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46 Wn.2d 62, HARRY RICHARDS, Appellant, v. RALPH KUPPINGER, Respondent

[No. 32980. Department Two. Supreme Court January 6, 1955.]

HARRY RICHARDS, Appellant, v. RALPH KUPPINGER, Respondent.«1»

[1] APPEAL AND ERROR - REVIEW - SCOPE AND EXTENT - ON DISMISSAL OR NONSUIT. On appeal from a judgment of dismissal entered after the granting of a motion for nonsuit in a jury case, the test to be applied by the supreme court is whether there is any evidence or reasonable inference from evidence which will sustain the plaintiff's case; but this test does not necessarily apply in a nonjury case.

[2] TRIAL - TRIAL BY COURT - WEIGHT AND SUFFICIENCY OF EVIDENCE - DISMISSAL OR NONSUIT. The trial court has the right to weigh the plaintiff's evidence on a motion for nonsuit in a nonjury case.

[3] APPEAL AND ERROR - TRIAL - TRIAL BY COURT - HEARING AND DETERMINATION - SUFFICIENCY OF EVIDENCE - DISMISSAL OR NONSUIT - QUESTION OF LAW. If, upon granting a nonsuit, the trial court's oral or memorandum opinion discloses that it treated the plaintiff's evidence as true and held as a matter of law that the plaintiff has not established a prima facie case, findings of fact are unnecessary; and the supreme court's review of the evidence is limited to determining whether there is sufficient evidence or reasonable inference from evidence to establish a prima facie case for the plaintiff.

[4] SAME - TRIAL - TRIAL BY COURT - HEARING AND DETERMINATION - SUFFICIENCY OF EVIDENCE - DISMISSAL OR NONSUIT - QUESTION OF FACT. Where it appears from the trial court's oral or memorandum opinion, or from the findings of fact if there is no opinion, that the trial court, in granting a nonsuit, has weighed the evidence and has found either that the evidence in support of the plaintiff's prima facie case is not credible or that the plaintiff's credible evidence establishes facts which prevent him from recovering, then it appears that the trial court has decided as a matter of fact that the plaintiff has not established a prima facie case, and findings of fact are necessary to apprise the supreme court as to what facts the court found; and in such a case, the supreme court will accept the findings as the facts in the case unless it is determined that the evidence preponderates against the findings.

[5] SALES - REQUISITES AND VALIDITY OF CONTRACT - CREATION AND EXISTENCE - EVIDENCE - SUFFICIENCY. On an issue as to whether there was an agreement between the owner of a farm and an occupant thereof that the occupant would purchase a quantity of hay stored on the farm, held that the evidence supports the findings of the trial court that the agreement between the parties contemplated that, for staying on the farm and taking care of the owner's horses and cattle, the occupant was to have the milk from the cows and was to feed

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«1» Reported in 278 P. (2d) 395.

[4] See 29 A. L. R. 638; 53 Am. Jur. 260.

the stored hay to the owner's horses and cattle, and that there was no agreement that the occupant would pay the owner for such hay.

[6] CONTRACTS - REQUISITES AND VALIDITY - NATURE AND ESSENTIALS - MEETING OF MINDS. Both express and implied contracts grow out of the intention of the contracting parties, and in each case there must be a meeting of the minds before there can be a contract.

Appeal from a judgment of the superior court for Spokane county, No. 131301, Edgerton, J., entered February 15, 1954, upon findings, dismissing an action for conversion at the close of the plaintiff's case. Affirmed.

A. O. Colburn and Leo H. Fredrickson, for appellant.

DONWORTH, J. -

This is an appeal from a judgment of dismissal entered after the trial court granted defendant's motion for a nonsuit as to plaintiff's first cause of action. The case was tried to the court sitting without a jury.

In his fourth amended complaint (which contained twelve causes of action), plaintiff alleged in his first cause of action that defendant converted to his own use forty-five tons of hay valued at $1,125 owned by plaintiff and stored on a farm which plaintiff sold to defendant.

Plaintiff testified, however, that he had not sold the farm to defendant but that the latter had moved onto the farm in September, 1948, after plaintiff orally agreed to sell him the farm. The oral agreement was canceled by plaintiff on October 15, 1948, when defendant failed to make the down payment of $450 agreed upon, plaintiff said. After the oral agreement was canceled, plaintiff agreed to allow defendant to remain on the farm in return for his agreement to feed and care for plaintiff's horses and cattle on the place. Plaintiff testified that defendant had agreed to purchase from plaintiff the hay stored in his barn on the premises and to feed plaintiff's hay to plaintiff's horses and cattle, and that he had agreed that defendant could retain the proceeds from the sale of the milk produced by the cows.

On cross-examination by counsel for defendant, and on examination by the court, plaintiff was unable to testify as to when defendant agreed to pay for the hay or what he said

when such alleged agreement was made. Plaintiff finally was asked by counsel for defendant:

"Q. And there was no question in your mind Kuppinger knew it was your hay and he had to pay for it? A. Well, if he had any brains at all, he would know it."

Plaintiff admitted on cross-examination that he had never asked defendant to pay for the hay even once between October 15, 1948, and August, 1949, when he evicted him from the farm.

At the conclusion of the plaintiff's case, the trial court granted a nonsuit as to the first cause of action, ruling that plaintiff's evidence wholly failed to prove any conversion of the hay. Furthermore, deeming the complaint amended to conform to the proof, the court also held that it could not find that there was any offer by plaintiff to sell, nor any agreement by defendant to buy

the hay, nor could the court find any implied contract obligating defendant to purchase the hay fed by him to plaintiff's stock.

From the judgment of dismissal as to the first cause of action entered after the motion for a nonsuit was granted, plaintiff appeals. Defendant has not filed any appearance in this court.

In his brief, appellant says:

"The trial court in granting the non-suit in effect stated that there was no evidence or reasonable inference from evidence, after weighing the evidence in light most favorable to the appellant, which establishes a cause of action against the respondent."

[1] Appellant is in error as to the rule to be applied by this court in an appeal from a judgment of dismissal entered after a motion for an involuntary nonsuit has been granted or a challenge to the sufficiency of the evidence has been sustained in a nonjury trial. In a case tried to a jury, the test is whether there is any evidence or reasonable inference from evidence which will sustain plaintiff's case. But in a case tried to the court, the test applied in jury cases may or may not apply.

[2] The trial court has the right to weigh plaintiff's evidence on a motion for a nonsuit in a nonjury case (which

the court cannot do in a jury case). This has been the rule in this state since Lambuth v. Stetson & Post Mill Co., 14 Wash. 187, 44 Pac. 148.

[3] In determining whether the trial court has weighed the evidence or has treated plaintiff's evidence as true, and has given him the benefit of the most favorable inferences to be drawn therefrom, this court looks first to the trial court's oral or memorandum opinion. O'Brien v. Schultz, 45 Wn. (2d) 769, 278 P. (2d) 322, Grichuhin v. Grichuhin, 44 Wn. (2d) 914, 272 P. (2d) 141. If the trial court's opinion discloses that it treated plaintiff's evidence as true and held, as a matter of law, that plaintiff has not established a prima facie case, findings of fact are unnecessary. In such case, our review of the evidence is limited to determining whether there is sufficient evidence or reasonable inference from the evidence to establish a prima facie case for plaintiff. O'Brien v. Schultz, supra; Grichuhin v. Grichuhin, supra; Arneman v. Arneman, 43 Wn. (2d) 787, 264 P. (2d)256.

[4] However, if we determine from the oral or memorandum opinion (or from the findings of fact if there is no opinion) that the trial court has weighed the evidence and has found either (1) that the evidence in support of plaintiff's prima facie case is not credible, or (2) that plaintiff's credible evidence establishes facts which prevent him from recovering, we know that the trial court has decided as a matter of fact that plaintiff has not established a prima facie case, and findings of fact are necessary to apprise this court as to what facts the trial court found. Rohda v. Boen, 45 Wn. (2d) 553, 276 P. (2d) 586; Lambuth v. Stetson & Post Mill Co., supra. When the trial court has weighed the evidence and has apprised this court by findings of fact what evidence it found credible or what facts it found which would prevent plaintiff from recovering, this court will accept the findings as the facts in the case unless we determine that the evidence preponderates against the findings. Rohda v. Boen, supra: O'Brien v. Schultz, supra.

Turning now to the case at bar, we discover from the

trial court's oral opinion in passing on the motion for a nonsuit that the court disbelieved appellant's testimony that respondent had agreed to purchase the hay. Furthermore, the court was of the opinion that appellant's testimony affirmatively established facts which would prevent him from recovering on the theory that respondent had agreed to buy the hay.

Consequently, unless the evidence preponderates against them, we must accept as true these findings of fact:

". . . For staying on the farm and taking care of plaintiff's horses and cattle, said defendant was to have the milk from the cows and was to feed the hay stored in the barn on the premises to plaintiff's said cattle and horses.

"That said defendant did not convert any part of said hay that was stored in the barn, nor was there any agreement, either express or implied, on the part of said defendant to pay plaintiff for the amount of said hay that was fed to plaintiff's said cattle and horses."

[5] We have read appellant's testimony with care and cannot say that his evidence preponderates against either of the foregoing findings. On the contrary, appellant's failure to testify as to when the alleged agreement to purchase the hay was made or what was said at the time it was supposed to have been made, and his failure to ask for payment for the hay for almost a year, taken in connection with his statement that if respondent "had any brains at all" he should have known he was expected to pay for the hay, amply support the trial court's finding that no such agreement was made by the parties.

[6] It is perfectly clear that there was no meeting of the minds between appellant and respondent, and hence no express contract of sale. Nor can we find any "implied contract" between them. Both express and implied contracts grow out of the intention of the contracting parties and in each case there must be a meeting of the minds before there can be a contract. McKevitt v. Golden Age Breweries, 14

Wn. (2d) 50, 126 P. (2d) 1077; Troyer v. Fox, 162 Wash. 537, 298 Pac. 733, 77 A.L.R. 1132.

The judgment of dismissal must be, and is, affirmed.

GRADY, C. J., SCHWELLENBACH, HILL, and WEAVER, JJ., concur.