FILED
APR 28 1978
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

NORMAN SLUIS d/b/a TUCKERS TRUCK & EQUIPMENT,

Appellant,

vs.

CARL BURKHART d/b/a CONTRACTOR'S ASSOC.,

Appellee.

Filed April 28, 1978

438
2-60375

Appeal from Polk District Court - Theodore H. Miller, Judge.

Plaintiff appeals award of damages to defendant on his counterclaim that plaintiff's refusal to resell a crane violated the repurchase option of their original contract of sale. - Affirmed.

Alfredo G. Parrish, Des Moines, for Appellant.

Heard by Allbee, C.J., and Donielson, Snell, Oxberger and Carter, JJ.

PER CURIAM

Plaintiff Norman Sluis appeals the trial court's granting of defendant Carl Burkhart's counterclaim for damages for Sluis' refusal to resell a crane to Burkhart in violation of a repurchase option in the original contract of sale. We affirm.

The controversy focuses upon a repurchase option clause added by Burkhart to the handwritten memorandum of sale with rental option signed by Sluis and Burkhart. Burkhart testified the repurchase option was initialled and acquiesced in by Sluis in order to secure the sale. Sluis at trial denied such acceptance.

Sluis attacks the trial court ruling on the ground that the photostatic copy of the option agreement introduced by Burkhart was not the best evidence of the contract and the absence of the original was not satisfactorily explained. Burkhart, upon Sluis' objection to the introduction of the photostatic copy, testified he did not know where the original writing was, that is was apparently "mislaid" in the files of one of the attorneys previously handling the case. Sluis argues since custody of primary evidence in Lende v. Ferguson, 237 Iowa 738, 23 N.W.2d 824 (1946) was traced to the party's own counsel and no reason or explanation was given for its non-production, the supreme court ruled the secondary evidence inadmissible. He contends Lende applied to the instant case requires reversal. In Lende the court was careful to note "absolutely no testimony" was received as to loss or destruction of the alleged written agreement. We believe Burkhart's testimony was sufficient to allow the trial court within its discretion to admit the copy. See Brintall v. Professional Investors of Iowa, Inc., 218 N.W.2d 453, 456 (Iowa 1974).

The supreme court has subsequently indicated the rule of best evidence of Lende has its underlying purpose in the prevention of fraud. U.S. Homes Inc. v. Yates, 174 N.W.2d 402 (Iowa 1970). Both parties were before the court and subjected to full cross-examination. The record at trial fully developed Slius' claim that the most he agreed to was a rental option. At trial both parties agreed the impetus for the original sale was Burkhart's need for money. The record indicates that the $1250 consideration for the original sale was well below the crane's market value, that Burkhart tendered $1600 to Sluis to repurchase the crane and to pay off

a parts bill, that the respective business demands for use of the crane indicated Sluis needed the machine in the fall at the time of sale and Burkhart needed it in the spring when he attempted the repurchase. Viewing this evidence in the light most favorable to the judgment, whether contradicted or not, see Farmers Insurance Group v. Merryweather, 214 N.W.2d 184, 186 (Iowa 1974), we are convinced the trial court could find the most consistent view of all the evidence was that the buy-back possibility was a condition to the original sale bargained for by the parties.

AFFIRMED.