IN THE COURT OF APPEALS OF IOWA

No. 0-09 / 88-1740

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CLINGAN ENTERPRISES, INC.,

Plaintiff,

DALE W. CLINGAN and **JACQUOLYN J. CLINGAN,**

Plaintiffs-Appellees,

vs.

DONALD G. McFARLANE, GREATER IOWA FUTURES, INC.,

Defendants,

and

GELDERMANN, INC.,

Defendant-Appellant.

Appeal from the Iowa District Court for Jefferson County, Phillip R. Collett, Judge.

Appellant appeals from a judgment rendered against it, pursuant to a jury verdict, by the district court for $15,000 in a breach of contract action. **AFFIRMED.**

Ed Kelly and John A. Morrissey of Kelly & Morrissey, Fairfield, and Gloria J. Matthews of Geldermann, Inc., Chicago, Ill., for appellant.

Myron L. Gookin and Craig R. Foss of Foss, Kuiken & Gookin, P.C., Fairfield, for appellees.

Considered by Donielson, P.J., and Sackett and Habhab, JJ. Hayden, J., takes no part.

HABHAB, J.

Appellees, Dale and Jacquoline Clingan, brought this action on June 28, 1985. On August 8, 1986, the district court clerk gave all parties proper rule 215.1 notice stating the case would be dismissed if not continued or tried prior to January 1, 1987. On November 25, 1986, the Clingans filed a motion for continuance. The Clingans' motion made specific reference to the fact that the case was subject to dismissal under rule 215.1. On December 29, 1986, the district court granted the Clingans' motion and continued the case "until the 2nd day of June, 1987."

On May 4, 1987, the district court made a calendar entry bifurcating trial of the case with the equitable issues being tried first and the legal issues to be tried at a subsequent date. The court directed the clerk to refer "this to Court Administrator since entire case is assigned for trial for June 2, 1987." The June 2nd deadline for trial passed without either party requesting a continuance.

The parties on October 9, 1987, jointly moved the court to again continue the matter to avoid a rule 215.1 dismissal. At this point, the case was set for trial during the week of October 20, 1987. The district court again granted a continuance on October 12, 1987. The case eventually proceeded to trial, where a jury returned a plaintiffs' verdict for $15,000 against appellant, Geldermann, Inc., for breach of contract.

On appeal, we remanded the case to enable the district court to make a written determination whether it reset this case for trial prior to June 2, 1987. On June 13, 1990, the district court filed a written order in compliance with this court's remand. The district court determined that the court administrator should have reassigned the bifurcated parts of the cause of action to another date prior to the June 2, 1987, trial date.

I.

We must now determine whether in light of the district court's explanation the district court had subject matter jurisdiction to proceed to trial. Geldermann contends that pursuant to Iowa Rule of Civil Procedure 215.1, the case was automatically dismissed since there was no actual order continuing the case beyond the June 2, 1987, trial date. Geldermann additionally asserts that the trial court erred in allowing Clingans' expert witness to testify concerning lost future profits since there was no adequate foundation concerning foreseeability. Geldermann also maintains that the trial court erred in giving a number of jury instructions, denying its motion for directed verdict, and in denying its motion for a judgment notwithstanding the verdict and for new trial. We affirm.

Our review is on assigned error. Iowa R. App. P. 4. Geldermann asserts the trial court lacked subject matter jurisdiction over this case after the June 2, 1987, continuance date had run. Pursuant to rule 215.1, a case may not be continued after a rule 215.1 notice has been given without an order of the court upon application and notice. See also Brown v. Iowa Dist. Court, 272 N.W.2d 457, 458 (Iowa 1978). The party wishing to obtain a continuance has the burden to obtain such an order. Grief v. K-Mart Corp., 404 N.W.2d 151, 154 (Iowa 1987); Doland v. Boone County, 376 N.W.2d 870, 872-73 (Iowa 1985).

Geldermann contends that the case at bar is similar to the facts in Grief v. K-Mart Corp., 404 N.W.2d 151 (Iowa 1987). In Grief, a tort action which was subject to a rule 215.1 dismissal was continued to March 12, 1985. 404 N.W.2d at 155. The case was not tried by that date, however, due to scheduling conflicts. Id. The Iowa Supreme Court held that since counsel had done nothing within six months from the March 12 trial date, the case was automatically dismissed when the continuance expired. Id. Geldermann argues that since the present case was neither tried or continued beyond the June 2, 1987, trial date, the present case must be automatically dismissed. We disagree.

In Dolezal Commodities v. City of Cedar Rapids, 387 N.W.2d 572, 574 (Iowa 1986), the case, which was subject to a rule 215.1 dismissal, was scheduled to be tried on December 14, 1984. The court could not hear the case by that date and had the court administrator reset the date of trial for February 13, 1985. Id. Following trial, the city airport commission appealed, alleging that the case should have been dismissed under rule 215.1. Id. The Iowa Supreme Court held that even though the case was not retried until after the try or dismiss period and no order of extension was obtained, the case was not automatically dismissed. Id. The court went on to hold that where the court, and through it the court administrator, had charge of the management of the case, the case would not be subject to automatic dismissal. Id. at 576.

We find that the holding in Dolezal is applicable to the facts of the present case. The district court, in its explanation to this court concerning the May 4, 1987, calendar entry, stated that at the time of the hearing it became evident that the case would have to be bifurcated in order to separate the difficult legal and equitable issues involved. The district court stated that when the court administrator was informed of the bifurcation decision, the court assumed that the administrator would reassign the bifurcated parts of the trial to a date after June 2, 1987. Therefore, as the supreme court concluded in Dolezal, the district court and the court administrator were in charge of the management of the present case, and it was not subject to automatic dismissal under rule 215.1.

II.

Geldermann next argues that the trial court erred in allowing the testimony of the Clingans' economist, Dr. Richard Stevenson, regarding future lost profits. Geldermann contends no proper foundation was ever admitted to permit submission of issues concerning loss of future earnings or future profits of the Clingans to the jury. Geldermann maintains the net result of the jury verdict, which it considers far in excess of the Clingans' claim of unpaid commissions, constitutes prima facie evidence of the prejudicial effect of such testimony.

Iowa adheres to a liberal policy concerning the admissibility of opinion testimony. State ex rel. Leas In Interest of O'Neal, 303 N.W.2d 414, 420 (Iowa 1981). Such evidence will be admitted if it is of a nature that will aid the jury and is based upon special training, experience or knowledge with respect to an issue in controversy. Id. The admissibility of opinion testimony rests in the sound discretion of the trial court, and the trial court's determination will not be disturbed on appeal unless manifest abuse of that discretion causing prejudice to the complaining party is shown. Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288 (Iowa 1979). A party wishing to introduce opinion testimony must show that the person is qualified as an expert who can render an opinion and must show sufficient facts in the record upon which an expert judgment can be made. Holmquist v. Volkswagen of America, Inc., 261 N.W.2d 516, 524 (Iowa 1977).

Geldermann apparently does not challenge the qualifications of Dr. Stevenson, but rather argues that there are not sufficient facts in the record to support the trial court's decision to allow Dr. Stevenson's testimony.

We disagree. The Clingans offered Dr. Stevenson's testimony to show lost profits under the theories of breach of contract, agency-subagency, and tortious conduct on the part of Geldermann. The Clingans claimed they were agents of Geldermann, or at minimum subagents, through Greater Iowa Futures. Consequently, the Clingans assert there were implied contractual obligations which arose from this relationship, including the payment of compensation for services rendered from Geldermann to the Clingans. Thus, the Clingans argued, the lack of payment forced them to ultimately close their offices and suffer loss of future profits. Geldermann argued there was no responsibility owed by it to the Clingans and that any contractual obligations were between the Clingans and Greater Iowa Futures.

We conclude a jury question was engendered as to whether there were any contractual obligations between Geldermann and the Clingans and find the trial court was correct in admitting the testimony offered by Dr. Stevenson, since lost profits may be recovered as consequential damages so long as the profits are not based on conjecture and speculation. See Mid-Country Meats v. Woodruff-Evans Const., 334 N.W.2d 332, 335 (Iowa App. 1983). Moreover, since the Clingans claimed they were owed approximately $11,000 in commissions and claimed over $400,000 in lost future profits, the jury's award of $15,000, does not in our opinion evidence any substantial prejudice towards Geldermann resulting in an unfair trial. We find no manifest abuse of discretion here.

III.

Geldermann next contends the trial court erred in instructing the jury on numerous issues, in failing to give the jury its requested instructions, and in failing to give proper instructions on the issues heard at trial. Specifically, Geldermann suggested seven supplements to the trial court's proposed list of jury instructions. Geldermann offered these supplements in an attempt to provide the jury with what it believed to be clear instructions on the meaning and consequences of foreseeability and the duty to mitigate damages. The other additional supplements concerned the law of Iowa regarding privity or the lack thereof among Geldermann, Greater Iowa Futures, and the Clingans.

Geldermann maintains had the trial court accepted the proposed jury instructions, the jury would have had a clear picture that any association or broker relationship resulting from a limited number of trades through Geldermann was solely through the Clingans' association with Greater Iowa Futures, and not through any separate obligation emanating from Geldermann to the Clingans. Geldermann in addition argues that its requested instructions on mitigation of damages would have shown the jury that the Clingans did virtually nothing to mitigate their damages and lost profits after November 1984, when the Clingans left their office and moved to a residential district.

An examination of the record reveals the trial court ordered that all requested instructions be filed by October 18, 1988. Geldermann failed, however, to submit any instructions to the trial court by the October 18, 1988, deadline, but did submit the above-described instructions on October 20, 1988, after all the evidence had been closed and just prior to final argument. The record reveals Geldermann did object to Instruction No. 5, the marshaling instruction, on the ground that it did not properly instruct on the issues as were tried to the jury. Geldermann, however, does not argue nor make reference to its objection to Instruction No. 5 in its brief. Geldermann made no objections to any other instruction proposed by the trial court, but merely submitted supplements to the court's instructions.

Under the record made, there is nothing before us for review as to these matters. Our courts have held that "[t]he court's failure to give a requested instruction saves no error in the absence of specific objection to such failure." Wong v. Waterloo Community School District, 232 N.W.2d 865, 868 (Iowa 1975); Iowa R. Civ. P. 196. Here, the record reveals only one specified objection to the proposed jury instructions. No other objections were made concerning the instructions throughout the remainder of the trial. Accordingly error, if any, is waived.

Geldermann next asserts the trial court erred in failing to sustain its motions for directed verdicts subsequent to the Clingans' resting of their case in chief, and upon close of all the evidence. Geldermann additionally contends the trial court erred in failing to sustain its motion for judgment notwithstanding the verdict. Geldermann contends there was not sufficient evidence in the record to support the jury's finding that a contractual or implied relationship existed between Geldermann and the Clingans. Geldermann maintains that even taking the evidence in a light most favorable to the Clingans, no evidence exits mandating a verdict in their favor.

Pursuant to Iowa Rule of Civil Procedure 243(b), the trial court may correct a possible error in failing to sustain a motion for directed verdict where the movant was entitled to a directed verdict at the close of all the evidence and moved therefor and the jury did not return such verdict. Meeker v. City of Clinton, 259 N.W.2d 822, 827 (Iowa 1977). In determining whether a jury question was engendered when a party seeks a directed verdict, dismissal, or judgment notwithstanding the verdict, the trial court views the evidence in the light most favorable to the party against whom the motion was made regardless of whether such evidence is contradicted, and every legitimate inference which may be reasonably deduced therefrom must be carried to the aid of the evidence, and if reasonable minds can differ on the issue, it is for the jury. Matter of Will of Pritchard, 443 N.W.2d 95, 97 (Iowa App. 1989). A mere scintilla of evidence is not sufficient to require denial of a motion for directed verdict. Oberreuter v. Orion Industries, Inc., 398 N.W.2d 206, 209 (Iowa App. 1986). Though circumstantial evidence is sufficient to engender a jury question, if it merely suggests "a possibility of negligence or shows negligence 'is in the air,'" such circumstantial evidence is insufficient to engender a jury question. Id.

Viewing the evidence in a light most favorable to the Clingans, we find sufficient evidence to generate a jury question on the issue of agency or subagency. The record reveals that Geldermann directly confirmed the trades placed by the Clingans on a daily basis. Geldermann had to approve all customers proposed by the Clingans and provided the Clingans with a large share of the forms used by the Clingans to transact business. The Clingans for almost two years placed trades through Geldermann for customers who had specific agreements with Geldermann concerning trades and commissions. The payment for commissions owed the Clingans were paid from Geldermann, though such payments were routed through Greater Iowa Futures before the Clingans actually received their money. Geldermann approved the appointment of the "associated persons" and approved their offices. Geldermann, through its parent company, additionally held the authority to conduct audits of the associated persons' business accounts. Geldermann additionally had general control over office procedures.

The vice-president of Geldermann, Jerome Vrabel, testified, however, that they only had a relationship with Greater Iowa Futures. Vrabel testified that they had no concern as to who they had to pay or what percentage of commission was to be paid to a particular broker. Thomas Tyler, a private attorney with considerable experience in litigation before the Commodity Futures Trading Commission and a member of the Chicago Board of Trade, testified that it is against federal regulations for an associated person to be an employee or agent of both the introducing broker, Greater Iowa Futures in this case, and the Future Commissions Merchant, in this case Geldermann. The record also reveals that Geldermann did not in any way fail to properly clear all transactions that were ultimately handled through Geldermann. There were no express contracts between Geldermann and the Clingans, but only through Greater Iowa Futures. Geldermann did not allow associated persons to use their letterhead, though the Clingans did use the letterhead for a period of time before they became aware of Geldermann's rule.

We believe that the above-outlined facts evidence more than a mere suspicion of an agency relationship between Geldermann and the Clingans. Whether or not such an agency relationship existed was for the jury to determine upon an examination of all the evidence, and having done so, the jury determined that Geldermann owed the Clingans for services rendered on its behalf. We decline to disturb the jury verdict on appeal.

We likewise reject Geldermann's argument that irregularities during the course of the trial prevented Geldermann from receiving a fair trial, based on our findings set forth above. We do address, however, Geldermann's claim that the jury award was excessive. The measure of damages recoverable for breach of contract is such amount as may reasonably be considered as arising naturally from the breach of contract itself, or as such as may reasonably be supposed to have been in the contemplation of the parties, at the time they made the contract. Cannon v. National By-Products, Inc., 422 N.W.2d 638, 641 (Iowa 1988). Precedents are of little value in determining the excessiveness of awards. Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973). In the present case the award was $15,000. The Clingans had claimed approximately $11,000 in commissions owed and over $400,000 in lost future commissions. We do not find the $15,000 award so shocking as to offend the sensibilities of this court and find it was well within the permissible range of the evidence.

AFFIRMED.