FILED
MAR 31 1980
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

396

ALAN C. PARRY,

Plaintiff-Appellee,

vs.

MID-AMERICA BODY AND EQUIPMENT COMPANY, INC.,

Defendant-Appellant.

Filed March 31, 1980

331
2-63076

Appeal from Polk District Court - James P. Denato, Judge.

Defendant appeals from judgment for plaintiff on a jury's verdict. AFFIRMED.

Donald W. Wine of Davis, Hockenberg, Wine, Brown & Koehn, Des Moines, for defendant-appellant.

Michael M. Sellers of Langley, Dunn, Mountain & Sellers, Des Moines, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

Defendant, Mid-America Body and Equipment Company, Inc., appeals from judgment for plaintiff, Alan C. Parry, on a jury's verdict. Plaintiff's claim against defendant was based on an alleged wrongful termination of a written employment contract between the parties. The jury ultimately awarded the plaintiff-employee a verdict of $81,959. We consider each of the several assignments of error and affirm the judgment.

I. Defendant's first contention arises from an initial failure of the jury to return a verdict in accordance with the trial court's instructions. The trial court refused to accept the jury's first verdict, gave a supplemental instruction, and sent the jury back to the jury room for further deliberation. Following this, the verdict upon which final judgment has now been entered was returned.

With respect to this occurrence, the defendant urges that the trial court erred in not accepting the initial verdict returned by the jury in the sum of $40,959. We disagree. The jury had been instructed that if it found plaintiff was entitled to recover for lost salary, under the agreement that amount was $81,959.[1] In addition, if the jury found for plaintiff, it was instructed that it could allow extra compensation (above the $81,959 amount) based upon bonus clauses in the agreement. The trial court also instructed the jury that if it rejected defendant's affirmative defenses to plaintiff's claim, it should not consider defendant's counterclaim.[2] In effect, these instructions directed the jury that if it found for the plaintiff, there should be no recovery on the counterclaim and its verdict should be either $81,959 or that figure plus the amount of any bonuses found to be owing. No complaint has been made in the court below or on appeal as to the legal effect of these instructions.

The initial verdict for the plaintiff in the sum of $40,959 clearly failed to respond to the trial court's instructions.[3] Faced with such a circumstance, the trial court acted

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[1] Trial court's instruction number nine.

[2] Trial court's instruction number eight.

[3] We are not persuaded by defendant's argument that the verdict was permissible under the trial court's instruction number eleven which provided:

> Nothing in these instructions, or any amounts mentioned, is to be taken by you as any indication of what amounts, if any, are proper or what your verdict should be. These are matters for your determination.

Nor do we find that instruction number eleven is inconsistent with instruction number nine.

within its discretion in sending the jury back for further deliberation with an additional claritive instruction.[4] Campbell v. Iowa Central Ry. Co., 124 Iowa 248, 251, 99 N.W. 1061, 1062-63 (1904) (not error to permit jury to correct its verdict to correspond to court's instructions by doubling amount first found); Johnson v. Rider, 84 Iowa 50, 54, 50 N.W. 36, 37-38 (1891).

Defendant also contends that the effect of the additional instruction was to direct a verdict for plaintiff. We find no merit in such contention. The additional instruction only sought to specifically direct the jury's attention to the original instructions on the amount of plaintiff's recovery. It was in no way inconsistent with those instructions and did not infer that the verdict should be for the plaintiff.

II. We next consider defendant's claim that the trial court erred in failing to submit its requested instruction on plaintiff's duty to mitigate damages. Defendant concedes that because it did not allege plaintiff's failure to mitigate damages, it may rely upon such issue only to the extent shown by plaintiff's evidence. See sections 619.7, 619.8, The Code 1977; Stauter v. Walnut Grove Products, 188 N.W.2d 305 (Iowa 1971). It urges, nonetheless, that plaintiff's evidence sufficiently shows failure to mitigate so that the requested instruction should have been given. We disagree. Although there was evidence presented by plaintiff tending to show his skill in his particular field of endeavor, there was no direct evidence of his employability or potential earning capacity. Had the issue of mitigation been submitted, the jury would have been forced to speculate as to the result. Under such circumstances, the trial court properly refused to submit the issue.

III. Defendant next urges that the trial court's instruction number eight is fatally defective. The complaint thus advanced is that the instruction fails to peremptorily instruct the jury that a violation by plaintiff of the requirement in the written

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[4] This instruction provided:

> 1. If you find for the Plaintiff Parry, the damage amount shall be the $81,959.00 referred to in the first paragraph of Instruction 9, plus any damage you find due the Plaintiff, if any, under the second paragraph of Instruction 9—in which case the Defendant may not recover damages.
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> 2. If you find for the Defendant Mid-America, you shall compute its damages, if any, under Instruction 10—in which case the Plaintiff may not recover damages.
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> The reference to "amounts mentioned" in Instruction 11 applies to the amounts mentioned in the second paragraph of Instruction 9 and to Instruction 10.

We conclude that nothing therein contained is inconsistent with the original instructions to the jury.

employment agreement that he perform in a "good working manner" would discharge the defendant's obligations under the agreement. As authority for this contention, defendant relies upon section 397 of the Restatement of Contracts (1932) which provides: "A breach or non-performance of a promise by one party to a bilateral contract, so material to justify a refusal of the other party to perform a contractual duty, discharges that duty." The test of whether a breach by one party is sufficiently material to invoke a discharge of the other party's obligations is stated in section 275 of the Restatement.[5] The comments to this section suggest that where there has been partial performance by the promisor, a subsequent failure of performance on his part must be more substantial to totally discharge the other's obligations than is the case with a failure at the outset of the agreement. In the latter situation, it may be more conformable to justice to grant a right of action for damages to the injured party rather than relieving that party of all obligations under the contract.

In applying the foregoing principles to defendant's challenge to the trial court's instruction number eight, it must be noted that the cited Restatement rules relate to grounds for discharge under general principles of contract law. The challenged instruction in the present case purports to define rights specifically reserved by defendant under the agreement itself. See 17 Am. Jur. 2d Contracts, § 495 (1964). We

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[5] This section of the Restatement provides:

> RULES FOR DETERMINING MATERIALITY OF A FAILURE TO PERFORM
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> In determining the materiality of a failure fully to perform a promise the following circumstances are influential:
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> (a) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated;
>
> (b) The extent to which the injured party may be adequately compensated in damages for lack of complete performance;
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> (c) The extent to which the party failing to perform has already partly performed or made preparations for performance;
>
> (d) The greater or less hardship on the party failing to perform in terminating the contract;
>
> (e) The wilful, negligent or innocent behavior of the party failing to perform;
>
> (f) The greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

conclude the trial court's instruction with respect to the extent of such rights reserved by defendant was adequate. It was for the jury to determine whether the defendant, by expressing several examples of the class of conduct sufficient to invoke discharge under a particular clause in the agreement, implied the exclusion of other types of conduct. See, e.g., Maytag Co. v. Alward, 253 Iowa 455, 459-60, 112 N.W.2d 654, 656 (1962).

Had defendant asked for an instruction that, in addition to those rights of termination expressly reserved to defendant under the contract, it could also invoke such other grounds for discharge as were available to it under general principles of contract law (such as section 397 of the Restatement), such instruction doubtless should have been given.[6] But no such request was made. Defendant's quarrel with the instructions appears at all times to have been with respect to the interpretation of those rights expressly reserved by defendant under the contract. This was the thrust of its pleaded affirmative defense. The trial court did not err in defining those rights.

Lastly, on this issue, we note that the trial court's instruction number eight does tell the jury that just cause for termination (discharge) of defendant's obligations under the agreement would include "a cause that would satisfy a reasonably prudent person in [defendant's position]." We believe this gave to defendant at least as broad a basis to urge a finding of legal termination to the jury as does the rule of section 397 of the Restatement.

IV. Defendant's last contention on appeal urges that an instruction should have been given which told the jury defendant was entitled to discharge plaintiff for failure to abide by an implied obligation to perform in a good working manner. Assuming the existence of such an implied duty, we fail to see how it gives defendant any additional rights not flowing from the similar express agreement. Our disposition of the issues involving the express agreement to perform in a good working manner appears to apply equally to defendant's contentions based on an implied agreement.

We have considered all issues presented and find no ground for reversal.

AFFIRMED.

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[6] Such instruction, however, should only have expressed the applicable Restatement rules and let the jury determine whether a ground for discharge had been established under said rules. We reject defendant's contention that a failure of plaintiff to perform in a good working manner would automatically result in a complete discharge of defendant's obligations. Contrary to defendant's assertion, plaintiff's performance was not necessarily the only consideration for defendant's obligations. The employment obligation was intertwined with the sale of plaintiff's business to defendant.