IN THE COURT OF APPEALS OF IOWA

310

MARK S. SOLDAT,)
Plaintiff-Appellant,)
vs.)
TIMOTHY J. BRAUNSCHWEIG,)
Defendant/Cross-Appellant.

Filed November 26, 1985

5-09
83-1420

Appeal from the Iowa District Court for Kossuth County, John F. Stone, Judge.

Plaintiff appeals and defendant cross-appeals from judgment in an action seeking rescission of a law partnership agreement. **AFFIRMED.**

Mark S. Soldat, Algona, for plaintiff-appellant.

Timothy J. Braunschweig, Algona, for defendant/cross-appellant.

Considered by Oxberger, C.J., Hayden, and Sackett, JJ.

OXBERGER, C.J.

This dispute between two attorneys who formerly practiced law together has reached this court following the trial court's disposition of the claims against each other and resolution of numerous motions following its ruling. Both plaintiff and defendant have appealed. We affirm the trial court in all respects.

The parties executed an agreement for a partnership in the practice of law on January 2, 1979. Plaintiff was elected county attorney and appointed defendant as his assistant. Plaintiff, previously a sole practitioner, contributed virtually all of the initial capital investment while defendant left a job with the Legislative Service Bureau and relocated. As a result of gradually escalating disagreements plaintiff wrote defendant a letter on June 2, 1982, stating that there had been a substantial breach of the partnership agreement and that their professional relationship was at an end. On January 12, 1983, plaintiff commenced an action seeking legal and/or equitable rescission of the partnership agreement.

Plaintiff's complaints included failure of defendant to generate income in an amount approximating fees earned by plaintiff, a failure attributed by defendant to his being required to perform a disproportionate share of the workload of the county attorney's office. The partnership agreement did not expressly require that the partners contribute equally to income of the partnership. Defendant failed to make capital contributions as required by the agreement for the purposes of ultimately equalizing the parties' capital contribution, but defendant asserted as an offset draws by plaintiff in excess of the amounts permitted by the agreement. Plaintiff also alleged that defendant had failed to adequately list certain capital assets consisting of furnishings of his personal office and that he had failed to participate in partnership decisions.

Following trial in June 1983, the trial record was reopened to allow presentation of additional evidence including an accounting for certain fees, which Braunschweig now says is false. Judgment was entered August 18. The court found both parties had breached the partnership agreement and that plaintiff had not established a right to rescission. An accounting was undertaken which resulted in a net award to plaintiff of $3498.11. When plaintiff attempted to execute upon certain property of defendant a stay order was entered.

On appeal Justice McCormick overruled a motion to dismiss based on alleged lack of finality of the judgment. Justice Schultz overruled a motion to dismiss the cross-appeal and deny oral argument based on untimely filing of appellee's brief.

We will address the issues presented upon appeal, and then resolve the cross-appeal.

Appeal

I.

Soldat says the court erred by not using its equitable powers to confirm that a rescission had taken place in pais or to use its powers to rescind the contract between the parties. Soldat cites at length the holdings found in Binkholder v. Carpenter, 260 Iowa 1297, 1302-05, 152 N.W.2d 593, 596-97 (Iowa 1967). This opinion reflected upon the difference between rescission in pais in which the parties have rescinded the contract without court intervention, and rescission made upon the equitable powers of the court. Id. The plaintiff says the court did not attempt to distinguish between the two theories, both of which were pleaded by plaintiff, and claims the court "had difficulty mastering the rescission theories."

Whether the rescission occurs in pais or in equity, the breach alleged of the agreement must not be minor, but must be "so substantial and fundamental as to strongly tend to defeat the object of the parties making the contracts." Rescission is considered an extreme remedy and is not allowed in every case where one party has failed to perform. Maytag Company v. Alward, 253 Iowa 455, 465-66, 112 N.W.2d 654, 660 (1962).

The substantial breaches alleged by Soldat to have been made by Braunschweig include lack of generation of income. He claims this is implied in the contract, although Soldat admits the contract is silent in this regard. His argument consists mainly of his insistence that the agreement must be implied since Soldat complained frequently to Braunschweig about his lack of fee generation and assumed that such an agreement was included. The second alleged breach is that the capital contributions were not equal, although he concedes this is "perhaps not of great significance." Soldat further claims Braunschweig's refusal to negotiate or attempt to reach an agreement with him regarding the partnership is a significant breach.

Braunschweig claims Soldat breached the agreement by, inter alia, giving Braunschweig the bulk of the criminal caseload of the office and taking an excessive draw.

Our review of the considerable evidence presented on this point leads this court to the same conclusion as that reached by the trial court. None of the breaches alleged were substantial enough to allow rescission under either theory. Both parties made minor breaches of the contract. Further, both also operated under the agreement for nearly three and one-half years. Rescission is not proven in this case.

Soldat makes reference to this conclusion being inconsistent with the court's decision the partnership was justifiably dissolved. While the breaches were not of the type to allow the extreme remedy of rescission, they resulted in such ill-will between the parties the partnership could not continue.

II.

Soldat's next claim is the court's alleged error in totaling damages. It would unduly prolong this opinion to list every detail which Soldat claims was in error by the court. Much of the error he says occurred is based on his premise he should get more money out of the partnership because he contributed more time and effort. He says the value of his time was not properly computed, nor was he compensated for his property and resources used. He says he should be refunded the bulk of what was received for rental of his property to the county and his excess draw was not properly computed. He also wants to have a typewriter and dictating equipment returned to him.

Soldat indicates the court's award was in many respects "by and large" correct. A review of the volumes of appendices and documents presented on review confirms the court's thoughtful and thorough analysis of the situation. We affirm the trial court's award of damages.

III.

Soldat presented claims of tortious conduct by Braunschweig, including conversion, trespass, breach of fiduciary duty to settle partnership affairs, and tort ex delicto. The court in response to plaintiff's motion following judgment asking it to rule on this issue said it had "made no findings of liability for damages on those theories and the court does not intend to do so." A review of the claims presented to the trial court shows that plaintiff was seeking damages under these theories in order to recover loss of use of equipment and property, and for failing to wind up the partnership. These matters were settled more properly by the court through its rulings regarding the dissolution of the partnership. The court correctly found there was no tortious liability. Each of the parties has been equally culpable of breaches and bitter conduct towards each other. Even if the court could find the elements of one of the torts were shown, both plaintiff and defendant have equally contributed to the damages inflicted upon themselves.

IV.

Plaintiff claims the court should have provided for the windup of the partnership, saying that although the court's failure to do so is now mostly moot, such a holding is necessary for future guidance. As the court pointed out in its ruling, by the time the court handed down its findings the partnership had been wound up and all that remained was an accounting. The partnership is no longer in existence and an order to wind up the relationship is unnecessary.

V.

Plaintiff says the court erred in refusing to construe its stay order. Judgment was entered in this case August 18, 1983. The next day, Soldat says, motor vehicles in Braunschweig's possession were levied upon and later that same day, the court stayed all proceedings in the case pending disposition of the motion for a new trial. Also that day Braunschweig obtained the vehicles and transferred title out of his name. On August 24 Soldat asked the court to construe its order so that the motor vehicle titles would be returned. Soldat says he does not understand how the court could deny the request, rather than construe the stay order. In fact, the court ruled on the motion by indicating an agreement between the parties of September 12, 1983, had made the point moot. Soldat renewed his motion, indicating the motor vehicles were not included in the agreement. It was at this point the court denied Soldat's request to reconsider its ruling to clarify the stay order.

On appeal Soldat says the trial court should have indicated whether the stay was dissolved and, when in existence, it included the motor vehicles. A review of the September 12 agreement confirms the levy on the motor vehicles was not included in the release. We believe the court was indicating in its denial that the effects of the stay were obvious, and we agree. The stay by its terms halted all executions and levies. It included the levy on the motor vehicles, if not exempt. The stay by its terms lasted until "disposition of defendant's motion for new trial and to vacate judgment." That motion has been disposed of and the stay is dissolved.

VI.

Plaintiff's final issue presented on appeal is that the trial court was rude to him. He points to several parts of the record where the court urged the parties to obtain independent counsel because their emotional involvement in the situation was hindering their abilities to objectively and coherently present the issues of the case. We conclude the trial judge exercised much patience and judicial restraint.

Cross-Appeal

I.

The defendant's first issue on cross-appeal is that the court erred by assessing all the secretarial salaries to himself although the court had concluded Braunschweig owed only one-half of the salaries due from June 2, 1982, to February 18, 1983. He says the result is a $3544.42 in excess charged to him.

The court denied Braunschweig's amendment to his application for a new trial which presented this issue filed August 31, 1983. It found the matter was not an amendment because it presented an entirely new matter from that involved in the motion for a new trial, and therefore was untimely under rule of civil procedure 247. We find the court's ruling to be proper.

II.

Braunschweig accuses Soldat of making a false accounting concerning the financial affairs of the partnership. The court properly found no extrinsic or collateral fraud was pleaded, and denied the claim. In re Marriage of Bauder, 316 N.W.2d 697, 699 (Iowa Ct. App. 1981).

III.

The final issue presented by Braunschweig is that we should clarify that the award of property and division of assets did not include giving Soldat the client files of Braunschweig, nor the accounts receivable.

Client files contain personal papers belonging to the client and papers belonging to the lawyer. Whether an individual is a client of Soldat or Braunschweig, it is a question to be answered by the client. See Iowa Code of Professional Responsibility Canon 4-6 (1971); Bump v. Stewart, Wimer & Bump, P.C., 336 N.W.2d 731, 736 (Iowa 1983). We can find no ruling by the court below to the contrary.

Nor do we find any ruling which contradicts the premise that property acquired during the existence of the partnership, by purchase or otherwise, with partnership funds or effort, is ordinarily partnership property. Iowa Code § 544.8(1)(1985). This includes such items as profits, or accounts receivable. 69 C.J.S. Partnership §§ 69, 70(e)(1950). Braunschweig alleges that the court awarded to plaintiff only items listed in plaintiff's exhibit B, but the decree shows to the contrary. The decree also indicated that except for an electric typewriter and Lanier recording system "all other personal property acquired by the partnership is awarded to plaintiff." This would include accounts receivable earned from partnership accounts while the partnership was in existence or winding down. We do not believe this contradicts any rulings of the trial court, but to the extent it clarifies matters for the litigants we so hold.

AFFIRMED.