FILED
JAN 29 1991
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-629 / 90-86

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JOHN D. CANTRELL, An Individual,

Appellant,

vs.

MAX D. ALVARADO, DUANE ALVARADO, and **NELLIE G. ALVARADO,** Individuals; and **ALVARADO TRUCKING, INC.,** A Colorado Corporation, d/b/a **ALVARADO TRUCKING, MAX ALVARADO TRUCKING,** and **MAX TRUCKING SERVICE,**

Appellees.

Appeal from the Iowa District Court for Pottawattamie County, Keith E. Burgett, Judge.

Plaintiff appeals adverse ruling on action for unpaid wages. **REVERSED AND REMANDED WITH DIRECTIONS.**

C. R. Hannan of Perkins, Sacks, Hannan, Reilly and Petersen, Council Bluffs, for appellant.

Angela A. Swanson of Morain, Burlingame, Pugh, Juhl & Peyton, West Des Moines, for appellees.

Heard by Donielson, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Max Alvarado, and the plaintiff, John Cantrell, were long-time friends. Alvarado needed a driver for his semi-trailer truck. He hired Cantrell. Cantrell arranged a contract with Armour Food Express (AFX) to use Alvarado's tractor for hauling AFX's trailers. He began driving in August 1986. There was no written contract concerning compensation. At trial, the parties disputed the exact nature of the oral agreement concerning wages. Alvarado did agree to pay the truck expenses.

AFX used settlement sheets in calculating trip information which included mileage and expenses. The final proceeds were paid to Alvarado. Cantrell was allowed to take out cash advances from AFX for wages and truck expenses. He charged expenses on the truck through AFX to Alvarado.

Alvarado contends Cantrell was paid through three different methods. First, Cantrell had the right at his discretion to receive cash advances from AFX. These cash advances were deducted from the amount AFX owed Alvarado. Secondly, Alvarado paid Cantrell additional money from his business checking account. Third, Alvarado paid Cantrell substantial amounts of cash.

In June 1987 Alvarado terminated Cantrell as driver. The amount of wages and expenses owed at his termination is disputed.

Cantrell filed this petition in May 1988. He then filed a motion for default judgment and application for hearing on September 9, 1988. An answer was filed by Alvarado on September 23, 1988. The district court overruled Cantrell's motion for default judgment on October 11, 1988. The defendants' final answer was filed on October 14, 1988.

On December 5, 1988, a request for production of documents was served upon Alvarado. Cantrell received defendants' response on January 10, 1989, and Cantrell saw the documents on January 12, 1989. A motion in limine and motion to compel and for sanctions were presented to the court on the day of trial. Trial before the court was held on January 13, 1989.

It was not until July 1989, that the trial court entered judgment in favor of Cantrell for $101.43 plus ten percent interest from May 16, 1988, against Max D. Alvarado. The court dismissed the claims against Duane Alvarado, Nellie G. Alvarado, and Alvarado Trucking, Inc. Cantrell filed this appeal.

Initially the appellant contends the trial court erred in not granting default judgment. Iowa Rule of Civil Procedure 230 sets forth the circumstances that place a party in default. Even though a party is in default under rule 230, it is not mandated that the court enter a default judgment. Johnson v. Gib's Western Kitchen, Inc., 338 N.W.2d 872, 874 (Iowa 1983). In addition, when the trial

court refuses to grant a default judgment, it is not required to find oversight, mistake, or inadvertence to exist which causes the defendant's failure to answer. Id. The question of allowing a default is largely within the discretion of the trial court. Id. at 874. While we may not totally agree with the action of the trial court, we are unable to find an abuse of discretion.

Cantrell also contends the trial court erred in overruling his motion in limine and motion to compel discovery and for sanctions. Iowa Rule of Civil Procedure 134 allows for sanctions when a party fails to comply with an order compelling discovery, but the trial court has broad discretion in imposing such sanctions. We will not reverse such an order unless there has been an abuse of discretion. Rumeley v. Mason City, 320 N.W.2d 648, 652 (Iowa 1982). We are unable to find an abuse of discretion.

In addition to the above, Cantrell contends there was not sufficient evidence to support the findings of the trial court. In this respect, our review is on error. Thus the trial court's findings of fact have the effect of a jury verdict and are binding on us if supported by substantial evidence. In re Receivership of Mt. Pleasant Bank & Trust Co., 426 N.W.2d 126, 129 (Iowa 1988). We construe these findings broadly and liberally. In case of doubt or ambiguity we construe them to uphold, rather than defeat the judgment. Kendall/Hunt Publishing Co. v. Rowe, 424 N.W.2d 235, 238 (Iowa 1988). A corollary rule

prohibits us from weighing the evidence or the credibility of the witnesses. Hamilton v. Wosepka, 261 Iowa 299, 304, 154 N.W.2d 164, 166 (1967).

From our review of the record, we find that the court's ruling is supported by substantial evidence. There are significant disputes as to the contents of the agreement of the parties. The appellant and the appellee have with commendable effort pointed out to us the conflict in the testimony. In addition, the appellant vigorously challenges the credibility of the defendant's witnesses.

We agree that, to a great extent, the decision of the trial court rested on which of the witnesses' testimony was more believable. For the most part, the trial judge came down on the side of the defendant. However, as we pointed out above, it is not our task to weigh the credibility of witnesses. This is so even though we may have reached a different result if the case was tried to us in the first instance.

The appellant also argues that the trial court failed to consider this as an action for wages under Iowa Code section 91A (1989). We have reviewed the trial court's initial ruling and its ruling on the plaintiff's motion asking the trial court to enlarge its findings and find that the trial judge did address the effect Chapter 91A has on these proceedings. In this respect, when the trial court in a law action tried to the court denies recovery because a party failed to carry the burden of proof on the

issue, we will not interfere on appeal unless we find the party carried its burden of proof as a matter of law. Liberty Mutual Insurance Company v. Winter, 385 N.W.2d 529, 532 (Iowa 1986). We are unable to find that the plaintiff carried its burden of proof as a matter of law on this issue.

In attempting to prove a violation of Chapter 91A, the plaintiff was required to show Alvarado's failure to pay was intentional. Miller v. Component Homes, Inc., 356 N.W.2d 213, 216 (Iowa 1984). The trial court analyzed this question and considered the evidence relating thereto and found as a fact that intent was lacking. We find substantial evidence in the record to support this finding.

We have also considered plaintiff's assertion insofar as the burden of proof is concerned. Iowa Rule of Appellate Procedure 14(f)(5) states that the burden of proof on an issue is upon the party who would suffer loss if the issue were not established. The burden of proof is measured by a preponderance of the evidence. Iowa R. App. P. 14(f)(6). The burden of proof here rested with the plaintiff.

We find substantial evidence in the record to support the trial court's ruling with one exception. According to the evidence we find the trial court erred in calculating the wages owed. During the time period in which the defense was cross-examining Mr. Cantrell, the subject of checks written to Mr. Cantrell by Mr. Alvarado was

discussed. Mr. Cantrell agreed that each check had been issued to him for personal use with the exception of two checks. He stated that two of the checks were used for maintenance on the truck and were therefore not for his personal use. Defense counsel in turn never offered any evidence to rebut Mr. Cantrell's statement. The checks in question were made out to Great Falls truck center for $582.35 and to Midland International for $272.28. We conclude that the sum of 854.63 should be included in Mr. Cantrell's back wages.

The appellant also directs to our attention that the trial to the court was held on January 13, 1989, and it was not until July 27, 1989, that the court filed its ruling. The appellant complains that an unreasonable amount of time was taken by the trial court to render the judgment. He further complains that the court "delayed and used an unreasonable amount of time to rule on Cantrell's motion for further findings or in the alternative a new trial." The ruling on that motion was not filed until December 15, 1989, "over four months after said motion was filed." The appellant further calls to our attention Iowa Court Rule 200 and asks that this case be reversed and remanded for a new trial because of this delay.

Although there may be merit in appellant's position that the court took an unreasonable length of time to enter its rulings, we do not understand rule 200 as authorizing us to grant a new trial on that ground. We recognize the

plaintiff's frustration and are aware of the pitfalls in the judicial process that occur because of delayed rulings. However, we also recognize that dockets are exceedingly crowded and, from the record before us, are unable to give a reasoned opinion in explanation of the lengthy delay in this case.

We affirm as modified and remand to the trial court for entry of judgment consistent with this opinion.

REVERSED AND REMANDED WITH DIRECTIONS.