

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 29 1982

CLERK SUPREME COURT
Filed June 29, 1982

ROBERT ROSACKER,

)

Plaintiff-Appellee,

)

vs.

)

GALAXY HOMES, INC.

)

Defendant-Appellant.

)

1-404
2-66038

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Appeal from Dubuque District Court - Karl Kenline, Judge.

The defendant-corporation appeals from the judgment entered on a jury verdict which awarded plaintiff Rosacker \$190,000 for breach of an oral permanent employment contract. **AFFIRMED.**

Robert M. Bertsch and Chad C. Leitch of O'Connor, Thomas, Hammer, Bertsch & Norby, Dubuque, for defendant-appellant.

Donald R. Breitbach of Reynolds, Kenline, Breitbach, McCarthy, Clemens, McKay & Nigg, Dubuque, for plaintiff-appellee.

Heard en banc.

PER CURIAM

Defendant Galaxy Homes, Inc. appeals from the judgment entered against it upon a jury verdict awarding the plaintiff Robert Rosacker \$190,000 for defendant's breach of an oral contract with plaintiff for lifetime employment. Several issues are raised on appeal which we consider separately. Those facts which we deem necessary to a proper resolution of the legal claims presented are stated in our discussion of these various legal issues.

I. Motion for Directed Verdict. We first consider defendant's claim that the trial court should have sustained its motions for directed verdict and judgment notwithstanding the verdict. Because the former motion controls the extent to which the trial court could grant relief on the latter motion (see, e.g., Iowa R. Civ. P. 243; Northrup v. Miles Homes, Inc., 204 N.W.2d 850, 860 (Iowa 1973)) we consider only the grounds of the motion for directed verdict. Unlike other cases which have troubled the courts concerning alleged contracts for permanent or lifetime employment, the present case does not present an issue involving the rather stringent requirements placed upon the purported lifetime employee to establish independent consideration beyond the performance of services.¹ No contention was advanced in defendant's motion for directed verdict or in its present appellate argument that the requirement of independent consideration was not sufficiently established. Rather, the grounds of defendant's motion for directed verdict in the court below were as follows: (1) that the evidence was insufficient to permit a jury to find the required manifestation of mutual assent between the contracting parties on the issue of permanent employment; (2) that the evidence was insufficient to establish the terms of the alleged contract with sufficient particularity to permit enforcement thereof by a court; and (3) that the assent to the lifetime employment of plaintiff, if any such assent took place, was

¹ These principles have recently been reviewed by this court in Moody v. Bogue, 310 N.W.2d 655, 658-59 (Iowa Ct. App. 1981).

by the promoters of the defendant corporation prior to the corporation's existence and such promoters' contracts were never ratified by the corporation. On this appeal, defendant urges only the first two grounds listed above and we deem any issue involving the third ground to be waived.²

In reviewing defendant's arguments that its motion for directed verdict should have been sustained, we must of course view the evidence in the light most favorable to the plaintiff. Poulsen v. Russell, 300 N.W.2d 289, 294 (Iowa 1981). With respect to defendant's claim that the evidence was insufficient as a matter of law to permit a finding of mutual assent between the parties to lifetime employment for plaintiff, plaintiff's case rests almost entirely on his own testimony. If such testimony is believed the jury could find that in 1972 the plaintiff, Robert Hale, Thomas Greenwood, Michael Goodson, and Elmer Radabaugh, while employed by LCA Modular Enterprises of Guttenberg, Iowa, became concerned for their job security as a result of LCA's poor financial condition. These five persons, together with Loris Kickbush, discussed throughout the latter part of 1972 the forming of the defendant corporation as a means of establishing a new business to provide secure employment for these six individuals. These discussions led to the six persons named above forming the defendant corporation which came into existence on September 22, 1972. On October 20, 1972, plaintiff was discharged by LCA, when his superiors learned of his involvement in the planned new company.

Plaintiff thereafter became an officer and employee (sales manager) of the defendant corporation and continued to be employed there until May 26, 1978, when he was purportedly discharged by action of the board of directors. The resulting

² The conversations testified to by the plaintiff which form the basis for the alleged oral contract of permanent employment occurred with persons who caused the corporation to be formed and who constituted a majority of the initial board of directors of the corporation. The conversations occurred after the certificate of incorporation was issued on September 22, 1972, and after a preliminary meeting of stock subscribers had been held on October 16, 1972, wherein decisions were made by plaintiff and the other five principal incorporators as to a Small Business Administrator loan and other matters involving the securing of a plant site. It does appear, however, that these conversations occurred prior to the election of the initial officers and directors of the corporation

resolution of the board of directors which called for plaintiff's discharge specifically stated that said discharge was "without cause" other than being in the best interests of the corporation.

At the trial, plaintiff testified, in part, as follows:

Q. At any of these meetings, was there a discussion in regard to what position or job you would have with the corporation that had been formed, Galaxy Homes, Inc.?

A. We all had our assignments, assigned our positions on a permanent basis, one for some and some for one.

Q. What was your position with the new corporation to be?

A. Vice-President of Sales and Marketing.

Q. At that time, what was to be Mr. Hale's position with the corporation?

A. He was to be President.

Q. What about Thomas Greenwood? What was his position with the corporation?

A. He was to be Secretary-Treasurer.

Q. What about Elmer Radabaugh? What was his position with the company?

A. He was to be Vice-President of Production.

Q. Mike Goodson?

A. He was going to be Vice-President of Finance and Salesmen (sic).

Q. And Loris Kickbush? What was his position?

A. Vice-President of Purchasing.

Q. In connection with your working for the corporation, was there discussion as to the length of time or the time that your contract of employment was to run?

A. As long as the company was in existence we would be working for them.

Q. Was that same thing true of the other members of the group?

A. We agreed generally to the same standards on everybody in all the positions.

There was evidence from which the jury could have found that these discussions took place after September 22, 1972, and continued throughout the balance of that calendar year. All of the participants in these discussions except Hale thereafter went on to become officers and employees of the defendant corporation. Three of the six went on to become a majority of the initial five member board of directors of the defendant corporation.

Defendant contends that the foregoing evidence is insufficient to permit a finding that the defendant corporation intended to be bound to a contract of life time employment with the plaintiff. Mutual manifestation of assent to the same terms is an essential element of a contract. Services Employees International v. Cedar Rapids Community School District, 222 N.W.2d 403, 408 (Iowa 1974). But the test for determining assent is objective and depends upon what is expressed rather than undisclosed intentions. Industrial Products Manufacturing Co. v. Jewett Lumber Co., 185 F.2d 866 (8th Cir. 1951). We believe the jury could have found in the present case that there was an agreement among the six persons listed that each would have employment with the corporation which they intended to organize as long as the company was in existence. The jury could further have found that it was implicit in such agreement that action would be taken by those members of the group who became officers and directors of the corporation whereby their mutual agreement would become a corporate obligation. As previously stated certain members of the group became officers of the corporation who had authority to make a contract of this type. In addition, three of the six controlled the board of directors of the defendant corporation.

Subsequent to these persons becoming officers and directors of the company on or about January 18, 1973, the plaintiff not only undertook his employment as sales manager but also was called upon to personally guarantee corporate obligations under a 20-year lease and to personally guarantee a \$200,000

obligation of the defendant company to the Small Business Administration. Although it might be difficult to separate those actions undertaken by the plaintiff as an employee from those which were undertaken as an organizer and investor in the business, we note that the extent of plaintiff's ownership interest in the company was from its inception minimal. The jury could have found that plaintiff's hope for financial return from the business was as an employee rather than as an investor. Other stockholders who owned a far greater interest in the company either were not called upon or were unwilling to give personal guarantees of these corporate obligations. From this state of facts, the jury could have inferred that the personal guarantees of corporate indebtedness undertaken by the plaintiff were benefits received by the defendant corporation pursuant to plaintiff's reliance on the offer of life time employment.

Defendant relies strongly upon the decision in Lewis v. Minnesota Mutual Life Ins. Co., 240 Iowa 1249, 1257, 37 N.W.2d 316, 321 (1949) as precluding plaintiff's right of recovery as a matter of law. We find that the decisions in LaFontaine v. Developers & Builders, Inc., 261 Iowa 1177, 156 N.W.2d 651 (1968) and Thompson v. Miller, 251 Iowa 324, 100 N.W.2d 410 (1960) to be more analogous to the present situation wherein the employment is coupled with an interest in the business. Particularly under the principles stated in LaFontaine, 261 Iowa at 1183, 156 N.W.2d at 655-56, we find that the intention of the parties to contract for permanent employment was for the jury to be determined "not alone from the words used, but in the situation, acts, and conduct of the parties, and from their situation and the attending circumstances, and by the inferences which mankind would ordinarily and reasonably draw therefrom."

With respect to the other ground of the motion for directed verdict now urged on appeal, which suggests that the terms of the alleged agreement were too indefinite to permit the granting of any relief, we hold that the terms were sufficient to withstand a motion for directed verdict. Vagueness, indefiniteness,

and uncertainty are matters of degree. The terms of a contract are sufficiently definite if the record provides the basis for determining the existence of a breach and an appropriate remedy. Palmer v. Albert, 310 N.W.2d 169, 172 (Iowa 1981). We find that the evidence was sufficient to permit the jury to make both of these determinations in the present case. This matter is discussed further below incident to defendant's assignment of error relating to damages. The trial court properly denied the motion for directed verdict on the grounds urged.

II. Dismissal for Cause. Next, we consider defendant's argument that even if there exists a contract with plaintiff for life time employment, he was properly discharged for cause. This issue was submitted to the jury and its verdict reflects a finding that the discharge was not for cause. Defendant may therefore prevail on this issue only if it appears as a matter of law that the discharge was for cause. The cause for discharge relied upon by the defendant includes (a) the writing of orders for less than established dealer prices, and (b) the keeping by plaintiff of a loaded gun in his office. Plaintiff offered explanations for this conduct which, when coupled with the corporate resolution of defendant stating that the discharge was "without cause" made this issue one for the jury.

III. Invalidity of a Lifetime Contract for Corporate Office. Next, defendant contends that the verdict and judgment are improper as establishing an illegal contract to perpetuate an individual as a corporate officer. We conclude that this contention is without foundation as the evidence reflects that plaintiff's contract, if any, was as a sales manager-employee rather than as a corporate officer. We therefore find no factual basis for the ground now urged.

IV. Requested Instructions. We next consider defendant's assignment of error based upon the failure to give certain requested instructions. These requested instructions include proposed instruction 18 relating to the degree of "definiteness" required for contracts of permanent employment and proposed instructions 9 and 10. With respect to proposed instruction 18 we believe that the

requirement of definiteness for purposes of permanent employment contracts is satisfied if the jury finds by a preponderance of the evidence that the terms of a contract authorized or ratified by the defendant corporation granted the plaintiff permanent or lifetime employment. See LaFontaine at 261 Iowa at 1183, 156 N.W.2d at 655-56. The trial court's instruction 11 required the jury to make this finding. To the extent defendant's proposed instruction 18 suggests that a greater showing was required it was properly refused.

Proposed instruction 9 seeks to inform the jury that certain acts do not give rise to a cause of action for breach of contract. Trial courts are only required to instruct the jury as to what acts are essential to recovery and need not negate in the instructions all of those situations which do not give rise to a cause of action. There was no error in refusing to give requested instruction 9.

Defendant's requested instruction 10 asked the court to instruct that in the absence of contractual rights on the part of an employee, the board of directors may terminate an employee without cause. Because the trial court's instructions required a finding by the jury that plaintiff did have a contract in order to permit recovery it was not necessary to instruct as to the defendant's rights in the absence of contract. There was no error in refusing to give any of the requested instructions.

V. Excessive Damages. Defendant also contends that the damages awarded by the jury were excessive. We consider this issue in conjunction with defendant's other argument that the terms of plaintiff's contract were too indefinite to permit the granting of any relief by a court. We believe that the jury could find from the evidence of plaintiff's prior years' salaries and bonuses paid by defendant what sum would represent a reasonable potential for future earnings. It could also find that the financial health of the defendant corporation was good, that management was sound and efficient, and that future success was probable although not assured. From all of these potential findings and the reasonable inferences to be drawn therefrom the verdict finds support in the evidence and is not excessive.

VI. Jury Misconduct. Finally, we consider defendant's claim of jury misconduct based upon a juror's affidavit stating the basis upon which the finding of liability was made which formed the basis for the jury's verdict. Based upon the principles reviewed in Harris v. Deere & Co., 263 N.W.2d 727, 729-30 (Iowa 1978) we believe the matters complained of inhere in the verdict and therefore may not be made the basis for a new trial. We have considered all issues presented and find no ground which requires reversal.

AFFIRMED.