FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

SHEARSON HAYDEN STONE, INC., a Delaware corporation, Successor in Interest to LAMSON BROS. & CO., formerly an Illinois partnership,

Plaintiff-Appellee,

vs.

JOHN G. MILES,

Defendant-Appellant.

Filed December 27, 1979

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2-62303

Appeal from Scott District Court - L. D. Carstensen, Judge.

Defendant, a customer of the plaintiff commodities broker, appeals from judgment dismissing his counterclaim for damages following trial court's ruling on motion for directed verdict. REVERSED.

Samuel J. Walker of Bettendorf for defendant-appellant.

Thomas M. Knepper of Abramson & Fox, Chicago, Illinois; and Charles W. Brooke of Lane & Waterman, Davenport, Iowa; for plaintiff-appellee.

Submitted to Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant, a customer of the plaintiff commodities broker, appeals from judgment dismissing his counterclaim for damages following jury trial. The judgment dismissing said counterclaim resulted from an order of the trial court sustaining plaintiff's motion for directed verdict at the close of all evidence. Said ruling also directed a verdict in favor of the plaintiffs on its claim based on an open account.

Defendant's counterclaim is based upon the allegation that an agent of plaintiff engaged in unauthorized trading on defendant's account and failed to liquidate that account when directed to do so by the defendant, resulting in substantial losses to defendant. Those transactions antedated those upon which plaintiff's claims are based.

In directing a verdict on the counterclaim, the trial court recognized that it was the uncontroverted testimony of the defendant that plaintiff's registered representative, one Jerry Dye, made unauthorized trades on defendant's account and failed to implement an order from defendant to liquidate that account. There was evidence that the latter failure resulted in a substantial financial loss to defendant. In spite of this evidence, the trial court sustained plaintiff's motion for directed verdict on the ground that defendant's actions in continuing to trade with plaintiff after knowledge of Jerry Dye's unauthorized acts and in not reporting such acts to Dye's superiors, constituted a ratification of such transaction as a matter of law.

I. On appeal, plaintiff seeks to sustain the ruling below by relying on Pillsbury Co. v. Ward, 250 N.W.2d 35, 39 (Iowa 1977). In that case, the court discusses the doctrine of ratification of the unauthorized act of an agent. It is there stated that "a failure to repudiate the unauthorized act of an agent within a reasonable time after learning thereof will be deemed a ratification." Id.

We cannot conclude that the court, in making this comment, intended to hold that failure to repudiate within a reasonable time is in all instances ratification as a matter of law. This would be contrary to the views expressed in Restatement (Second) of Agency § 94 (1957), which are quoted with approval in Abodeely v. Cavras, 221 N.W.2d 494, 503 (Iowa 1974). Both the Restatement and Abodeely are cited with approval in Pillsbury Co. v. Ward, 250 N.W.2d at 39. Moreover, Pillsbury Co. v. Ward states: "[t]o ratify an unauthorized act of an agent, the principal must have full knowledge of the facts (actual or inferred) and must intend to ratify (expressly or impliedly)." 250

N.W.2d at 39. Abodeely and Restatement (Second) of Agency § 94 both treat a failure to repudiate as evidence from which an intent to ratify may be inferred—not as conclusive evidence of such intent.

Taking this view of the evidence presented, we conclude that in the present case, it was for the jury to determine whether there had been an intent by defendant to ratify the unauthorized acts of plaintiff's agent. In this regard, we note that there was testimony that the agent assured defendant he would make him whole. In this regard, we note that section 101(a) of Restatement (Second) of Agency, provides, in part: "[r]atification is not effective . . . in favor of a person who, by misrepresentation or duress, has caused the affirmance." The trial court erred in directing a verdict on the counterclaim and defendant is entitled to a new trial on that claim.

II. As to plaintiff's claim on the open account, defendant, in paragraph 5 of his answer, sets up, as an affirmative defense for set-off, the same matters raised in his counterclaim. Accordingly, plaintiff is not entitled to judgment as a matter of law at this time on its claim even though the essential elements thereof, other than this affirmative defense, may not be in dispute. Under the circumstances, we hold that there should be a new trial on all issues.

REVERSED.