



IN THE COURT OF APPEALS OF IOWA

LAMSON BROS. & CO.,)
an Illinois Partnership,)
)
Plaintiff-Appellee,)
)
vs.)
)
DALE RIEDIGER, DALE RIEDIGER,)
d/b/a DALE RIEDIGER FARMS, and)
DALE RIEDIGER FARMS,)
)
Defendants-Appellants.)

Filed August 9, 1979

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2-61575

Appeal from Plymouth District Court - George F. Davis, Judge.

Defendant-customer appeals trial court judgment in favor of plaintiff broker in an action on open account alleging that trial court's findings are not supported by substantial evidence and that certain exhibits were erroneously admitted into evidence.
AFFIRMED.

Donald E. O'Brien of O'Brien, Galvin & O'Brien, Sioux City, Iowa, for defendants-appellants.

Jeffrey A. Sar of Carter & Sar, Sioux City, Iowa, for plaintiff-appellee.

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

JOHNSON, J.

Defendants Dale Riediger and Dale Riediger Farms appeal trial court's judgment awarding plaintiff Lamson Bros. & Co. \$7,346.03 in an action on open account. Defendants¹ allege that trial court's findings are not supported by substantial evidence and that certain exhibits were erroneously admitted into evidence. We affirm.

Commencing in 1963, defendant traded in commodities with plaintiff. The original account was opened in January, 1963, and a second account in February, 1974. Defendant regularly traded in such commodities as corn, wheat, beans, pork bellies and cattle. This specific controversy arises from a series of transactions involving September corn. Plaintiff, inter alia, pled the following facts in its petition: Defendant, on May 21, 1974, directed plaintiff to sell 10,000 bushels of September corn for \$2.46 per bushel.² Due to transactions on May 20, 1974, defendant had no open contracts in September corn at the close of the business day.³ Defendant's June 21, 1974, order to buy 5,000 bushels of September beans was erroneously sent by the teletype operator as an order to purchase 5,000 bushels of September corn, resulting in the elimination of one-half of defendant's 10,000 bushel "short" position of May 21, and a paper loss of \$1,733.50. The mistake was discovered and, on June 25, 1974, the error was reversed by a \$1,733.50 credit to defendant's account; the defendant's account was erroneously credited with \$1,733.50 a second time but was subsequently corrected.

Due to an extremely volatile market in July, 1974, commodity prices were rapidly fluctuating and defendant was asked to place additional money into his account to maintain it.⁴ One of plaintiff's witnesses testified that defendant made repeated promises to meet his margin calls but, in fact, did not. On August 9, 1974, plaintiff liquidated the majority of defendant's open contracts and completed the liquidation on

¹ Hereinafter referred to singularly as defendant in reference to defendant Dale Riediger.

² This type of transaction results in a "short" position in that the seller does not actually own the commodity sold but takes the risk of being able to "sell" it to a third person or to acquire it at an advantageous price prior to a purchaser's right-to-delivery.

³ The sale of a commodity not yet owned (short position) or the purchase on credit of a commodity for future delivery (long position) results in an "open contract."

⁴ This is called a "margin call."

August 28, 1974.⁵ Calculation of profit or loss on each contract liquidated resulted in a claimed total loss of \$8,096.08⁶ for which plaintiff sought judgment against defendant.

Defendant, who at trial admitted he relied on plaintiff's records and kept no independent records, denied he authorized the May 21, 1974, sale of 10,000 bushels of September corn and claimed he, at all times, refused to answer the margin calls. Defendant, therefore, asserted he not only owed nothing on account to plaintiff but in fact was entitled to a credit.

Trial court found that plaintiff had established defendant's indebtedness of \$8,096.08 by a preponderance of the evidence but that defendant was entitled to an offset of \$750.⁷

I. This is an action at law tried to the court and reviewable on assigned errors only. National Food Products Corp. v. Schakel, 171 N.W.2d 858, 859 (Iowa 1969). Trial court's findings of fact have the effect of a special verdict and, if supported by substantial evidence and justified as a matter of law,⁸ are binding on this court. Id. We view the evidence in the light most favorable to the judgment. Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 387 (Iowa 1975). We can neither weigh evidence nor pass on the credibility of witnesses. National Food Products Corp. v. Schakel, 171 N.W.2d at 859.

II. Plaintiff has the burden to prove existence of an account by a preponderance of the evidence. Rehmann v. Balduehi, 169 N.W.2d 894, 895 (Iowa 1969). An account "is equivalent to a claim or demand based upon a transaction creating a debtor-creditor relation." In re Estate of Stratman, 231 Iowa 480, 489, 1 N.W.2d 636, 643 (1942). An "open account" means only that the balance of the account has not been established⁹ and results where the parties intend to keep the account open subject to a shifting balance due to a connected series of transactions. Griffith v. Portlock, 233 Iowa 492,

⁵ Liquidation required plaintiff to purchase commodities to meet those contracts in which defendant had "sold" a commodity not yet owned (short position) and to sell a commodity which defendant had purchased for future delivery (long position).

⁶ Plaintiff, for example, had to purchase 10,000 bushels of corn at \$3.55 per bushel to meet the May 21, 1974, contract in which defendant allegedly had agreed to sell September corn at \$2.46 per bushel.

⁷ Judgment in the amount of \$7,346.08 was entered with interest at 5% per annum from February 28, 1975, to date of judgment and interest at 7% per annum thereafter.

⁸ Findings based on improperly admitted evidence are not justified. Prestype Inc. v. Carr, 248 N.W.2d 111, 113 (Iowa 1976).

⁹ 1 Am. Jur. 2d Accounts and Accounting § 4 (1962).

498, 7 N.W.2d 199, 202 (1943); Tucker v. Guimby, 37 Iowa 17, 19 (1873). Generally, an account is proved by proving each individual item, including the date, the correctness of each item, the charge made, and the reasonableness of the charge. 1 Am. Jur.2d Accounts and Accounting § 19 (1962). An open account can be established by business records. See Prestype Inc. v. Carr, 248 N.W.2d 111, 117 (Iowa 1976).

III. We first address whether trial court's findings that plaintiff had established the account is supported by substantial evidence. After reviewing the entire record, we conclude there is substantial evidence that the real controversy centers around an alleged sale of May 21, 1974, which plaintiff asserts was authorized by defendant. Defendant testified that he relied on plaintiff's records to the point of keeping none himself, that he subsequently relied on plaintiff's records after the alleged May 20-21 error occurred, and that he had no complaint with the course of record keeping engaged in by himself and plaintiff over the preceding 10 years. Plaintiff produced a solicitor who testified that the records kept were regular business records made at or about the time of the transaction and presented evidence pertaining to the alleged error in record keeping that indicated the trustworthiness of the records. Plaintiff's witnesses also testified as to their own recollection of the transactions.

The evidence mitigating against a finding that the May 21 transaction was authorized results in a verbal stand-off between plaintiff and defendant. The records go to the weight of plaintiff's assertion. Also weighing for the plaintiff is the fact that defendant continued to trade with plaintiff after the time the alleged error was revealed and that he continued to use "short" position trading. This is sufficient to support trial court's findings that plaintiff had met its burden to establish the open account and the amount thereof.

IV. We also must decide whether certain evidence was properly admitted. Defendant focuses his challenge particularly on Exhibit 63 (copy of a wire from plaintiff's Sioux City office to the Chicago office regarding transactions in one of defendant's account) and Exhibit 64 (a reply from plaintiff's Chicago office indicating that the company's records of defendant's account were in agreement) which were admitted over defendant's objections that they were inaccurate, self-serving statements without probative value and that their introduction constituted improper rebuttal.

The crux of defendant's challenge centers on his denial of any transaction in September corn after May 20, 1974, and his assertion that plaintiff also concedes there was no authorization for that transaction.¹⁰ Plaintiff's position, found at page 17 of its brief, states: "On page 15 of his brief, Riediger assumes that because there was no May 21, 1974 sale of 10 Sept [sic] corn, then anything suggesting that there was must be an error and not admissible as evidence. Lamson submits that the only real issue in this appeal is whether Riediger did authorize the May 21, 1974 sale."

Section 622.28, The Code 1977, provides as follows:

Any writing or record, whether in the form of an entry in a book, or otherwise, including electronic means and interpretations thereof, offered as memoranda or records of acts, conditions or events to prove the facts stated therein, shall be admissible as evidence if the judge finds that they were made in the regular course of a business at or about the time of the act, condition or event recorded, and that the sources of information from which made and the method and circumstances of their preparation were such as to indicate their trustworthiness. . . .

The statute is to be given a broad and liberal construction, State v. Fisher, 178 N.W.2d 380, 382 (Iowa 1970), and trial court is given considerable discretion as to admissibility of alleged business records. Prestype Inc. v. Carr, 248 N.W.2d at 117. If trial court finds the evidence complies with the requirements of section 622.28, it is admissible. State v. Anderson, 159 N.W.2d 809, 815 (Iowa 1968). The foundation requirements for admissibility of business records are: 1) that the record be made in the regular course of business; 2) that it was made at or about the time of the act, condition or event recorded; 3) that the source of information from which the record was made and the method and circumstances of its preparation were such to indicate its trustworthiness; and 4) that the record is not excludable as evidence because of any rule of admissibility of evidence other than the hearsay rule. Section 622.28, The Code 1977; State v. Anderson, 159 N.W.2d at 814. The weight to be accorded to such evidence once admitted is for the trier of fact. State v. Anderson, 159 N.W.2d at 815. Business records

¹⁰ In his Brief at page 2, defendant states:

The specific controversy, for the purposes of this appeal, boils down to whether or not Riediger had an "open contract" or "old" position on September corn as of the close of business on May 20, 1974 and whether or not Lamson's accurately corrected a mistake they made on May 21, 1974 when admittedly they erroneously "sold" for Riediger 10,000 bushels of September corn. It is conceded that Riediger didn't authorize this sale.

may be made up of regular entries, including dates, number and character of items purchased and the sales price. Yonkers Bros., Inc. v. Meredith, 217 Iowa 1130, 1131, 253 N.W. 58, 58 (1934).

In the instant case, plaintiff has established that a record of defendant's purchases, sales, items and costs were maintained in a regular fashion from December, 1973, until August, 1974, thereby fitting the Yonkers requirement. Defendant, however, argues that Exhibits 63 and 64 should not be admitted because they are inaccurate and unreliable, yet he presented no rebuttal evidence other than his own testimony and the admitted errors in the record to support this proposition. Plaintiff, on the other hand, presented evidence to show it conscientiously and openly corrected the inaccurate entries and presented pertinent information that occurred at the time of and concerning the errors. We conclude Exhibits 63 and 64 were properly admitted as business records following adequate foundation and were consistent with all of the other business records which were admitted, as well as testimony of one of plaintiff's witnesses.¹¹ We likewise reject defendant's argument that the exhibits were an attempt on rebuttal by plaintiff to bolster its case with inaccurate documents having no supporting records. Judgment of trial court is affirmed.

AFFIRMED.

¹¹ Additionally it appears that no objection was made as to the custody, manner and completeness of the records. Defendant's objections were to the reliability and probative value of the records.