FILED
APR 28 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

CONTRACT PACKAGING, INC.,
Appellee,
vs.
SANTA CLAUS INDUSTRIES,
Appellant.

Filed April 28, 1978

435
2-60263

Appeal from Polk District Court - Harry Perkins, Judge.

Defendant manufacturer appeals judgment for plaintiff packager for balance due for contract services and seeks a favorable ruling on its counterclaim that plaintiff negligently performed the contract. - Affirmed.

William S. Smith, Waterloo, for Appellant.

Alan H. Bowers, of Baird, Bowers & Oliver, Des Moines, and Richard G. Santi, of Ahlers, Cooney, Dorweiler, Haynie & Smith, Des Moines, for Appellee.

Submitted to Donielson, Snell, Oxberger and Carter, JJ. Allbee, C.J., takes no part.

PER CURIAM

Defendant Santa Claus Industries Inc. seeks to reverse judgment for plaintiff Contract Packaging Inc. for the balance due for contract services rendered. It seeks also a favorable ruling on its counterclaim that Contract Packaging negligently capped the bottles of lamp oil and thereby breached the contract. We affirm.

Santa Claus argues customer comments penned in by its staff on the credit memos supply the necessary preponderance of the evidence to establish Contract Packaging's liability for leakage during transit. It was error, it claims, to exclude the comments when challenged on § 622.28, The Code 1975, grounds. To justify the relaxation of the hearsay rule via § 622.28, certain foundational facts must be shown which would allow the court to find reliability as to the nature, source, method and circumstance under which the writing was made. Additionally, it must appear the evidence is not excludable as evidence because of any rule of evidence other than the hearsay rule. Polson v. Meredith Publishing Company, 213 N.W.2d 520, 524 (Iowa 1973); In re Delaney, 185 N.W.2d 726, 731 (Iowa 1971). We find the customer comments inadmissible since they were not relevant. They had no probative value in relation to establishing Contract Packaging's liability. See Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511, 517 (Iowa 1976). At most, they reflect a number of different customer assessments of the cause of damage: bottles split at seams, damage in transit, breakage and leakage apparent at the time delivery refused, collapsed bottles, defective merchandise, and damage through loss of oil. These customer comments of Exhibit A were properly excluded since there was a failure to establish the requisites of preliminary proof under § 622.28. The documents comprising Exhibit P were not produced during discovery. The trial court properly prohibited them from evidence. Rule 134(b)(2)(B), Rules of Civil Procedure.

The real dispute is factual: did Contract Packaging tighten the caps upon the plastic oil-filled bottles properly? On this question the court found the capping at Contract Packaging began by hand and was completed by machine to the torque specified by Santa Claus. There was no evidence of the machine malfunctioning at

any time during the contract. We have found no error of law in the exclusion of the customer comments of Exhibit A or the exclusion of Exhibit P; therefore, if the trial court's findings of fact are supported by substantial evidence we are bound by them. Nora Springs Co-Op. Co. v. Brandau, 247 N.W.2d 744, 747 (Iowa 1976). We must construe the evidence in the light most favorable to the trial court's judgment without weighing the evidence or passing on the credibility of the witnesses. Herman Ford-Mercury Inc. v. Betts, 251 N.W.2d 492, 493 (Iowa 1977). Under this limited review we find adequate support for the judgment on the contract for Contract Packaging and the ruling adverse to Santa Claus on its counterclaim.

AFFIRMED.