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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

FIRST NATIONAL BANK IN LENOX,	)	
Plaintiff-Appellee,	)	Filed September 6, 1984 87
vs.	)	
DR. WM. BURL ROUDYBUSH,	)	4-278 / 83-881
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Muscatine County - James E. Kelley, Judge.

Defendant appeals from a judgment for plaintiff on a promissory note. AFFIRMED.

Garry D. Woodward, Des Moines, Iowa, for defendant-appellant.

John R. Sandre, Richard O. McConville, and Pamela D. Griebel of Scalise, Scism, Sandre & Uhl, Des Moines, Iowa, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from a judgment for plaintiff on a promissory note. He contends that the trial court erred in excluding the testimony of two of his witnesses for his failure to comply with a pretrial order requiring an exchange of witness lists between the parties. Defendant also claims the trial court erred in denying his motion for new trial on the grounds of newly discovered evidence. We affirm.

Defendant executed a promissory note in the amount of $30,000 in favor of the plaintiff bank on June 30, 1979. This note represented a renewal of a prior obligation to the bank. Plaintiff instituted the present suit after defendant's default. Although defendant does not appear on the face of the note to have been a cosigner or surety, such contentions, plus lack of consideration, were his defenses at trial.

Defendant was initially represented by Des Moines attorney James Cook and Greenfield attorney C. W. Carlberg. On February 10, 1982, the trial court entered an order setting April 12 as the deadline for both parties to present their exhibits and witness lists. The case was set for trial on May 4. On February 16 Cook withdrew as defendant's attorney and on April 29 Carlberg withdrew claiming a conflict of interest. The trial court granted defendant's present counsel, Garry Woodward, a continuance and scheduled the trial for August 11. At trial plaintiff moved to exclude testimony by any of defendant's witnesses because of defendant's failure to provide plaintiff with a list of witnesses as required by the pretrial order. The motion to exclude witnesses was granted with the exception that defendant himself was allowed to testify. Defendant produced two additional witnesses, his brother, Earl Roudybush, and Gary McKinney, and made an offer of proof.

Subsequent to trial defendant made a motion for new trial on the grounds of newly discovered evidence. The motion was denied because since the evidence was in the file of one of the attorneys who previously represented defendant, it was not newly discovered evidence.

Our review of this action at law is on assigned error. Iowa R. App. P. 4.

I. Exclusion of Witnesses. Defendant claims that the trial court's order requiring an exchange of witness lists was illegal under Iowa Rule of Civil Procedure 139 and, therefore, the court had no right to enforce the order with sanctions. Additionally, defendant argues, even if the court had the authority to impose a sanction, it abused its discretion in selecting such a severe one.

At the time this case was before the district court, Iowa Rule of Civil Procedure 139 provided:

> The court shall not, under any pretrial procedure or other rules, require a party to list or name the witnesses he expects to call to testify at the trial.

The rule was subsequently stricken by order of the supreme court on January 14, 1983. Although the trial court's actions in this case seem to contradict the express language of the rule, we do not agree with defendant's position that the pretrial order was illegal. There is evidence in the record that counsel for the parties agreed to exchange witness lists and requested the trial court to set a deadline for the exchange. Such an agreement would, of course, be advantageous to both paties as a substitute for other forms of discovery. Plaintiff sent a list of its witnesses to defendant. Allowing defendant to later challenge the order it requested and agreed to would place plaintiff at an unfair disadvantage. Consequently, we believe that although the trial court could not have sua sponte or ex parte ordered an exchange of witness lists, it was free to make such an order at the request of counsel for both parties. Defendant's present counsel as successor attorney is bound by this agreement entered into by defendant's previous attorney. Therefore, we need not consider and express no opinion concerning plaintiff's argument that the striking of rule 139 should operate retroactively and apply to this case.

Since the trial court had the authority to set a deadline for an exchange of witness lists, it also had the authority to enforce that order. A trial court has the inherent ability to enforce pretrial orders with appropriate sanctions, including the exclusion of testimony. Rowen v. Le Mars Mutual Insurance Co., 282 N.W.2d 639, 646 (Iowa 1979); In re Smith's Will, 245 Iowa 38, 45-46, 60 N.W.2d 866, 870-71 (1953). The imposition of sanctions is discretionary and will not be reversed unless there has been an abuse of discretion. Sullivan v. Chicago and Northwestern Transportation Co., 326 N.W.2d 320, 324 (Iowa 1982). The supreme court has been slow to find an abuse of the trial court's discretion in imposing discovery sanctions. Id. Although the present case does not involve a discovery sanction per se, the situation is analogous. See Fox v. Stanley J. How and Associates, Inc., 309 N.W.2d 520, 522 (Iowa Ct. App. 1981).

In Fox, this court held that the trial court abused its discretion by excluding evidence to enforce its pretrial order. At a deposition of an expert witness defendant's attorney requested that the deposition be continued indefinitely to allow the expert more time to reach a conclusion. Then at trial defendant's attorney attempted to exclude the unfavorable conclusion reached by the expert on the grounds that it was reached after the discovery closing date. We held that defendant's own conduct made the sanction of exclusion of testimony inappropriate. Id.

In the present case we cannot say there has been a clear abuse of discretion. Plaintiff has done nothing which would render the sanction imposed inappropriate. Furthermore, we are not persuaded by defendant's present counsel's problems in obtaining a complete file of the case. The April 12 deadline for exchanging witness lists had passed before Woodward became involved in the case.

II. Motion for New Trial. In order to obtain a new trial on the basis of newly discovered evidence pursuant to Iowa Rule of Civil Procedure 244(g), the movant must satisfy each of the following requirements:

(1) the evidence was discovered following trial;

(2) the evidence was such that it could not have been discovered before the conclusion of the trial in the exercise of diligence;

(3) the evidence must be material and not merely cumulative or impeaching; and

(4) such evidence would probably change the result if a new trial were granted.

Miller v. AMF Harley-Davidson Motor Co., Inc., 328 N.W.2d 348, 353 (Iowa Ct. App. 1982). In ruling upon motions for new trial the trial court has broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3). The granting of a new trial on the grounds of newly discovered evidence is not favored and will be closely scrutinized. Vanden Berg v. Wolfe, 196 N.W.2d 420, 422 (Iowa 1972).

The evidence in question in this case consists of seven documents: one bank ledger sheet, four letters from plaintiff to defendant, and two letters from defendant to plaintiff. The trial court found that this evidence was not newly discovered since it was provided by plaintiff to defendant on two occasions prior to trial and was at all times in the files of one of defendant's prior attorneys. We agree with the trial court's decision to deny the motion for new trial. It is obvious that the documents were discovered by defendant's prior attorneys before trial. Although defendant's present attorney may not have been aware of the documents prior to trial, he could have been by the exercise of due diligence. The record shows that he did not consult one of defendant's prior attorneys until after the trial and that the documents were found in the files of that attorney. Therefore, defendant cannot meet the requirements necessary to entitle him to a new trial.

AFFIRMED.