IN THE COURT OF APPEALS OF IOWA

No. 0-191 / 89-422

FILED
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CLERK SUPREME COURT

JAMES E. ROSS,

Appellant,

vs.

GARNER PUBLISHING CO., ROBERT G. GARNER II, BERNARD C. NEVINS, GERALD L. ROSS, and **JOHN WILLIAM DURO,**

Appellees.

Appeal from the Iowa District Court for Polk County, Jack D. Levin, Judge.

Plaintiff appeals from an adverse jury verdict in a suit alleging breach of employment contract and breach of fiduciary duty. **AFFIRMED.**

James E. Brick of Brick, Seckington, Bowers, Swartz & Gentry, P.C., Des Moines, for plaintiff-appellant.

Dick L. Jensen of Dreher, Wilson, Simpson, Jensen, Sellers, Butters, Adams & Kaiser, Des Moines, for defendants-appellees.

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

OXBERGER, C.J.

In 1978 plaintiff James Ross entered into a partnership agreement with Robert Garner II, Bernard Nevins, Gerald Ross, and John Duro to buy all the stock of Garner Publishing Company. James was an employee of the corporation and continued as an employee after the company became a partnership. In 1986 James was discharged as an employee.

James brought this suit alleging a breach of employment contract by the company and a breach of fiduciary duty by the partners. The company and other partners counter-claimed, seeking a dissolution of the partnership. A jury trial and a bench trial were held on the various legal and equity claims. The jury found for defendants on the breach of contract claim, but awarded James $10,444.57 in actual damages and $20,000 in punitive damages on his breach of fiduciary duty claims. The court valued James's one-fifth share of the partnership at $77,524.

James appealed. He contends the court incorrectly valued his one-fifth interest in the partnership. He believes under the terms of the partnership agreement he is entitled to $136,506.89. James states under the terms of Iowa Code section 544.38, the Uniform Partnership Law, he is entitled to $141,700. The value adopted by the court subtracted almost $102,000 from the value of the partnership for negative goodwill. James asserts there is no evidence to support the court's valuation.

James argues the jury instructions improperly required him to prove the terms of his employment contract. He states the terms of an employment contract are often left unexpressed, but a contract exists nonetheless. He also believes the court incorrectly required him to prove a contract for "permanent or lifetime employment." James also objects to some of the jury instructions of the breach of fiduciary claims.

Finally, James claims he is entitled to a new trial because the jury verdicts were inconsistent. He points out that the jury found there was no breach of employment contract, but the individual partners breached their fiduciary duty by unlawfully discharging him. He states under the jury instructions the jury could find a breach of fiduciary duty only if it found wrongful discharge. We affirm.

Actions for accounting and dissolution of partnerships, such as the present case, sound in equity and thus our scope of review is de novo. Engel v. Vernon, 215 N.W.2d 506, 512 (Iowa 1974). We review the facts as well as the law and enter the conclusions we deem proper. Id.

Ross first contends the trial court erred in failing to correct the formula used to determine the value of his one-fifth interest in the partnership. Ross contends there was no oral agreement to change the valuation method as contained in the partnership agreement. The defendants,

however, contend the formula for valuation was agreed upon at the July 18, 1983 board of directors meeting.

The record reveals the original partnership was entered into on October 23, 1978, in order for each of the partners to acquire and hold stock of Garner Publishing Company. Pursuant to the agreement, the partnership was to terminate when all the stock of Garner Publishing was owned by the partnership, each partner to receive his equal share of the stock. Upon termination of the partnership, each of the partners was to enter into a shareholder agreement which placed restrictions on the sale of the stock and agree on how the stocks should be valued upon the event of death, retirement, withdrawal from the partnership, and disability. Several of the provisions of the 1978 agreement are important for purposes of our analysis.

Paragraph 11(D) of the 1978 agreement provides a method of valuation of stock in the event of death. Pursuant to that paragraph, the deceased partner's estate shall sell the stock to the corporation "at a price equal to the net asset value of the corporation as determined by the corporation's regular certified public accountant, divided by the total number of shares of the corporation then issued and outstanding." The corporation had the right under the agreement to pay for all stocks so purchased in ten equal annual installments of principal and interest at the prime interest rate. Similarly paragraph 17 of the

agreement provides that upon the death of any partner, the partner's estate shall be obligated to sell, and the remaining partners are obligated to buy the decedent's partnership interest at a price equal to one-fourth of the net asset value of the partnership as of the date of death. Paragraph 18, providing for retirement and disability, provides for a similar valuation method as provided in paragraph 17. As of the time of trial, however, the partnership had not been terminated nor had the partners entered into the shareholders' agreements as contained in paragraph 11.

On July 18, 1983, the board of directors, consisting of Robert Garner II, Bill Duro, Jim Ross, Jerry Ross and Bernie Nevins, held a meeting. The partners discussed the method of valuation for a partner leaving the partnership. According to the minutes of the July 18, 1983 meeting the board voted the following:

> In the event of disability of a partner, the company agrees to (1) pay full salary for one year; (2) maintain disability insurance coverage to age 65; (3) pay $50,000 for stock buy-out with the payoff to be spread over no more than five years with interest at the current prime rate; and (4) the remaining partners assume all liability on Julia Chasey payoff and long term debt obligations. *Stock to be re-evaluated July 1984 and annually thereafter.

The partners agreed to pay the partner wishing to withdraw whatever annual stock evaluation for disability was, and partners would assume all liability on the Julia Chesey payoff and long term debt obligations.

The next board of directors meeting discussing valuation was held on October 22, 1984, at which time the board approved the valuation formula approved in 1983, and pursuant to such formula each individual share was valued at $71,792.30. All of the partners except Ross were present at this meeting. At the annual stockholders' meeting on September 16, 1985, Bill Duro moved that the same formula be used to evaluate the partnership stock, and moved that the value of the stock as of September 1985 be $76,236.75 per share. All directors voted yes to the proposal, except Ross, who voted no.

Ross maintains there is no evidence that an oral agreement existed which changed the valuation of the partnership stock. Upon our own independent examination of the facts, we agree with the trial court the valuation method as contained in the minutes of the July 1983 board of directors meeting was the agreed upon method for valuing the stock of a withdrawing partner. In doing so, we are mindful of the provisions of Iowa Code section 544.18(8) which provides:

> Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

The record also reveals that the other partners all understood the formula adopted at the July 1983 meeting applied to each of them, and the same valuation would be

used each year so a withdrawing partner would not have to negotiate the value of his interest at the time of his leaving. Jerry Ross, the plaintiff's brother, testified that it was his understanding the formula would be applied in all situations no matter how a partner left the company.

Ross advocates a number of formulas were considered by the board when determining which method to use in valuating the partners' stock. Ross, however, does not specify which of the methods he advocates is applicable to the present case.

Ross urges this court to consider the formula codified in Iowa Code section 544.38. Section 544.38, in pertinent part, provides that when a dissolution is caused in any way, each partner "may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners."

We do not find any evidence in the record, however, to support a finding that the partners contravened any agreement among the partners by following the formula adopted at the July 1983 meeting. Though Ross voted "no" to the valuation at the September 1985 meeting, we do not believe his "no" vote changed the agreed upon formula, since nothing in section 554.18(8) or section 554.38 requires that all partners be unanimous in deciding to reaffirm a preexisting agreement.

We agree with the trial court Ross' one-fifth interest in the partnership should be valued as of the date of dissolution, May 31, 1986. See Engel v. Vernon, 215 N.W.2d 506, 514 (Iowa 1974). We find the testimony of Garner Publishing's accountant, Tom Ahlers, to be most persuasive of the numerous experts who testified, and hold the trial court correctly valued Ross's one-fifth interest in the partnership at $77,524.

Ross next contends the trial court erred in submitting various instructions to the jury. Ross first maintains the court erred in submitting Instruction No. 7 to the jury because it required him to prove all of the elements which form the basis of a traditional contract. Instruction No. 17, in instructing the jury on the applicable law regarding Ross's claim of permanent or lifetime employment, stated the following:

> The Plaintiff claims that the Defendant, Garner Publishing Company, breached a contract for permanent or lifetime employment with him. To entitle the Plaintiff to recover on his breach of contract claim, he must prove the following propositions:
>
> 1. The existence of a permanent or lifetime employment contract;
> 2. The terms of the contract;
> 3. Consideration;
> 4. The Plaintiff had done what the contract requires of him;
> 5. The Defendant has breached the contract;
> 6. The amount of any damage the defendant has caused.
>
> If the Plaintiff has failed to prove any of these propositions, the Plaintiff is not entitled to damages. If the Plaintiff has proved all of these propositions, you will then consider the Defendant's defenses as explained in Instruction No.___.

Ross's requested instruction regarding the question of permanent employment provided the jury could find a contract for permanent or lifetime employment upon a showing that (1)an employer-employee relationship existed; and (2) some "additional consideration" in addition to the rendering of the services expected under the contract. In Wolfe v. Graether, 389 N.W.2d 643, 655-56 (Iowa 1986), the jury was instructed similarly to that requested by Ross. The employer had objected to the instruction concerning "additional consideration," arguing the instruction prevented the court and jury from resolving the paramount issue of interpretation regarding the issue of permanent employment. Id. The employer had requested the trial court to instruct the jury that it was its duty to interpret the contract in light of all the evidence and determine whether it was for an extended period of time or whether its term was indefinite. Id. at 56. The trial court refused to give such an instruction, and the Iowa Supreme Court reversed. Id.

The court in Wolfe acknowledged that "[a]dditional consideration is an essential element of a contract for permanent employment. Id. at 657. However, the court also held that "[s]uch additional benefit or forbearance does not create that status unless this was the intention of both the employer and employee, or, unless this was the employee's intention and the employer should have

reasonably known that it was." Id. In the present case we find Instruction No. 17 adequately apprised the jury of the applicable law. Coupled with Instruction No. 9, which permitted the jury to find the existence of a contract for permanent employment when the intentions of the parties are left unexpressed, Instruction No. 17 instructed the jury according to the language set forth in Wolfe. Additionally we note that Instruction No. 17 follows closely that of Iowa Civil Jury Instruction No. 2400.1. We find no reversible error here.

Nor do we find any merit to Ross's objections to Instruction No. 20, which provided in order for Ross to prevail on his claim for breach of fiduciary duty the jury must find a fiduciary duty existed and the defendants unlawfully discharged him from employment. While we agree with Ross the fiduciary duty existed as a matter of law and not of fact, we find no prejudice in the present case since Ross was successful in his claim for breach of fiduciary duty. See Waddell v. Peets Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978).

Ross lastly contends he is entitled to a new trial because the jury verdicts are inconsistent and cannot be reconciled. In determining whether a jury verdict is inconsistent, the test is whether the verdict can be reconciled in any reasonable manner consistent with the evidence and its fair inferences and in light of the

instructions of the court. Hoffman v, National Medical Enterprises, 422 N.W.2d 123, 126-27 (Iowa 1989). It is fundamental that a jury's verdicts are to be liberally construed to give effect to the intention of the jury and to harmonize the verdicts if possible to do so. Id. at 126. Only where the verdicts are so logically and legally inconsistent that they cannot be reconciled will we set them aside. Id. at 127.

We find Ross's reliance on Hoffman to be misplaced. In Hoffman, the jury was instructed that in determining the measure of damages regarding the claim of interference with contract, damages were measured by the amount necessary to place the plaintiffs in the position they would have been in had the employment contract been fully performed, such instruction being similar to the instruction given regarding breach of contract. 442 N.W.2d at 127. However, the jury awarded the plaintiff $293,000 for breach of contract, and only $15,000 for interference with contract. Id.

In the present case the jury was not instructed that they had to find a contract of employment and breach of contract in order to find the defendants had breached a fiduciary duty owed Ross. The breach of contract claim required Ross to prove there was an employment contract, he performed all the required duties under that contract, and the corporation breached that contract by discharging him.

In contrast, the claim for breach of fiduciary duty, against the individual defendants only, required Ross to show the existence of a fiduciary duty owed him by the individual defendants, and they unlawfully discharged him from employment. While we agree Instruction No. 20 permitted the jury to find a breach of duty without determining what duties existed, we find no prejudicial error, since Ross was successful on the breach of fiduciary claim.

AFFIRMED.