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CLERK SUPREME COURT

409

IN THE COURT OF APPEALS OF IOWA

HOWARD WESTERKAMP, WESTERKAMP TRUCKING, INC., and BONNIE LOU WESTERKAMP,

Plaintiffs-Appellees,

vs.

LEIGHTON STOCKYARDS CORP.,

Defendant-Appellant.

Filed January 29, 1986

5-552
85-368

Appeal from the Iowa District Court for Mahaska County - Dan F. Morrison, Judge.

Defendant appeals the district court's judgment in favor of plaintiff in a contract action. **AFFIRMED.**

Robert K. Clements and Randall C. Stravers of Clements, Blomgren & Pothoven, Oskaloosa, Iowa, for defendant-appellant.

Harold B. Heslinga, Oskaloosa, Iowa, for plaintiffs-appellees.

Considered by Donielson, P.J., Schlegel, and Sackett, JJ.

SCHLEGEL, J. 410

Defendant Leighton Stockyards Corporation appeals the district court's judgment in favor of plaintiff in a contract action. We affirm.

On May 9, 1983, plaintiff Howard Westerkamp, on behalf of Westerkamp Trucking, Inc., entered into a contract with defendant Leighton Stockyards for the sale of the corporate assets of plaintiff's trucking business. The total contract price amounted to $113,000. Defendant paid $100,000 immediately, and upon receipt of titles to two trailers, agreed to release from escrow the trailers as well as an additional $3,000 cash. Plaintiff was also entitled to receive $500 at final closing but not later than December 31, 1983.

On March 28, 1984, plaintiff filed this action to recover the remaining $12,500 of the purchase price. Plaintiff claimed that he had performed as required under the escrow arrangement but that defendant refused to authorize the defendant Farmers Savings Bank of Leighton to release the two trailers and the $3,000 cash. Plaintiff alleged that the value of the two trailers was $9,000.

Defendant Farmers Savings Bank deposited the items in escrow with the Mahaska County Clerk of Court and was dismissed by the plaintiff.

Defendant Leighton Stockyards raised the affirmative defense of breach of contract and sought damages. The defenses raised include: (1) failure to transfer authority; (2) improper registration of a 1977 GMC tractor; (3) failure to deliver tire rims; (4) failure to pay fines and repairs; (5) failure to turn over business records; and (6) breach of the covenant not to compete. The trial court ruled in favor of plaintiff on all of the defenses except for the delivery of the tire rims and the delivery of business records. Defendant was ordered to deliver the titles of the trailers to plaintiff and pay plaintiff $3,500 plus interest. On

411

appeal, defendant alleges the trial court erred in holding it had failed to carry its burden in proving its affirmative defenses and counterclaim.

The legal principles applicable to reviewing the facts and a party's burden of proof were clearly stated in Roland A. Wilson v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925 (Iowa 1976):

> One who seeks recovery on a contract has the burden to plead and prove the contract and his performance. Heaberlin v. Heaberlin, 255 Iowa 403, 406-407, 122 N.W.2d 841, 843 (1963). When the trial court in a law action tried to the court denies recovery because of a party's failure to carry his burden on an issue, we will not interfere on appeal unless we find the party carried his burden as a matter of law. The evidence in the party's favor must be so overwhelming that only one reasonable inference could be drawn. On review we examine the evidence in the light most favorable to the judgment. Harper v. Cedar Rapids Television Co., Inc., 244 N.W.2d 782, 787 (Iowa 1976).

We will briefly address the evidence offered on each of the alleged instances of plaintiff's breach of contract.

1. **Transfer of Authority.** Defendant offered, as evidence, the security agreement between it and plaintiff. The plain language of the agreement authorized defendant to transfer the stock certificates and to carry on plaintiff corporation's business. The evidence shows that defendant simply failed to transfer the stock, or to operate as Westerkamp Trucking as was allowed in the agreement.

2. **Improper Registration.** Defendant alleges that it suffered $6,000 in damages because the truck it purchased for $13,000, brought only $7,000 at an auction. Defendant claims it was forced to sell the truck because plaintiff did not have the vehicle properly registered at the time of the sale. Defendant admitted that the cost of registering the truck would be around $2,000, but that it did not check to make sure that amount was correct. "To support an award of actual damages, the [claimant] must prove that damages have been

412

sustained." Poulsen v. Russell, 300 N.W.2d 289, 295 (Iowa 1981). Actual damages are recoverable unless it is speculative whether damages have been sustained. Id. Defendant has not provided any evidence why he was "forced" to sell the vehicle. It has also merely speculated as to the cost to register the truck. The record shows only that defendant voluntarily chose to sell the truck at a loss. We therefore agree with the trial court in denying recovery for plaintiff's alleged breach on this issue.

3. Tire Rims. Plaintiff admitted that he may not have delivered all of the tire rims. We hold the trial court correctly ordered the rims to be delivered to defendant.

4. Fines and Repairs. No evidence was introduced as to when the fines were assessed, why they were assessed, or if they were paid. No evidence was introduced that the alleged repairs were due to circumstances existing at the time of delivery. Therefore, we affirm the trial court in denying recovery on this issue.

5. Failure to Turn Over Business Records. Defendant has failed to show that it was damaged due to the unavailability of any particular account or record. We agree, however, that it is entitled to such records and accounts and affirm the trial court's order to have them delivered to defendant.

6. Covenant Not to Compete. The trial court found that the record failed to support a finding that plaintiff violated the covenant not to compete. Agreements not to compete and those imposing restrictions on the circumstances under which one may work are in restraint of trade. As such, they are strictly construed against the one seeking to restrain another from pursing his profession, business, or employment. Blackman v. Folson, 200 N.W.2d 542, 542, 43 (Iowa 1972). We agree with the trial court that the record does not support a finding that plaintiff has engaged in the trucking business.

Because we hold the record does not support a finding that defendant carried his burden of proof as a matter of law, the judgment of the trial court is affirmed.

AFFIRMED.