiff testified consistently with Shonk regarding the calculation of his commissions. Plaintiff's commissions were subject to the same commission agreement that Plaintiff had been paid pursuant to on all of his previous sales with GSV. Shonk's calculations, which were pursuant to Pritchett's direction and consistent with Plaintiff's testimony, were relevant and properly admissible.

The Court finds that the jury's verdict on damages was not excessive or against the

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[35]*M.D. Mark, Inc. v. Kerr-McGee Corp.*, 565 F.3d 753, 762–63 (10th Cir. 2009) (quoting *Anaeme v. Diagnostek, Inc.*, 164 F.3d 1275, 1284 (10th Cir. 1999)).

[36]*See Henning v. Union Pac. R.R.*, 530 F.3d 1206, 1216–17 (10th Cir. 2008) (citing Fed. R. Civ. P. 61).

weight of the evidence in light of Plaintiff's testimony and the properly admitted testimony of Shonk. Therefore, Defendants' request for remittitur or for a new trial must be denied.

C. Motion to Alter or Amend Judgment

A motion under Fed. R. Civ. P. 59(e) to alter or amend a judgment should be granted only "'to correct manifest errors of law or to present newly discovered evidence.'"[37] Plaintiff seeks to alter or amend the Court's August 29, 2012 Judgment, to include prejudgment interest for the period from January 12, 2012, through August 28, 2012—the period between the jury's verdict and the Court's ultimate entry of judgment.

The Court granted Plaintiff's request for prejudgment interest, and awarded interest in the amount of $25,205.74.[38] This amount represented prejudgment interest on $124,000 from December 30, 2009 through January 11, 2012, the date of the verdict. The jury found that Defendant GSV knowingly failed to pay Plaintiff $124,000 within 30 days of Plaintiff's November 30, 2009 termination date. The Court held that even if the $124,000 amount was unliquidated, the case warranted the entry of an award of prejudgment interest on this amount pursuant to the recognized equitable exception. This Court's Memorandum and Order provided that:

> The jury did find that Defendants "knowingly" failed to pay Plaintiff $124,000 in sales commissions that were earned but unpaid as of November 30, 2009, within thirty days of that date. Based on the jury's award and in light of Instruction No. 10, this amount was arguably liquidated on December 30, 2009. Even if this amount was unliquidated, the Court finds that this case warrants the Court entering an award of prejudgment interest on this amount pursuant to the recognized equitable exception.
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> The Kansas Supreme Court has created an exception to the general rule

[37]*Phelps v. Hamilton*, 122 F.3d 1309, 1324 (10th Cir. 1997) (citations and quotations omitted).

[38]Doc. 72.

> and held that when equitable principles so require, a court in its discretion may award prejudgment interest where necessary to arrive at fair and full compensation. In exercising discretion, the Court is guided by considerations of fairness and traditional equitable principles. In this case, the jury found that Defendants knowingly failed to pay Plaintiff the $124,000 in sales commissions that were earned as of November 30, 2009. Even though the Court finds that the total amount of unpaid commissions was unliquidated until the jury returned its verdict, the Court is aware that the shift in Plaintiff's calculations was caused by Plaintiff's delayed receipt of pertinent documents that were in the possession of GSV's former Director of Operations for the Central Region.[39]

The Court also considered the award of prejudgment interest fair and equitable even though the statutory penalty was imposed on this same amount. However, because Plaintiff was receiving a statutory penalty in the amount of $124,000, in addition to pre-judgment interest on this amount, the Court held that interest should run through the date of the jury verdict, and not beyond. Interest in the amount of $25,205.74, in addition to the statutory penalty, provides for "fair and full compensation" in light of the equities in this case. Therefore, Plaintiff's motion to alter or amend judgment shall be denied.

IT IS THEREFORE ORDERED BY THE COURT that Plaintiff's Motion to Alter or Amend Judgment (Doc. 76) is **DENIED.**

IT IS FURTHER ORDERED that Defendants' Motion for Judgment as a Matter of Law, Motion for New Trial, and/or Motion for Remittitur (Doc. 74) is **DENIED**.

IT IS SO ORDERED.

Dated: February 5, 2013

[39]Doc. 72 at 8–9 (citing *Dodson Aviation, Inc. v. HLMP Aviation Corp.*, No. 08-4102-KGS, 2011 WL 1234705, at *6 (D. Kan. Mar. 31, 2011) (citing *Lightcap v. Mobil Oil Corp.*, 562 P.2d 1, 16 (Kan. 1977), *cert. denied*, 434 U.S. 876 (1977)); *see also Schatz Distributing Co. v. Olivetti Corp. of America*, 647 P.2d 820, 826 (Kan. Ct. App. 1982) ("a court may in the exercise of its discretion award interest or its equivalent as an element of damages even where the primary damages are unliquidated."); *Dodson*, 2011 WL 1234705, at *6 (citing *Wichita Fed. Sav. & Loan Ass'n v. Black*, 781 P.2d 707, 721 (Kan. 1989), *superseded by statute on other grounds*.)).

S/ Julie A. Robinson

JULIE A. ROBINSON

UNITED STATES DISTRICT JUDGE