IN THE COURT OF APPEALS OF IOWA

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CLERK SUPREME COURT

LLOYD E. HUMPHREYS,)
Plaintiff-Appellant,)
vs.)
KARL D. BRINER,)
Defendant-Appellee.)

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87-442

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Appeal from the Iowa District Court for Linn County (No. 9855) - Van D. Zimmer, Judge.

Plaintiff appealed following a judgment for defendant in plaintiff's action to recover on two promissory notes. **AFFIRMED.**

Lloyd E. Humphreys, Cedar Rapids, plaintiff-appellant, pro se.

William L. Meardon, of Meardon, Sueppel, Downer & Hayes, Iowa City, for the defendant-appellee.

Heard by Oxberger, C.J., and Donielson and Schlegel, JJ.

OXBERGER, C.J.

The plaintiff, Lloyd Humphreys, is a lawyer who owns and operates a law firm in Cedar Rapids, Iowa. The defendant, Karl Briner, is a lawyer who was associated with Humphreys as an independent contractor from September 1978 to December 1980. While the parties were associated, Briner received certain payments from Humphreys which were clearly compensation and other payments whose nature is now disputed. Briner contends these disputed payments were either bonuses or advance draws on future earnings, and were therefore compensation. Humphreys contends the disputed payments were loans.

After Briner terminated his association with Humphreys, Humphreys filed the present suit seeking repayment of the alleged loans. Briner filed an answer asserting that the disputed sums were compensation; Briner also filed a counterclaim asserting that Humphreys owes him still more compensation.

The appellant Humphreys presents three issues on appeal: (1) whether the trial court erred in denying a jury trial on the original petition at law and transferring the entire case to the equity docket; (2) whether the evidence supports the judgment of the trial court; and (3) whether the court erred in refusing to grant a motion for new trial and a motion to modify findings and decree. Briner does not cross-appeal as to additional

compensation. As the case was in equity our review is de novo. We will give weight to the findings of fact of the trial court especially when considering the credibility of witnesses. We affirm.

First, plaintiff contests the trial court's action in denying a jury trial and in transferring the case to equity upon defendant's motion. Rule 177 of the Iowa Rules of Civil Procedure provides "Jury trial is waived if not demanded according to this rule . . . ." Iowa R. Civ. P. 177(a). Rule 177 further provides:

> A party desiring a jury trial of an issue must make written demand therefor by filing a separate instrument clearly designating such demand not later than ten days after the last pleading directed to that issue.

Iowa R. Civ. P. 177(b).

Plaintiff filed his jury demand together with an Amended and Substituted Petition. Plaintiff filed this petition after defendant's responsive pleading but failed to obtain leave of court as required by Iowa Rule of Civil Procedure 88. Since the plaintiff's Amended and Substituted Petition was not properly filed and plaintiff's jury demand was filed forty-four days after his petition, plaintiff effectively waived his right to a jury trial. The granting or denial of a jury trial belatedly sought under the rules rests within the discretion of the trial court. Federal Deposit Ins. Corp. v. Nat'l Surety Corp., 281 N.W.2d 816, 818 (Iowa 1979). We find the trial court

acted within its discretion in denying plaintiff's demand for a jury trial.

A court of equity will not withdraw the litigation from a law court unless it clearly appears that such a course is necessary, in order that complete justice may be done. Brown v. Conway, 201 Iowa 117, 118, 206 N.W. 665, 666 (1926) (citing Mayo v. Halley, 124 Iowa 675, 100 N.W. 529 (1904)). Defendant Briner moved to transfer the case to the equity docket for a number of reasons: because it involved an accounting; because the controversy between the two parties was composed of complicated details over a period of two years; because the relationship was of a fiduciary nature; and all transactions involved attorney-client relationship. We find the trial court properly granted defendant's request to transfer the case to the equity docket.

Second, plaintiff contends that the evidence which was presented at trial does not support the findings of fact and conclusions of law of the trial court. Plaintiff brought this action to recover on two promissory notes: May 1, 1980 for $3,500 and June 28, 1980 for $6,000. Defendant did not dispute that these amounts were advanced to him but contends that $2,000 was a bonus and $7,500 was an advance against future accounting.

The original agreement between the parties provided that Briner would be paid $10 per hour for all hourly work performed by him at Humphreys' direction. He was to be paid fifty percent of this sum on the fifteenth and thirtieth of each month. He would be paid the remaining fifty percent when the client paid. Briner was to contribute toward the firm's expenses a minimum of $450 per month. Also pursuant to the agreement, Briner was to be advanced $650 per month as an advance draw which would later be reimbursed from fees earned by him. This agreement was later orally modified to provide for an increase in the hourly rate from $10 to $15 per hour and an increase in monthly draw from $650 to $1,000. Other modifications concerning compensation are disputed.

Each party testified that there was no accounting due to some fault of the other. Humphreys claims that Briner did not turn in his time statements regularly. Briner asserts that extensive time records were given but no accounting was ever given. Further, that Humphreys' accounting which was presented at trial was prepared solely for that purpose.

Testimony at trial revealed that the promissory notes submitted by Humphreys were signed by Briner in blank as acknowledgments for bookkeeping purposes of the total disbursement received by him. Evidence further revealed that Humphreys inserted on the promissory notes the words

"on demand," added the dates for first payment, and specified an interest rate after they were signed. These changes were made without Briner's consent. Further, both parties testified that the word "loan" was inserted by Humphreys after the May 1980 check was written. Iowa Code section 554.3407(b) and (c) provide that an alteration of an instrument which completes an instrument other than authorized or by adding to it constitutes a material alteration. Iowa Code § 554.3407(b) and (c) (1987).

Evidence of the parties' tax treatment of these sums is also relevant. Briner testified that he declared $14,000 as his taxable income for 1980 ($12,000 in monthly draws plus $2,000 in extra advances as bonuses). He held the additional $7,500 advanced to him as an accrual item subject to future accounting. Humphreys deducted the entire $21,500 as a current business expense against his 1980 income. This evidence supports a finding that this sum was not treated as a loan.

Courts of equity will scrutinize, with jealous vigilance, and will require the dominating party to a confidential relationship to conduct himself in his dealings with the other with the utmost good faith. Dibel v. Meredith, 233 Iowa 545, 551, 10 N.W.2d 28, 31 (1943). Facts relevant to Humphrey's good faith include: his refusal to submit his tax returns to Briner when subpoenaed; his failure to keep a proper accounting of

these transactions; and his actions in offsetting Briner's wife's clerking salary received while employed by Humphreys against Karl Briner's credits without his consent.

The question before us as to the nature of these payments is a question of fact. The burden was upon the appellant Humphreys to prove the allegations of his petition. See Economy Co. v. Honett, 228 Iowa 559, 292 N.W. 825 (1940). The evidence presented at trial, both of documents and testimony of each party, is inconsistent. The trial court who had the witnesses before it, and after listening to the evidence and examining the exhibits came to the conclusion that the plaintiff had failed to prove his case. After examining the record, we are convinced that the trial court was correct.

We also find that the record supports the trial court's denial of defendant's recovery against plaintiff in excess of the amount of the promissory notes in question. Defendant contends that he has an estimated $26,075 worth of credit for work performed. This total includes: 100% credit for court-appointed cases at $3,500 credit; 100% credit for state-paid court-appointed cases at $1,680; 78 hours at $15 per hour of cases appointed to Humphreys where work was done by Briner for a credit of $1,170; 100% credit for Briner's own clients at $3,925; 294 hours of personal legal work done for Humphreys at $15 per hour at $4,410 credit; $2,000 in fee credit on contingent fee cases; and

550 hours at $15 per hour for work done for Humphreys' clients at a fee credit of $8,250; and $1,080 for work performed after January 1981 at $45 per hour. Plaintiff disputes that many of the clients that Briner claims to be his own actually are and further disputes some of the modifications as they relate to the form of compensation. Our de novo review of the record finds agreement with the trial court that the defendant is entitled to a credit for services performed during his association with the plaintiff in amount at least equal to the sums advanced by the plaintiff to the defendant during May and June of 1980.

Plaintiff also challenges the trial court's rulings in denying the motion for a new trial and motion to modify findings and decree. We find evidence to support the trial court's findings and we find no error in the trial court's denial of a motion to modify findings and decree under Iowa Rule of Civil Procedure 179(b).

Rule 244 provides the standard for a new trial. I. R. Civ. P. 244. A new trial may be granted for a cause specified in the rule but only if it materially affected the substantial rights of the party. Id. Plaintiffs' motion for a new trial is filed under I. R. Civ. P. 244(e), (f), and (h). Section (e) provides that a new trial may be granted for error in fixing the amount of the recovery, whether too large or too small, in an action upon contract

for injury to or detention of property. I. R. Civ. P. 244(e). Plaintiff claims the evidence at the trial court clearly establishes the nature of the funds at issue. We find the trial court properly denied the motion for a new trial on this ground. Section (f) provides that a new trial may be granted if the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. I. R. Civ. P. 244(f). Section (h) provides that a new trial may be granted for errors of law occurring in the proceedings, or mistakes of fact by the court. I. R. Civ. P. 244(h). Plaintiff does not indicate specifically errors of fact and law made at the trial court but generally asserts that the trial court failed to weigh the evidence appropriately. As we find sufficient evidence in the record to support the trial court judgment and fail to find errors of law or mistakes of fact, we find no abuse of discretion in the trial court's denial of plaintiff's motion for a new trial pursuant to sections (f) and (h).

AFFIRMED.