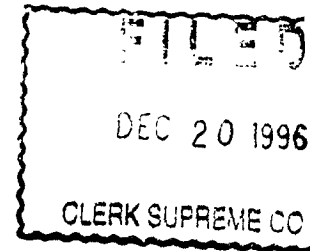


IN THE COURT OF APPEALS OF IOWA

No. 6-373 / 95-743



DELOSS CONSTRUCTION, INC., OF SPENCER, IOWA,
Plaintiff-Defendant to Counterclaim/Appellee,

vs.

VAUGHN DELOSS, d/b/a VAUGHN DELOSS CONSTRUCTION,
Defendant-Counterclaimant/Appellant.

Appeal from the Iowa District Court for Sioux County, James D. Scott, Judge.

Defendant appeals a district court judgment, following a jury trial, dismissing his counterclaim and awarding plaintiff damages on plaintiff's petition based on a breach of contract. **AFFIRMED.**

Stanley E. Munger and Jay E. Denne of Munger & Reinschmidt, Sioux City,
for appellant.

John R. Mackaman and F. Richard Lyford of Dickinson, Mackaman, Tyler &
Hagen, P.C., Des Moines, for appellee.

Heard by Sackett, C.J., and Habhab and Vogel, JJ., but decided by Habhab,
P.J., and Streit and Vogel, JJ. Sackett, C.J., takes no part.

VOGEL, J.

Defendant appeals a district court judgment, following a jury trial, on defendant's counterclaim based on breach of an oral contract. We affirm.

Plaintiff DeLoss Construction, Inc., ("Barry"), is owned by Barry DeLoss. Defendant Vaughn DeLoss, d/b/a Vaughn DeLoss Construction, ("Vaughn"), is Barry's brother. The DeLoss brothers are both in the construction business, including concrete, dirt, and grading work in Clay County. Vaughn claimed the brothers had a long-standing oral contract, for ten years or so, that provided Barry would cosign any performance bond required by Vaughn on any construction project. In return Barry would receive the subcontracted concrete work rather than allowing Vaughn to award that to any of Barry's competitors. Vaughn also agreed not to bid against Barry on any project for which Barry had cosigned the bond. The alleged breach of this oral contract ("contract #1") formed the basis of part of Vaughn's counterclaim.

In 1991 Vaughn submitted a bid for two IDOT contracts. He needed Barry's signature on the performance bond, but relying on contract #1 that Barry would cosign the performance bond and Vaughn would give Barry the subcontracted concrete work, Vaughn went ahead and secured bid bonds totaling \$41,500. Vaughn was awarded the project. Vaughn next claims Barry refused to sign the performance bond unless he was given not only the concrete work but also the purchasing of materials subcontract. Giving that portion of the work to Barry meant two things to Vaughn: (1) he was losing a lucrative part of the project and (2) he was going to have

to do the dirt and grading work himself as the IDOT contract did not allow Vaughn to subcontract more than 60% of the work. Knowing the amount of the bid bonds was at stake, Vaughn agreed to Barry's terms and the project moved forward.

The next problem Vaughn claims he was faced with was not having the proper equipment to do the dirt and grading work himself. Since he had expected to subcontract this portion out to a company with the proper heavy equipment, but was precluded from doing so as Barry had insisted on the ordering materials work, Vaughn had to secure the necessary equipment himself. He asked Barry if he could rent a piece of Barry's equipment, a scraper, and alleges Barry agreed. Vaughn refers to this agreement as "contract #2". Barry denies there was ever such an agreement and failed to provide Vaughn with the scraper. The project was slowed down and penalties were assessed. Vaughn claims the breach of contract #2 was the reason for the project delay and incorporates this in his counterclaim.

Barry's claim against Vaughn for the remainder due him under the IDOT project was resolved on a Motion for Summary Judgment in favor of Barry. Vaughn's counterclaim for breach of contracts #1 and #2, along with other associated claims of damages, proceeded to a jury trial and is the subject of this appeal. Prior to the close of Vaughn's case, Barry made a motion to strike Vaughn's counterclaim based on contract #1 as being within the statute of frauds. Vaughn made an offer of proof. Barry renewed his motion to strike and also added an additional reason for striking. He argued the alleged contract, if it existed, was illegal as a contract in

restraint of trade. The trial court sustained the motion. Among Vaughn's arguments are: (1) the court erred in striking Vaughn's claim for damages regarding contract #1; and (2) the court abused its discretion by not granting his motion for new trial.

I. *Scope of Review.* We review a motion to strike for corrections of errors of law. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 106 (Iowa 1995). In making this decision, we view the evidence in the light most favorable to the nonmoving party. *Spaur v. Owens-Corning Fiberglas Corp.*, 510 N.W.2d 854, 858 (Iowa 1994).

II. *Motion to Strike.* The issue of whether contract #1 existed was initially raised by Barry on a motion for summary judgment. The trial court overruled that motion in favor of allowing the issue to proceed to trial. However, as the evidence developed, it became apparent to the trial court Vaughn could not recover on contract #1. The trial court sustained the motion to strike prior to the close of Vaughn's case. Vaughn argues the timing alone was error as sustaining the motion to strike is akin to sustaining a motion for a directed verdict under Iowa Rule of Civil Procedure 216, which cannot be done prior to a party having the opportunity to submit all of his evidence. *See* Iowa R. Civ. P. 216. From the standpoint of determining whether a party has put on sufficient evidence to prove his case, the time for a directed verdict is after the close of that party's case. Iowa R. Civ. P. 216; *see Wernimont v. State*, 312 N.W.2d 568, 569 (Iowa 1981). If, however, part of a claim is not allowed, as a matter of law, the trial court did not err any more than if such a ruling would have

been made on a motion for summary judgment. We uphold a grant of summary judgment when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *De Koning v. Mellema*, 534 N.W.2d 391, 394 (Iowa 1995). In sustaining the motion to strike on two grounds, the trial court stated:

First, under no set of facts could the defendant-counterclaimant [Vaughn] establish a breach in damages arising out of oral contract number one, and two, the second term of the contract that was testified to by Vaughn DeLoss is an agreement that the parties wouldn't bid head to head on contracts where the cosignature of Barry DeLoss would be required. This constitutes a restraint of trade and is contrary to the public policy and voids the contract.

We need not reach the second issue as we find the alleged contract was within the statute of frauds.

Vaughn argues their agreement for Barry to cosign performance bonds for Vaughn in exchange for Vaughn awarding Barry subcontracts is outside the statute of frauds. Iowa Code section 622.32 provides, in pertinent part:

Except when otherwise specially provided, no evidence of the following enumerated contracts is competent, unless it be in writing and signed by the party's authorized agent:

(4) Those that are not to be performed within one year.

Iowa Code § 622.32(4) (1993). The statute of frauds is a rule of evidence, and it relates to the manner of proof but does not render oral contracts invalid. *Stauter v. Walnut Grove Prods.*, 188 N.W.2d 305, 313 (Iowa 1971); *Davis v. Davis*, 156 N.W.2d 870, 877 (Iowa 1968); *Netteland v. Farm Bureau Life Ins. Co.*, 510 N.W.2d 162, 166 (Iowa App. 1993).

Barry did cosign the bond in question; that is not in dispute. What is at issue, however, is whether Vaughn and Barry had an agreement as to how they would do business with each other under certain circumstances. That is the issue behind contract #1 and it could not be proven by competent evidence. *See Meylor v. Brown*, 281 N.W.2d 632, 634 (Iowa 1979). It is one brother's word against the other's. Vaughn said the agreement or contract existed; Barry denies they ever had such an agreement. The trial court found that such an agreement could not be proven after receiving an offer of proof and therefore was not a fact issue which could be presented to the jury. As a matter of law, the alleged contract fell within the statute of frauds and Vaughn was unable to offer competent testimony to prove its very existence. The trial court could have so ruled on the motion for summary judgment but waited for some of the evidence to be developed and allowed an offer of proof to be made. The trial court was not in error by dismissing that portion of Vaughn's counterclaim.

III. Motion for New Trial. We review for abuse of discretion. *Benson v. Richardson*, 537 N.W.2d 748, 762 (Iowa 1995). Vaughn argues the trial court abused its discretion in not allowing him to present witnesses who would offer their opinions on the character of Barry and Vaughn. Vaughn's purpose in trying to include such testimony is to show the jury which brother was most honest in his business dealings and hence which would be more likely to tell the truth at the trial. Iowa Rule of Evidence 608(a) provides :

The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

Iowa R. Evid. 608(a).

The issue was the existence of two oral contracts and the jury needed to determine which brother was telling the truth, Vaughn in detailing the terms of the contracts or Barry in denying their existence. There was no prerequisite attack on Vaughn's truthfulness by Barry. We do not believe parading witnesses before the jury regarding the credibility of either brother would be helpful. The jury had both brothers before them and could determine for themselves, after sorting out the conflicting testimony, which one to believe.

Vaughn next argues statements from other witnesses should have been allowed to prove the existence of contract #2. The trial court found the statements were hearsay within hearsay. We review the trial court's ruling on the admissibility of evidence for an abuse of discretion. *Vaughan v. Must, Inc.*, 542 N.W.2d 533, 542 (Iowa 1996). Vaughn may well have made statements to others regarding his dealings with Barry, but the trial court, after offers of proof were made, found them to be hearsay within hearsay and we agree. The statements could well have been self-serving things said by Vaughn who was having difficulty on the IDOT job with Barry. The statements did not establish the terms of contract #2. Those terms were offered

through Vaughn's own testimony. To not allow witnesses to repeat what Vaughn said to others was not an abuse of discretion.

Having considered Vaughn's other arguments, we affirm the trial court.

AFFIRMED.