FILED
APR 24 1990
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 0-102 / 89-853

164

ELIZABETH J. McRAE,

Claimant-Appellant,

vs.

JOANNE DEGENER, Executor of the Estate of **CAMERON E. JOHNSTON,** a/k/a **C.E. JOHNSTON,** Deceased,

Defendant-Appellee.

Appeal from the Iowa District Court for Black Hawk County, Dennis D. Damsgaard, Judge.

McRae appeals a district court ruling granting the executor's motion for new trial. **AFFIRMED.**

Douglas V. Coonrad, Hudson, for appellant.

James E. Walsh, Jr. and Randy P. Scobee of Clark, Butler, Walsh & McGivern, Waterloo, for appellee.

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

SACKETT, J.

This case involves an alleged broken promise between a man and a woman. Claimant-appellant Elizabeth J. McRae contends decedent Cameron E. Johnson promised her certain things, including the income from his 160-acre farm for the remainder of her life after he died. A Black Hawk County jury found Elizabeth should have the income from Cameron's farm for life. Appellee Joanne Degener, executor of Cameron's estate, moved for a new trial. The trial court ordered a new trial subject to Elizabeth remitting all but $21,000. Elizabeth did not file a remittitur and has appealed.

Elizabeth and Cameron met in 1977. They were both single, and they began dating. Elizabeth started performing household services for Cameron. Elizabeth claimed Cameron told her in 1979 that if she continued to care for him, "she would always be taken care of." In 1980, Elizabeth moved to a separate apartment in Cameron's home. She continued to perform his household tasks. Elizabeth claimed that after she lived in the apartment for three months, Cameron promised the manner by which he would care for her would be to leave her all the rents from his farm and homestead before the payment of taxes and upkeep. Elizabeth said part of Cameron's promise was that the expenses of the farm would be paid by the remainderpersons. It is this agreement Elizabeth sought to enforce.

Elizabeth continued performing household services for Cameron. In 1974 Elizabeth moved from decedent's home and obtained part-time employment. She continued to perform some household services. She testified decedent still promised the life income from the farm.

On September 16, 1986, Cameron was killed in an accident. His estate was opened and Elizabeth filed a claim in it. The claim included a request for $16,185.86 for reimbursement for monies she claimed she spent for decedent and a claim for life income from Cameron's 160-acre farm as payment under the oral contract she claimed he made for household services. Elizabeth also made claims under alternate theories of implied contract, unjust enrichment, quantum meruit, and promissory estoppel.

The case involved equitable and legal issues. The issues were consolidated in one trial. The equitable issues were submitted to the court. The legal issues were submitted to the jury. The jury was given five special verdicts. The jury found there was clear and convincing evidence Elizabeth entered into an express oral contract, the terms of which she had carried out. The jury also determined: "We, the jury, find in favor of the claimant, Elizabeth J. McRae, and find she is entitled to a life estate and the home farm as claimed."

In granting the estate's motion for new trial, the trial court made a lengthy ruling. A portion is set out below:

The legal issues were tried to a jury and the equitable issues were tried to the Court. Unfortunately, the case was not bifurcated so that the legal issues were tried in one action and the equitable issues in a separate action. As predicted, the trial of both the law and equitable issues in the same case does not result in a satisfactory resolution of the claims.

The primary claim in this action was Claimant's allegation that she had entered into an express oral contract with the Decedent to provide certain services and in payment thereof she was to receive a life estate in the home farm of Decedent. . . . [T]he evidence herein is mainly the testimony of the Claimant and her witnesses concerning conversations with the Decedent. As stated this was a claim of an oral contract and there were no written memorandums by any of the parties. The case, therefore, depends largely upon the credibility of the witnesses.

* * *

. . . [T]he legal and equitable issues were tried at the same time. This created problems because the jury was allowed to hear the evidence on the equitable questions and over the course of several days it becomes a difficult job for the jury to separate the evidence as between the legal and equitable questions.

The Defendants in their answer and at trial raised the issues of hearsay, statute of frauds, statute of limitations, and laches.

* * *

The Court has some problems with Claimant's credibility. Originally, Claimant filed for reimbursement of monies spent to support the Decedent. This claim was based on the fact that she had gone to the Decedent's home with a specific sum of money, had money coming in from alimony, and the money had vanished and the only explanation is that it had been spent upon the Decedent. It is true this claim was later withdrawn when discovery showed that the claim was erroneous. Nonetheless, the claim was made in Court and was sworn to by the Claimant. The other aspect is the lack of memory of the Claimant for specific details. In particular the Claimant's

> name was placed upon an account with the Morris Plan. Without knowledge of the Decedent, the Claimant withdrew funds from that account to loan to her son for the purpose of purchasing a house. At trial the Claimant testified that the amount was only $3,000 or $4,000. From the record it is clear that the Decedent was highly incensed about this withdrawal and removed Claimant's name from the account. Cross-examination showed that the amount withdrawn was not $3,000 or $4,000 but was in fact $20,000. The inability to recall major items raises a question as to the ability to recall smaller items dealing with the establishment of an oral contract.

The issue is whether the trial court abused its discretion in ordering a new trial. The order will be reversed only on a showing of an abuse of the trial court's discretion. Yoch v. City of Cedar Rapids, 353 N.W.2d 95, 98 (Iowa App. 1984). We are more reluctant to interfere with the granting of a new trial than with its refusal. Hardy v. Britt-Tech Corp., 378 N.W.2d 307, 310 (Iowa App. 1985); Kelly v. Iowa State Educ. Ass'n, 372 N.W.2d 288, 300 (Iowa App. 1985). The discretion afforded the trial court in ordering a new trial must have some support in the record. Hardy, 378 N.W.2d at 310. Ordinarily, juries should settle factual disputes, and a verdict should not be set aside because a reviewing court would have reached a different conclusion. Waddell v. Peet's Feeds, Inc., 266 N.W.2d 29, 32 (Iowa 1978).

Appellee contends the reasons for the ruling are: (1) The trial court had problems with Elizabeth's credibility; (2) The trial court found evidence came in the record because of the equity case that should not have been admitted in the law case.

The trial court, while determining the law and equity issues should not be combined on retrial, did not specify the evidence admitted that would not have been inadmissible had the case been tried only at law. Defendant's brief does not specify the evidence either. We consider the trial court's determination that the law and equity matters should not have been combined for trial, and we note the trial court expressed serious doubt as to the manner of submission of the claims before the trial commenced. We consider the trial court's contention that instructions should have been given on modification of a contract. We find some evidence the contract could have been modified. We consider the trial court's concern with Elizabeth's credibility.

With the discretion we afford to the trial court, we determine these factors, when considered collectively, are sufficient to support the order for a new trial subject to a remittitur. See Hardy, 378 N.W.2d at 310; see also Whiting v. Cochran, 241 Iowa 590, 593, 41 N.W.2d 666, 667-68 (1950) (trial court ordered new trial on several grounds, including verdict was against the weight of the evidence; supreme court determined the record disclosed a sharp conflict in evidence and affirmed); Hansen v. Hough, 177 Iowa 93, 100, 158 N.W. 501, 503 (1916) (believability of witness considered by supreme court in affirming motion for new trial).

AFFIRMED.