Murray v. American Builders Supply Inc.

472 P.2d 738 (1970) | Cited 0 times | Colorado Court of Appeals | June 30, 1970

PIERCE, Judge.

This case was originally filed in the Supreme Court of the State of Colorado and subsequently transferred to the Court of Appeals under authority vested in the Supreme Court.

The parties appear here in the same order as in the trial court; defendant will be referred to as "the corporation."

Plaintiff sued to recover salary allegedly owed him by defendant. He contended at trial that he had been hired by the corporation's predecessor at a monthly salary of$800 per month, and that he had not been paid this full amount. The corporation denied the alleged contract, and maintained that there was no back salary due and owing to plaintiff. The parties stipulated that if plaintiff should prevail, the amount of salry due him woudl be $4,200.

Plaintiff testified that he was hired in November of 1963 by one Edward Garber, then president of the corporation, after contract negotiations between the two of them, only. The result of these negotiations, according to plaintiff, was an agreement eventually reduced to written contract form by the corporation's attorney, under which he was to recieve $800 per month salary. Plaintiff also testified that after the contract had been executed, he had agreed to draw a lesser amount than the $800, subject to payment of the balance due him at a later date when the corporation had sufficient funds with which to pay it.

The attorney testified he had prepared a contract of this nature and that it had been forwarded to Mr. Garber. However, there was no testimony other than plaintiff's that the contract was ever executed. No copy of the contract could be found at the time of trial, which plaintiff testified was due either to its loss in the South Platte River flood of 1965 or its delivery to other attorneys of the corporation who could not locate it. Evidence further showed that when Mr. Garber left the corporation in June of 1964, plaintiff told the new president he would continue to work "under the same circumstances and arrangement I have now." Thereafter, plaintiff's dealings were primarily with the new president, Mr. Weir, and the vice-president, witness Kelly, until plaintiff's employment was terminated in 1965, some ten months after Garber had departed.

Plaintiff offered into evidence unexecuted memoranda obtained from the files of the corporation's attorney, indicating that a contract of employment was to be executed by the parties and plaintiff was to receive no more than $800 per month. These were offered to show the intent of the parites.

Defendant's only witness, Kelly, testified there was no contract of employment with plaintiff, who merely started at a salary of$400 per month; that after Garber left the corporation, plaintiff's salary payments were handled by Weir and himself, and that he and Weir had always countersigned corporation checks; and that he had daily contact with plaintiff during his entire period of employment, and knew that plaintiff had received raises on at least two occasions which had been discussed between plaintiff and himself before they were granted. Kelly further testified there had been no mention of the contract allegedly made with Garber in the entire time he had dealt with plaintiff, and that his first knowledge of the purported contract was after the instant case was filed.

Kelly also testified, over plaintiff's objection, that he had attended all meetings of the board of directors of both the present corporation and its predecessor, and that there had never been mention of the agreement or contract (either proposed or executed) claimed by plaintiff at any of those meetings; but that all pay raises had been discussed at those meetings before being granted.

At the close of testimony, the court entered a judgment of dismissal.

The sole issue before us is whether or not Kelly's testimony was admissible and of any probative value. Plaintiff argues that his own evidence was uncontradicted in that Kelly's testimony was nothing more than "negative hearsay." We disagree.

This type of evidence should not be referred to as hearsay, which is defined as "evidence, whether oral or written, which derives its value, not solely from the credit to be given to the witness upon the stand, but in part from the veracity and competency of some other person," (Emphasis added). Ballentine's Law Dictionary, 553 (3rd. ed., 1969). The questioned testimony is more properly classified as circumstantial evidence.

This state has long approved the acceptance into evidence of statements of a negative fact by witnesses who were in a position to have observed the circumstances. Colorado & S. Ry. Co. v. Lauter, 21 Colo. App. 101, 121 P. 137; Union Pacific Railroad Co. v. Shupe, 131 Colo. 271, 280 P.2d 1115; Lee v. Missouri Pacific Railroad Co., 152 Colo. 179, 381 P.2d 35. The principle that it should be treated as circumstantial evidence was clearly stated in Colorado & S. Ry. Co. v. Honaker, 92 Colo. 239, 248, 19 P.2d 759, 763, where the court said:

"The probative force of negative testimony depends largely upon circumstances. In some circumstances, its probative force may be so slight as to reach the vanishing point; in other circumstances, such testimony may be more persuasive than the positive testimony of some witnesses. It is only when it is so clear that such testimony has no probative value whatever that reasonable men would not differ in their conclusions with reference thereto, that courts are justified in disregarding it on the ground that it does not rise to the dignity of evidence. That is not the situation in the case at bar."

It is clear from his findings that the trial judge in this case properly considered the circumstantial nature of this evidence.

There was probative evidence in the record sufficient to show a disputed fact situation. We will not disturb the trial court's determination regarding these facts, nor the legal conclusions which properly followed from them.

Judgment is affirmed.

COYTE and DUFFORD, JJ., concur.