

IN THE COURT OF APPEALS OF IOWA

No. 1-606 / 91-109

FILED

APR 28 1992

CLERK SUPREME COURT

KATHY ALDER,

Appellee,

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vs.

**DENNIS ADAMS, Individually, and d/b/a RELIABLE TREE SERVICE
and ADAMS TREE REMOVAL,**

Appellant.

Appeal from the Iowa District Court for Pottawattamie
County, Keith E. Burgett, Judge.

The defendant appeals a judgment of the district court finding he owed the plaintiff the sum of \$11,583.47 for money loaned to him to assist in the purchase of business equipment. **AFFIRMED.**

A.W. Tauke of Porter & Tauke, Council Bluffs, for
appellant.

Christopher J. Tinley of Pogge, Root, Fleming & Tinley,
Council Bluffs, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HAYDEN, P.J.

Dennis Adams and Kathy Alder met in 1983. Alder and her daughter moved in with Adams. Adams owned a tree removal business. Alder quit her job to assist Adams in his business without compensation. On several occasions Alder advanced money to Adams for various business and personal expenses while the parties were living together. After the relationship ended in 1988, Alder sued to recover the money she had advanced to Adams. Alder produced records showing withdrawals from her savings account and checks made out to Adams covering the amount of the various purchases.

The district court held an oral contract existed for the repayment of \$7,700 loaned to Adams for the purchase of a crane truck and \$3,000 loaned for the purchase of a wood chipper. The court also found Alder had loaned Adams \$720 so he could make payroll for his employees and \$163.47 for travel expenses. In total, the district court found Adams owed Alder the sum of \$11,583.47 plus interest. Adams' motion to enlarge and expand the findings of the district court was denied.

Adams appeals, contending recovery for services performed is improper because Alder's claim is based on a meretricious relationship. Adams also maintains the parties intended to become partners or joint venturers in the purchase of the equipment. As such, the district court erred in not dividing the proceeds from the equipment sold

by Alder and applying the proceeds as a set-off for the money he allegedly owes her. Our review is for the correction of errors at law. Iowa R. App. P. 4.

Adams relies on the rule recovery for services may not be had where the parties know their relation is meretricious. In re Ballard's Estate, 107 N.W.2d 436, 439 (Iowa 1961). Adams' reliance on this rule is misplaced.

Alder performed various duties for Adams in his business and received no compensation for her services. However, Alder's claim is not based on the services she rendered in Adams' business, nor is her claim based on services she may have rendered while the parties cohabitated. Rather, her claim is based on the money she advanced to Adams for the purchase of various business equipment which he failed to repay. A similar claim was made in Shold v. Goro, 449 N.W.2d 372 (Iowa 1989). In Shold our supreme court held a cohabitant was entitled to recover all amounts advanced as loans so long as the claim was not based on the parties' relationship and the money advanced retained its character as a loan. Id at 373. To deny recovery would "permit a person to escape payment of a debt by simply entering into a romantic relationship with the creditor." Id. We conclude Alder's claim existed independently of the cohabitation and the money advanced retained its character as a loan. Accordingly, we affirm the judgment of the district court.

Adams next claims he should be entitled to a set-off for various equipment sold by Alder arising out of an alleged joint venture or partnership with Alder. Adams relies on In re Estate of Millers, 159 N.W.2d 441 (Iowa 1968), and claims the issue of set-off is properly before this court even though he failed to raise set-off as an affirmative defense or file a counterclaim against Alder.

Permitting the introduction of evidence on an issue not specifically pleaded obviates the necessity of its formal presentation. Where, as here, parties proceed without objection to try an issue, even though not presented by the pleadings, it amounts to consent to try such issue and it is rightfully in the case.

Id. at 446.

In the present case, however, Adams' introduction of evidence on the issue of set-off was objected to and sustained by the district court. As such, the issue of set-off is not properly before this court. Wormhoudt Lumber Co. v. Union Bank & Trust Co., 231 Iowa 928, 934, 2 N.W.2d 267, 271 (1942).

We affirm the judgment of the district court. Costs of this appeal are taxed to Adams.

AFFIRMED.