IN THE COURT OF APPEALS OF IOWA

Filed August 27, 1986

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6-150
85-913

BILL KANZMEIER,	)	
Plaintiff-Appellee,	)	
vs.	)	
CHARLES McCOPPIN,	)	
Defendant-Appellant.	)	

Appeal from the Iowa District Court for Montgomery County (6613) - J. C. Irvin, Judge.

Defendant appeals from a judgment granting the plaintiff damages for the breach of an oral contract. **REVERSED.**

John K. Petersen, Red Oak, Iowa, and Philip C. Armknecht of Reese & Armknecht, Red Oak, Iowa, for defendant-appellant.

Arthur A. Neu of Minnich & Neu, Carroll, Iowa, for plaintiff-appellee.

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

HAYDEN, J.

Defendant appeals from a judgment granting plaintiff damages for breach of an oral contract.

We consider two of the errors that defendant contends the trial court committed: the finding that a valid contract existed between plaintiff and defendant, and the finding that an agency relationship existed between plaintiff and the cattle buyer.

The plaintiff has moved to dismiss the appeal asserting that the motion to reconsider was not a proper posttrial motion to extend the time for taking an appeal and thereby making defendants' notice of appeal untimely. We reverse.

I.

Initially, we address the question of whether appellant filed his notice of appeal within the thirty-day period provided for in Iowa Rule of Appellate Procedure 5(a). On March 15, 1985, the trial court filed its decision. Appellant filed his Motion to Reconsider on March 25, 1985, and the court overruled such motion on May 28, 1985. Appellant filed his Notice of Appeal on June 20, 1985.

"Appeals to the supreme court must be taken within and not after thirty days from the entry of the order, judgment or decree, unless . . . a motion as provided in R.C.P. 179"b" is filed, and then within thirty days after the entry of the ruling on such motion. . . ." Iowa R. App. P. 5(a).

To be a Rule 179"b" motion, the court must have tried the case without a jury. This motion allows the amending or enlargement of both the findings of fact and the conclusions of law. Suckow v. Boone State Bank and Trust Co., 314 N.W.2d 421, 422 (Iowa 1982).

In the present case the trial court heard the case without a jury and defendant's motion questions not only the facts involved but also the court's conclusion. Furthermore, we recognize that although the rule allows only enlargement or amending, this motion has commonly been called a motion to reconsider. See Sykes v. Iowa Power and Light Co., 263 N.W.2d 551, 553 (Iowa 1978).

Defendant's Motion to Reconsider is a proper 179"b" motion. The trial court ruled on this motion on May 28, 1985, and defendant filed his notice within thirty days of this ruling. We conclude that defendant's appeal was timely and we have jurisdiction over it.

II.

The next issue to consider is whether a valid contract existed between the plaintiff and defendant. In order to address this issue we must make a review of the record to determine the facts surrounding this alleged contract.

We note that our review of the trial court is limited to errors of law. Iowa R. App. P. 4. Therefore, this case is reviewed as tried in the court below. Mosebach v. Blythe, 282 N.W.2d 755, 758 (Iowa 1979). If supported by substantial evidence and justified as a matter of law, the judgment will not be disturbed on appeal. Atlantic Veneer Corp. v. Sears, 232 N.W.2d 499, 502 (Iowa 1975); Iowa R. App. P. 14(f)(1). But the reviewing court is not bound by the trial court's determination of law. Mosebach, 282 N.W.2d at 759.

On December 2, 1983, Mr. Dean Charling and Mr. Jerry Bates, two livestock order buyers, went to defendant's farm to determine if he was interested in selling any cattle. After discussing some general information regarding the current price of cattle, defendant stated that he would be willing to sell for $60 per hundred weight. The buyers did not tell defendant that certain cattle had sold that day at $62 per hundred weight.

That evening after calling the plaintiff, Mr. Charling phoned the defendant and they agreed to the sale of 360 head with an estimated weight of 850 pounds per head for $60 per hundred weight. There is conflicting evidence as to whether the defendant knew who the ultimate buyer would be.

The next day defendant learned of the sale of the cattle at $62 per hundred weight. As a result of this discovery defendant called Mr. Charling and cancelled the sale. Mr. Charling told plaintiff of the cancellation and plaintiff went to defendant's farm to discuss the matter. Defendant told plaintiff that he would not sell the cattle because of Mr. Charling's alleged misrepresentations and that he had already sold the cattle for $62 per hundred weight.

The plaintiff subsequently filed a petition seeking damages for the defendant's failure to perform the agreement.

The court found an enforceable contract for the benefit of a third party beneficiary; defendant contends that this was error.

To enforce a contract, the third party beneficiary has the burden of showing that the contract was made for his express benefit. Khabbaz v. Swartz, 319 N.W.2d 279, 285 (Iowa 1982); D.R.R. v. English Enterprises, CATV, 356 N.W.2d 580, 586 (Iowa Ct. App. 1984). "The real test is said to be whether the contracting parties intended that a third person should receive a benefit which might be enforced in the courts." Khabbaz, 319 N.W.2d at 285; Bailey v. Iowa Beef Processors, Inc., 213 N.W.2d 642, 645 (Iowa 1973), cert. denied, 419 U.S. 830, 95 S. Ct. 52, 42 L. Ed. 2d 55 (1974). But cf. 2 S. Williston, A Treatise on Law of Contracts, section 356A at 839 (Jaeger ed. 1959), and 4 Corbin on Contracts, section 776 at 16 (1951) (need only consider the intent of promisee).

From the record, it is apparent that defendant intended to sell his cattle to Mr. Charling and to contract with no one else. This is supported by the facts that Mr. Charling approached defendant, that defendant dealt solely with him, that he intended to pay defendant with his own bank draft, and that when defendant attempted to cancel the contract he called Mr. Charling.

The trial court's conclusion that plaintiff was a proper party to maintain an action against defendant based upon a third party beneficiary theory was reversible error. The theory was neither supported by substantial evidence nor justified as a matter of law.

III.

The trial court's ruling contains the bare assertion that there was, in fact, a contract between plaintiff and defendant. Not only is the existence of a third party beneficiary involved in this conclusion but the possibility of an agency relationship also exists. Therefore, we feel compelled to address said issue.

An agency is defined as "a fiduciary relationship in which one person acts for and on behalf of another." Walnut Hills Farms, Inc. v. Farmers Cooperative Company of Creston, 244 N.W.2d 778, 780 (Iowa 1976).

The agency relationship results from the manifestation of consent by the principal, that the agent shall act on the former's behalf and subject to his control and consent by the other so to act. Pay-N-Tacket, Inc. v. Crooks, 259 Iowa 719, 724, 145 N.W.2d 621, 624 (1966); Brown v. Schmitz, 237 Iowa 418, 424, 22 N.W.2d 340, 343 (1946).

Regarding whether a person is an agent or a supplier, the following provides:

> One who contracts to acquire property from a third person and convey it to another is the agent of the other only if it is agreed that he is to act primarily for the benefit of the other and not for himself.

Restatement (Second) of Agency § 14K (1958). Factors that indicate a sale, rather than an agency, are: 1) that the buyer receives a fixed price, irrespective of what he paid; 2) that the buyer acted in his own name and receives title to the property which he is to transfer; and 3) the buyer has an independent business in buying and selling similar property. Id., comment c. The first factor is the most important.

Whether there was a principle-agent relationship ordinarily is a question of fact. Pay-N-Tacket, Inc. v. Crooks, 259 Iowa at 724, 145 N.W.2d at 624.

The burden of proof is upon the party asserting such a relationship. Ioerger v. Schumacher, 203 N.W.2d 572, 575 (Iowa 1973).

At trial both plaintiff and Mr. Charling indicated that they felt an agent/principal relationship did exist. We must look beyond these self-serving statements and consider whether an agency relationship actually existed.

Mr. Charling went to defendant's on no instructions from plaintiff. On December 2, Mr. Charling called plaintiff, asked him if he needed any steers and then told him what defendant was willing to sell for. Plaintiff inquired about the delivery date, so Mr. Charling called defendant, recalled plaintiff, and the deal was finalized.

The method of payment was to be Mr. Charling drafting a check for defendant after the cattle had been weighed. Then, once plaintiff received the cattle, plaintiff would write a check, which would include Mr. Charling's commission (50¢ per hundred weight).

Mr. Charling is a bonded and licensed cattle buyer, in the business of buying and selling cattle. As stated by Mr. Charling himself, the cattle are his until bought by someone else.

The classic indicia of an agency relationship is the control exercised by the principle. In the present case Mr. Charling went to defendant's on the advise of another cattle buyer, not because of any instruction by plaintiff. Furthermore, Mr. Charling deals with several other buyers, not just plaintiff. These factors show the lack of control the plaintiff was able to exert over Mr. Charling.

The trial court's conclusion that a contract was created due to the plaintiff's agency relationship with Mr. Charling is not supported by substantial evidence. Further, plaintiff failed to show a principle/agent relationship. There was no agency relationship here; rather, double contracts were created, with defendant contracting with Mr. Charling and Mr. Charling then contracting with plaintiff.

Plaintiff was obviously not the correct party to enforce a contract made between defendant and Mr. Charling.

REVERSED.