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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

J. MYLES NEWCOMB and EDITH I. NEWCOMB,

Appellants,

vs.

KEITH I. SHEPARD and DORIS I. SHEPARD,

Appellees.

Filed November 10, 1977

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2-59413

Appeal from Black Hawk District Court - Roger F. Peterson, Judge.

Plaintiffs appeal entry of judgment for defendants based upon determination that plaintiffs had not sustained their burden of proof and were therefore not entitled to damages due to defendants' failure to pay the amount requested by plaintiffs for sale of veterinary supplies and drugs. AFFIRMED.

Upton B. Kepford, of Kennedy, Kepford, Kelsen & White, of Waterloo, counsel for appellants.

Edward J. Gallagher, Jr., of Gallagher, Martin, Keith & Langlas, of Waterloo, counsel for appellees.

Submitted to Allbee, C. J., Donielson, Snell, Oxberger and Carter, JJ.

DONIELSON, J.

Plaintiffs-J. Myles and Edith I. Newcomb appeal from an entry of judgment for defendants based upon a determination that the plaintiffs had not sustained their burden of proof and were therefore not entitled to damages because of defendants' failure to pay the amount requested by plaintiffs for the sale of veterinary supplies and drugs.

On April 15, 1971, plaintiffs and defendants-Keith I. and Doris I. Shepard entered into a uniform offer and acceptance contract which provided that plaintiffs would sell certain real estate to the defendants for $45,000, and that defendants would buy the entire inventory of veterinary drugs and supplies at plaintiffs' cost. The Shepards paid $10,000 for these supplies and drugs and then stated that they would not pay more until plaintiffs proved their costs by showing them the invoices for those items. The Newcombs claimed that this was impossible, as invoices were never kept.

Consequently, plaintiffs filed their petition on January 7, 1974, claiming that as of May 1, 1971, $9251.14 was due and owing on the veterinary drugs and supplies sold to the defendants. In their answer, the Shepards denied that anything was due and asserted that the contract provided that they were to pay for the supplies at plaintiffs' cost and that the Newcombs had produced no evidence as to costs after being requested to do so by defendants. By way of affirmative defense, the Shepards stated that the drugs were not priced at cost and were not salable and therefore, plaintiffs had not complied with the terms of the contract.

During the trial to the court, plaintiffs attempted to introduce into evidence an income tax inventory of March 31, 1971 which purported to establish their costs. Because of defendants' objection that the tax inventory had no proper foundation and did not constitute a proper method of proving costs, the court reserved its ruling on the objection.

According to the findings of the trial court, this inventory was taken each year and the unit prices used for that inventory were obtained from the plaintiffs' running inventory, consisting of a series of cards which had been prepared for each item of the inventory. The unit price placed by the plaintiffs upon this running inventory was obtained from the bills received for the items that had been ordered. Upon receipt of the items, the Newcombs would retain the invoice received for that item until such time as the bill was received, at which time they would pay the bill, destroy the invoice, and

transfer the cost of the individual item to the running inventory cards. When a price change for an individual item in current inventory was received, plaintiffs would change the running inventory accordingly.

As items were no longer replenished in plaintiffs' stock, the Newcombs would remove the card covering those items from the running inventory so they would not be reflected in the annual inventory. If items appearing on the running inventory were used or sold, they were deleted from it. At times, when the annual inventory for income tax purposes was being prepared and a card for a specific item in the running inventory did not exist, J. Myles Newcomb would assign a unit cost to that item.

The running inventory cards were not produced at the time of trial and, according to the trial court, the evidence was not clear as to what became of them. The court also found that the evidence did not establish the time at which each individual card in the running inventory was specifically prepared.

At trial, Keith Shepard testified that drug and supply prices had risen steadily since the time of the contract sale. He produced invoices from purchases made well after the sale in question which showed prices lower than those claimed by plaintiffs. Furthermore, he introduced into evidence an invoice he had found which showed that plaintiffs had paid less for a drug than they had claimed.

In its conclusions of law, the trial court sustained defendants' objection to the admission of the tax inventory and stated that the plaintffs had failed to show the cost of the items sold to the defendants by a preponderance of the evidence. Plaintiffs assign as error the failure of the trial court to (1) place upon the defendants the burden of establishing their affirmative defense by a preponderance of the evidence; (2) admit the income tax inventory into evidence; and (3) enter judgment for the plaintiffs notwithstanding the exclusion of the tax inventory.

The scope of review in a law action is limited. We are bound by the findings of fact of the trial court if supported by substantial evidence. Rule 14(f)(1), Rules of Appellate Procedure.

Plaintiffs initially contend that the trial court should have placed upon the defendants the burden of establishing their affirmative defense by a preponderance of the evidence. See rule 14(f)(6), R. App. P.; Dutcher v. Lewis, 221 N.W.2d 755, 762 (Iowa

1974). However, the court never reached the issue of the affirmative defense because it concluded that the Newcombs had failed to prove the cost of the items sold to the Shepards by a preponderance of the evidence. Since the plaintiffs failed to prove their costs, they also failed to establish that a balance was due from the defendants and consequently, plaintiffs could not recover an amount which they had not proven. There is no evidence that the trial court did not place the appropriate burden of proof upon the defendants, but, even if it did not, we hold that because of the conclusions reached by the court, a consideration of the affirmative defense was unnecessary.

Secondarily, plaintiffs argue that the court should have admitted the income tax inventory as a business record under § 622.28, The Code. In State v. Fisher, 178 N.W.2d 380, 382 (Iowa 1970), the court stated:

> "... in order for evidence to be admissible under this section, the trial court must find (1) that the record was 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 as 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."

Accord, Kitchen v. Stockman National Life Insurance Co., 192 N.W.2d 796, 802-803 (Iowa 1971); State v. Lain, 246 N.W.2d 238, 242 (Iowa 1976). The court, in concluding that requirements 2 and 3 were not satisfied, stated:

> "... [The income tax inventory] was prepared by securing the prices from the 'revolving inventory.' When prices were unavailable for items in the revolving inventory, a price was established by the plaintiff J. Myles Newcomb. When an increase in price was secured on items already in stock, the revolving inventory was changed accordingly. [The tax inventory] was prepared in March of 1971, and the revolving inventory was prepared upon the receipt of the invoices over the years. ..."

See In re Estate of Robinson, 253 Iowa 82, 84, 111 N.W.2d 275 (1961).

Since we conclude that the findings of fact which served as the basis for the court's ruling with regard to the tax inventory are supported by substantial evidence in the record, they are binding upon us. Rule 14(f)(1), R. App. P. Furthermore, the rules governing the admission of written memoranda or records are procedural and considerable discretion is vested in the trial court in determining admissibility. Nadler v. Treptow, 166 N.W.2d 103, 105 (Iowa 1969). That determination will not be disturbed unless

an abuse of discretion appears. State v. Anderson, 159 N.W.2d 809, 815 (Iowa 1968); Kitchen v. Stockman National Life Insurance Co., supra, at 803. Upon a review of the record in the instant case, we cannot say that the court abused its discretion in excluding the tax inventory from evidence.

Finally, the Newcombs contend that the trial court should have entered judgment for the plaintiffs because they sustained their burden of proof. In Arbie Mineral Feed Company v. Nissen, 179 N.W.2d 593, 595 (Iowa 1970), the court stated the appropriate standard of review:

> "In a law action tried without a jury, the trial court's findings have the same effect as a special jury verdict. We are bound by the facts thus established if there is substantial evidence to support them. We do not weigh the evidence; we only decide if there is a proper basis upon which the trial court could find as it did." (citations omitted) (emphasis in original).

In the instant case, the trial court heard the evidence and arguments of counsel at trial before entering its Findings of Fact, Conclusions of Law, and Order on April 9, 1976. We hold that there is ample evidence in the record to support the findings and conclusions of the trial court.

Finding no error, we affirm the district court.

AFFIRMED.