



IN THE COURT OF APPEALS OF IOWA

TOM DUKE,	)	
Plaintiff-Appellant,	)	Filed March 26, 1985
vs.	)	
ROBERT BOESCH, d/b/a HARRY'S,	)	<u>5-26</u>
Defendant-Appellee.	)	84-399

Appeal from the Iowa District Court for Monroe County - James P. Rielly,
Judge.

The parties were formerly business partners. According to the agreement dissolving their partnership, the defendant was to pay the plaintiff half of the profits for a specified year from an enterprise retained by the defendant. The defendant made no such payment, alleging that the enterprise showed no profit for the year in question. The plaintiff filed a petition for an accounting. The trial court concluded the defendant had established that the enterprise showed no profit for the year in question. The plaintiff has appealed, contending the evidence does not support the trial court's conclusion. AFFIRMED.

Jeffrey G. Flagg of Flagg, Hockett, Benhart & Jennett, Des Moines, for
plaintiff-appellant.

Thomas L. Anders, Centerville, for defendant-appellee.

Heard by Donielson, P.J., and Snell and Schlegel, JJ.

PER CURIAM

Thomas Duke and Robert Boesch were formerly partners in two business enterprises. In 1982, they dissolved their partnership. According to the terms of the agreement dissolving the partnership, Duke was to receive one of the business enterprises and Boesch the other. Since the business received by Boesch ("Harry's") was somewhat more valuable than the business received by Duke, the parties agreed that Boesch would make a cash payment to Duke; the cash payment was to include half the profits from Harry's for a period of one year.

Boesch did not include in his cash payment to Duke any amount for profits from Harry's for the year in question. He alleged that Harry's did not show a profit for the year. Duke, unsatisfied, filed the present petition for an accounting. At trial each side introduced testimony from an accountant regarding the profitability of Harry's.

The trial court concluded Boesch had established that Harry's did not show a profit for the year in question. The trial court therefore dismissed Duke's petition for an accounting. Duke has appealed, contending the evidence does not support the trial court's conclusion.

The sole issue on appeal is whether Harry's, the business which Boesch received when the partnership was dissolved, showed a profit during the year commencing March 1, 1981 and ending February 28, 1982.

This case was tried in equity and our review is de novo. Iowa R. App. P. 4. While we are not bound by the trial court's findings, we give weight to them, particularly with regard to the credibility of the witnesses. Iowa R. App. P. 14(f)(7); Recker v. Gustafson, 279 N.W.2d 744, 748 (Iowa 1979).

The controversy in this action stems from paragraph 7 of the contract dissolving the partnership, which provides:

The remaining portion of the payment due from Bob Boesch to Thomas Duke shall be determined in accordance with the following:

(a) Net profits from the business known as "Harry's" to be determined by generally accepted accounting practices and limited to profits on kitchen cabinets, woodburning stoves, and accessories that go with these; as this is the extent of merchandise handled at the time of partnership.

(b) From said net profits shall be deducted a salary to Bob Boesch in the amount of \$18,000.

(c) No deduction shall be made for improvements to the building located upon the real estate described in this contract unless the parties agree thereto in writing.

(d) The net profits shall be computed for the fiscal year beginning March 1, 1981 and ending February 28, 1982.

(e) Bob Boesch shall on or before April 1, 1982 pay Thomas Duke one-half of the profits as above defined. Upon such payment, this contract shall be considered completed in full and Thomas Duke and Dianna Duke convey by warranty deed the real estate described herein as required in the contract.

Prior to commencing this action for an accounting, the parties sought the help of third parties to perform a compilation of the profit or loss of the business. When Boesch first told Duke that there was no net profit for the year in question, Duke asked that Donald Carr, a local C.P.A. who had done work for the partnership before, to perform a compilation. Carr's initial compilation, based on Boesch's records, showed that the company had a net income of \$8,436. This figure did not take into consideration the \$18,000 salary which Boesch was to receive under paragraph 7.

The parties, still not satisfied, then sought the help of two of the members of the church which the parties attended. This avenue again produced no solution to the dispute. The parties then approached Brian Flagg, a C.P.A. in Des Moines. Boesch went to Flagg and gave him all of the records. Mr. Flagg is the brother of Duke's attorney, Jeffrey Flagg.

The first compilation Flagg performed, based solely on the records that defendant Boesch gave him, showed that the business had sustained a minor net loss without taking into consideration the \$18,000 salary which Boesch was to

receive. Flagg then spoke with Mrs. Duke and performed a second compilation based on her information. That compilation showed a minor profit of five or six thousand dollars. In his role as Duke's attorney, Flagg performed a final compilation after receiving more information from Mrs. Duke and determined that the business had a net income of \$18,114 after deducting the \$18,000 salary that Boesch was to receive. Carr, who was ultimately employed as Boesch's C.P.A., performed a final compilation showing a net loss of \$21,581. Both Carr and Flagg appeared as expert witnesses for their respective parties and testified as to their final conclusions of the value of Harry's.

While the parties dispute several minor differences such as the amount of vacation the Boesch's took during the year and the percent of the business property that was used for personal matters, the primary area of dispute stems from several sales for which partial work was done but payment had not been received. Duke's C.P.A., Brian Flagg, included the money to be received from these sales in determining the amount of sales on the theory that since most of the work had been done the money should be included.

Although the record does not specifically state whether the business used a cash or accrual system, the business records introduced as evidence and the statements during oral arguments indicate that this business was operated on a cash rather than accrual basis. Thus, the inclusion of money not received would be improper. In addition, Boesch testified that there was some question of whether he would ever actually be paid for those items. We find, therefore, that the estimated money to be received from these sales should not have been included.

After considering the entire record, we conclude that the trial court correctly determined that the business showed a minor profit without taking into consideration the \$18,000 salary to be paid to Boesch and a net loss when this salary is taken into consideration.

The findings of the trial court are affirmed and the petition for an accounting is dismissed.

AFFIRMED.