FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

COUNCIL BLUFFS SAVINGS BANK, Trustee of the trust under the will of Lewis W. Ross, Deceased,

Plaintiff-Appellee,

vs.

JOHN PLATH,

Defendant-Appellant.

Filed August 30, 1983

3-91
2-68731

Appeal from Harrison District Court - J. C. Irvin, Judge.

Defendant appeals from a judgment for plaintiff trustee in the amount of $10,662.50, which represents one-half of the proceeds of the sale of horses which had been jointly owned by defendant and plaintiff-trustee's decedent. AFFIRMED.

Lyle A. Rodenburg of Lyle A. Rodenburg, P.C., Council Bluffs, for defendant-appellant.

Jack W. Peters of Stuart, Tinley, Peters, Thorn, Smits & Sens, Council Bluffs, for plaintiff-appellee.

Considered by Oxberger, C.J., and Donielson, Snell, Schlegel and Hayden, JJ.

DONIELSON, J.

Defendant appeals from a judgment for plaintiff trustee in the amount of $10,662.50, which represents one-half of the proceeds of the sale of horses which had been jointly owned by defendant and plaintiff-trustee's decedent. On appeal defendant asserts that: (1) even though this case was tried at law, this court's review should be de novo because plaintiff's action was allegedly one for an accounting in a joint venture, which should have been in equity; (2) plaintiff failed to present sufficient evidence to prove either a joint venture or an accounting between the parties; and (3) trial court erred by refusing, on lack of foundation grounds, to admit into evidence defendant's handwritten list of expenses regarding the care and sale of the horses. We affirm.

In December 1981, plaintiff bank, as trustee of the trust of Lewis W. Ross, Sr., deceased, filed a petition at law seeking to recover from defendant $10,662.50, which amount represented one-half the proceeds of the sale of certain registered Belgian horses. In the petition, plaintiff asserted that the horses had been subject to a joint venture arrangement between defendant and Lewis W. Ross, Jr., as prior trustee of the Lewis W. Ross, Sr. trust, and that defendant had refused plaintiff bank's demand, on behalf of the trust, for one-half of the sale proceeds. Defendant answered, asserting that the ownership arrangement was between himself and Lewis W. Ross, Jr., personally. In its findings, conclusions and judgment, the trial court denied defendant's motion for directed verdict. The trial court specifically found that the interest in the horses was held by the Ross trust and not by Lewis Ross, Jr., personally. Because of lack of competent evidence, trial court made no offset to defendant for care and sales expenses for the horses. Accordingly, judgment was entered for plaintiff in the amount of $10,662.50. Defendant brought this appeal.

I.

Since defendant failed to make a timely motion at trial to transfer the case to the equity docket, he cannot now claim that it should have been heard in equity, thus rendering our review de novo. Galvin v. Suchornel, 186 N.W.2d 662, 664 (Iowa 1971).

II.

Defendant's motion for dismissal or directed verdict was properly overruled. Considering the record (including the deposition testimony of Lewis Ross, Jr.) in the light most favorable to plaintiff, there was sufficient evidence to engender a fact question on the issue of whether Ross had an ownership interest in the horses on his own behalf or as trustee of the trust established by his late father's will. See Iowa R. App. P. 14(f)(2). There was also substantial evidence to support the court's finding that the Ross trust held the other one-half interest in the horses such that plaintiff, as successor trustee to that trust, was entitled to one-half the net proceeds from the sale of the horses.

III.

Finally, the court did not err in refusing to admit into evidence defendant's handwritten list of expenses regarding the care and sale of the horses which was offered as a setoff to plaintiff's claim. The trial court found, and we agree, that no foundation was established for the admissibility of that evidence. Defendant does not affirmatively claim that a proper foundation was laid. Under these circumstances, we find no error.

The trial court's judgment in plaintiff's favor is affirmed.

AFFIRMED.