FILED
NOV 20 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEAN WILSON,)

Plaintiff-Appellee,) Filed November 20, 1984 320

vs.)

GARY RIDENOUR,) 4-392
84-515

Defendant-Appellant.)

Appeal from the Iowa District Court for Dickinson County - Charles H. Barlow, Judge.

Defendant appeals a $25,000 judgment against him for breach of a covenant not to compete. AFFIRMED.

W. E. Kunze of Bedell, Kunze & Maahs, Spirit Lake, Iowa, for defendant-appellant.

Richard J. Barry of Greer, Nelson, Montgomery, Barry & Bovee, Spencer, Iowa, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendant, Gary Ridenour, appeals a $25,000 judgment against him for breach of a covenant not to compete. His sole argument on appeal is that the covenant's $25,000 liquidated damages clause is a penalty and unenforceable. We affirm.

I. Background. Plaintiff, Jean Wilson, purchased a combination restaurant, bar, and grocery store from Ridenour in August, 1978. The contract included a covenant not to compete and a clause establishing $25,000 as liquidated damages for violation of that covenant.

In May, 1981, a bar and restaurant was opened for business as the sole proprietorship of Mary Ridenour, Gary Ridenour's mother. Wilson believed that Gary took an active part in the operation and management of his mother's business in violation of the noncompetition agreement, so Wilson filed suit to enjoin further breach of the agreement and to collect the liquidated damages. Wilson sold her business before the trial.

The trial court found that Ridenour was violating the noncompetition agreement. It therefore entered judgment in favor of Wilson for the $25,000 liquidated damages. Ridenour appealed. Our review in this equity action is de novo. Iowa R. App. P. 4; Ma & Pa, Inc. v. Kelly, 342 N.W.2d 500, 501 (Iowa 1984).

II. Liquidated Damages. Ridenour's sole claim on appeal is that the liquidated damages clause is a penalty and is therefore void. We affirm because Ridenour has not preserved this issue for appeal.

The Iowa Supreme Court, in Gordon v. Pfab, stated "A party who contends that a liquidation clause is in reality a penalty has the burden to plead that fact and prove the actual damages in the trial court." 246 N.W.2d 283, 288 (Iowa 1976) (citations omitted). Ridenour did not plead this defense in his answer. Thus, the issue was not present at trial and we cannot consider it on review. See Foods, Inc. v. Leffler, 240 N.W.2d 914, 919-21 (Iowa 1976).

We realize Ridenour's brief apparently raises a second issue: whether an award for liquidated damages should be "pro-rated" over the period of a covenant not to compete? However, the argument and authority cited in support of this issue relates only to the question whether a liquidated damages clause should be declared a penalty. As stated above, we cannot consider that issue.

AFFIRMED.