FILED
AUG 26 1980
CLERK SUPREME COURT

IN THE COURT OF ~~APPEALS OF IOWA~~

HARRY ANDERSON,

Plaintiff-Appellant,

vs.

DAVID RASMUSSEN,

Defendant-Appellee.

Filed August 26, 1980

DAVID RASMUSSEN, d/b/a RASMUSSEN AG SALES,

Plaintiff-Appellee,

vs.

HARRY ANDERSON,

Defendant-Appellant

0-175
2-64090 & 2-64091

Appeal from Tama District Court - John L. Hyland, Judge.

Anderson appeals from the trial court judgment awarding damages to Anderson for breach of contract and to Rasmussen for action on an account. - AFFIRMED AS MODIFIED.

Gary W. Kazragis, of Rickert, Thompson & Kazragis, Reinbeck, for appellant.

Roy I. Anderson, Blair, Nebraska, and Gary J. Altwegg, Logan, for appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Anderson appeals from trial court judgments in consolidated cases which awarded damages to Anderson for breach of contract and to Rasmussen for action on an account. We modify and affirm.

The parties entered into an oral agreement in which Rasmussen would sell silopress farm machines to Anderson who would have exclusive right to resell in a specified territory at a suggested mark-up price. Anderson requested two other counties be added to his assigned territory. Rasmussen was unable to transfer these counties to Anderson but did not notify Anderson of this result. Anderson actively pursued sales in these extra-territorial counties with the knowledge of Rasmussen. Anderson produced two prospective buyers in one of the restricted counties. He was told by Rasmussen's agent that the assigned salesman in that county would complete the sale. Rasmussen's agent tendered Anderson $500 for his efforts in lieu of the sale, which Anderson refused. Anderson demanded payment instead, of $6600, approximating his loss of profits for two machines and anticipated accessories, which Rasmussen refused to pay. Anderson subsequently ordered and received more machines from Rasmussen and withheld payment for them.

Both parties filed suit for money allegedly owing them and the cases were consolidated. The trial court found for Anderson in the amount of $2500 and for Rasmussen in the amount of $36,273 with interest pursuant to section 535.2, The Code 1977. Anderson appeals both awards. Our review is on errors assigned. Iowa R. App. P. 4.

Anderson contends he was a commission merchant and as such rightfully held the machines without payment on a lien basis for commissions due him. The trial court found the agreement between the parties to comprise a distributor/independent dealer relationship, and section 576, The Code 1977, was inapplicable. A commission merchant is an agent who as his business and for commission sells goods of principal entrusted to his possession for the principal. Black's Law Dictionary 707 (4th Ed. 1951). Aside from Anderson's own description of "commissions" due him, nothing in the record supports his agency contention. The trial court correctly rejected Anderson's argument and found Rasmussen entitled to payment on the account. See Mayrath Co. v. Helgeson, 258 Iowa

543, 139 N.W.2d 303 (1966).

Anderson challenges the amount of damages awarded to him and to Rasmussen. He also alleges improper application of interest prior to judgment pursuant to section 535.2, The Code 1977.

No post-trial motions were filed. This failure is fatal to our review of the interest issue. The matter was never brought to the attention of the trial court and, therefore, not appealable. Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 535 (Iowa 1973); Farris v. Iltis, 243 N.W. 195, 196 (Iowa 1932).

Anderson argues damages awarded to him should have represented his "commissions" on two completed sales plus accessories. The trial court found Rasmussen breached the agreement concerning Anderson's territory. Under this theory, the court found Anderson to have completed one sale and awarded him profit in the amount of $2,400 on that sale. However, the trial court found Anderson had abandoned his claim to the other sale when he turned over the prospective buyer to the assigned salesmen in the territory. The trial court awarded Anderson $500 as a referral fee for that sale which was a practice in this business. We find sufficient evidence in the record to support these findings and awards.

The trial court also found Anderson would have incurred post-sale expense of $400 for the completed sale and deducted this amount from the total award. Damages from loss of profits include a reduction by the cost of obtaining them. King Features Syndicate v. Courrier, 241 Iowa 870, 43 N.W.2d 718 (1950). However, we do not find support in the record of the certainty that any expense would have been incurred or any basis to compute post-sale expense. We, therefore, modify the judgment for Anderson to be increased to $2900.

Anderson challenges the sufficiency of evidence in support of the amount of damages awarded to Rasmussen. Questions of sufficiency of evidence may be considered on appeal without motion before trial court. Grall v. Meyer, 173 N.W.2d 61 (Iowa 1969); Iowa R. Civ. P. 179(b). Evidence in the form of business records and witness testimony was offered and received showing a balance owing in the amount of $36,273. No evidence was offered to contradict that figure. The record supports the court's finding of damage to Rasmussen in that amount. See Prestype Inc. v. Carr, 248 N.W.2d

111 (Iowa 1976).

We affirm the trial court's decision as modified herein and assess costs one-third to appellee and two-thirds to appellant.

AFFIRMED AS MODIFIED.