FILED
OCT 23 1984
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LENA KELLENBERGER ESTATE, ET AL.,)

Plaintiffs-Appellees,) Filed October 23, 1984 312

vs.)

ERNEST KELLENBERGER,) 4-323
83-1320

Defendant-Appellant.)

Appeal from the Iowa District Court for Lyon County - Charles H. Barlow, Judge.

Defendant appeals from an order denying his petition to vacate judgment in a partition action. AFFIRMED.

Terry W. Guinan, Fort Dodge, Iowa, for defendant-appellant.

James Furey, Carroll, Iowa, and Tom N. McGill, Rock Valley, Iowa, for plaintiffs-appellees.

Heard by Oxberger, C.J., Snell, and Hayden, JJ.

his brother received more help from their parents during their lifetime than did defendant, and his sisters divided some household goods between them after their mother's death.

Defendant's counsel withdrew and defendant retained Leighton Wederath to represent him. On April 29, 1983, Wederath met with the attorney for the plaintiffs and Judge Underwood. At the request of both counsel, the judge signed a decree of partition and Wederath was appointed refereee. Defendant claims that the partition decree was entered into without his consent. He maintains that Wederath assured him that the partition could be postponed and that defendant would be able to farm the land. Wederath testified that he informed defendant of the partition decree before it was signed and denied telling defendant that he could prevent the partition or that defendant could farm the land.

The trial court found that defendant had not shown, by even a preponderance of the evidence, that Wederath acted without his authority. We find no grounds on which to reverse the trial court. The issue is basically one of credibility and the trial court is in a much better position to evaluate the credibility of witnesses than are we. The trial court patiently allowed defendant, appearing pro se, to present his evidence, most of which was irrelevant. Even witnesses testifying on defendant's behalf at times disagreed with his recollection of conversations and events.

Since there is substantial evidence to support the trial court's findings of fact and we find no evidence that the trial court applied an incorrect legal standard, the decision of the trial court is affirmed.

AFFIRMED.

PER CURIAM

Defendant appeals from an order denying his petition to vacate judgment in a partition action. He asserts that the evidence was sufficient to establish that the partition decree was procurred by extrinsic fraud and that the trial court applied an incorrect legal standard in determining that there was no fraud.

This matter was tried as an application to set aside a judgment under Iowa Rule of Civil Procedure 252(b). Our review of a trial court adjudication under rule 252 is on assigned errors, and not de novo. Mishler v. Stouwie, 301 N.W.2d 744, 747 (Iowa 1981). The trial court's findings of fact have the effect of a jury verdict and are binding on us if supported by substantial evidence. Id. The trial court has considerable discretion in deciding whether to grant relief when vacation of a judgment is sought. We are more reluctant to find an abuse of discretion when relief has been granted than when it has been denied. Id.

Under rule 252(b) a court may modify or vacate a final judgment on the grounds of "irregularity or fraud practiced in obtaining the same." Where fraud is asserted as the ground for vacating a judgment it must be extrinsic fraud. Miller v. AMF Harley-Davidson Motor Co., 328 N.W.2d 348, 353 (Iowa Ct. App. 1982). The allegations of fraud must be supported by clear, unequivocal, and convincing evidence. Id.

The present case arises from a family dispute in trying to settle the estate of Lena Kellenberger. The estate and six beneficiaries under the will filed suit for partition against defendant, the seventh beneficiary and a brother of the individual plaintiffs, alleging that the beneficiaries had been unable to agree upon disposition of the family farm. Defendant's answer admitted that the parties had been unable to agree upon a sale or division of the property, but denied allegations as to ownership. It appears from the evidence presented at the hearing to vacate the judgment that defendant's only defense to the partition action was his personal belief that he should receive the farm, contrary to the terms of the will, because