

ARKANSAS COURT OF APPEALS

DIVISION I
No. CA07-1187

RICHARD LEWIS

APPELLANT

V.

ARKANSAS PULPWOOD COMPANY,
INC.

APPELLEE

Opinion Delivered NOVEMBER 19, 2008

APPEAL FROM THE OUACHITA
COUNTY CIRCUIT COURT,
[NO. CV-2007-126-6]

HONORABLE DAVID F. GUTHRIE,
JUDGE

AFFIRMED

ROBERT J. GLADWIN, Judge

After a bench trial, the Ouachita County Circuit Court granted possession of specific logging equipment to appellee, Arkansas Pulpwood Company, Inc., (hereinafter “Company”) by order filed July 16, 2007. The issue presented is whether the trial court erred in finding that, as part of the agreement between the parties, appellant Richard Lewis had to be a timber contractor for the Company and in finding that Lewis was in default on the agreement. We find no error and affirm.

In November 2006, Lewis negotiated to purchase from the Company three pieces of logging equipment, which included a Barko loader, a delimeter on a Pitts trailer, and a Caterpillar skidder. About three weeks later, a lowboy trailer was included in the purchase. The Company made repairs to the equipment and those repair costs were added to the purchase price. With the interest rate of ten percent included, the total purchase price was

\$95,000. Title remained with the Company, which maintained a security interest in the equipment. The parties signed a financing statement and security agreement. Lewis was to pay the debt by paying \$2.00 for every ton of timber he cut. The Company later agreed to reduce that rate to \$1.50 per ton.

In late May 2007, the Company seized the Barko loader and delimeter from a job Lewis was working for Johnson Timber Company. Lewis filed a complaint and petition for injunctive relief in circuit court asking for a restraining order against the Company and an order for the Company to return the equipment to him. The Company filed an answer and counterclaim alleging that Lewis breached the terms of their agreement by ceasing to cut and haul timber through it and by failing to make weekly payments. The Company asked that the remainder of the equipment be returned.

At trial, John Dawson, Jr., fifty-five percent owner of the Company, claimed that it was part of the agreement that Lewis work for the Company while making payments on the equipment. Dawson claimed that the equipment was repossessed because Lewis had not been heard from for nearly three weeks, even though he was “fairly current” on his payments. Dawson stated that the deciding factor in seizing the Barko loader and delimeter was the fact that Lewis had gone to work for Johnson Timber. Because Lewis had missed a couple of payments and was working for someone else, the Company seized the property.

Lewis testified that he did not recall any requirement in the parties’ verbal agreement that he would have to work for the Company. Lewis claimed that after he began working for Johnson Timber, he deducted payment for the equipment from each load he made. Lewis

testified that Dawson told him the equipment had been seized because the Company did not have to finance anyone who did not work for it. He then testified that several checks had been sent from Johnson Timber to the Company that were made payable to Lewis. These checks were payment for the equipment. Lewis also admitted at trial, “Usually if you are going to borrow money from a timber company, you are going to be working for that company.” He further stated, “As to the issue of borrowing money from a third-party-logging operation that I do not work for, I cannot recall ever having done such a thing.”

Dawson testified that the checks he received from Johnson Timber came to the Company after it had seized the equipment at issue. The checks were payable to Lewis, and Lewis never gave anyone authority to endorse his name on the checks. Dawson stated that he has sold equipment to contractors who worked for the Company in the past. He claimed it was his practice to deal with people that were working for the Company. He said that the normal practice in the industry is that a contractor who borrows money to purchase equipment from a timber company pays off the debt or returns the equipment when they leave the timber company.

The trial court ruled that Lewis breached the financing contract by quitting the Company and contracting to log with Johnson Timber, failing to pay at least one payment due, and failing to maintain insurance on the equipment remaining in his possession. Lewis filed a notice of appeal on August 15, 2007, and this appeal timely followed.

Where a case is tried with the circuit court sitting as the trier of fact, the standard of review on appeal is not whether there is substantial evidence to support the findings of the

court, but whether the judge's findings were clearly erroneous or clearly against the preponderance of the evidence. *White v. McGowen*, 364 Ark. 520, 222 S.W.3d 187 (2006). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a firm conviction that a mistake has been committed. *Id.* Disputed facts and determinations of credibility are within the province of the fact-finder. *Id.*

Maintaining Position as Contractor

Lewis argues that the trial court erred in determining that it was necessary to the agreement that, in order to retain the equipment, he had to be a timber contractor with the Company. Lewis maintains that Dawson believed Lewis's continued contracting with the Company was part of the agreement and that Lewis believed there was no such requirement. Lewis notes that the issue of determining the intent of the parties is a question of fact to be determined by the trial court. *See Bright v. Gass*, 38 Ark. App. 71, 831 S.W.2d 149 (1992). Lewis claims that the basis for the trial court's conclusion was that Dawson's testimony was more credible than his. He contends that conclusion is in error.

Lewis argues that Dawson testified that the industry standard is that a company will only finance the purchase of equipment by one of its contractors if, and only if, the contractor is working for the company. Here, there is no doubt that at the time the agreement was created between the parties, Lewis was employed as an independent contractor with the Company. He argues that the problem is that nothing was said to him about having to continue to work for the Company in order to continue to be able to keep the equipment

and finance it through the Company. He asserts that Dawson acknowledged that they did not discuss the issue. Further, there was no mention in the financing statement and security agreement that in order to keep the equipment, Lewis had to continue to work exclusively for the Company. Based on these arguments, Lewis contends that the trial judge's decision, that Dawson's testimony was more credible, was clearly erroneous.

The Company claims that the trial court did not err in finding that the parties' agreement required Lewis to exclusively contract with the Company. The testimony before the trial court differed as to who had to maintain insurance on the equipment and whether the financing was conditioned upon Lewis continuing to contract exclusively through the Company. The trial court noted the contradiction and found that Dawson's testimony was more credible. The trial court found that the financing agreement required Lewis to continue to contract exclusively with the Company, that such a condition was common practice in the industry, and that Lewis's going to work for Johnson Timber was a breach of the agreement.

Lewis testified he did not owe money to the Company before he began contracting through it and that he knew from his years in the business not to try to borrow money from a timber company for whom he was not working. He acknowledged that it was important for the company financing equipment to have input or control over its contractors' volume of work to assure repayment of their loans. These admissions are evidence that Lewis was aware of the standard in the industry that a timber company only finances equipment for those contractors contracting exclusively for it. Accordingly, we cannot say that the trial court's findings were clearly erroneous, and its determination of witness credibility should not be

reversed.

Default

Lewis also argues that the trial court erred in determining he was in default of the agreement between the parties. He contends that the trial judge found that he breached the agreement “if [for] nothing else because Lewis did not insure the equipment remaining in his possession and was at least one payment in the [sic] arrears.” He contends that this finding of fact was in error; but that even if the trial judge was correct in his findings, such would not support its conclusion that he was in breach of the contract.

Lewis asserts that the parties’ arrangement was that the Company would always maintain insurance on the equipment, and the premiums would be added to the contract debt. Therefore, he argues that there could not have been a breach of contract for his failure to pay insurance. Further, Lewis argues that Dawson testified that the reason for the Company’s repossession of the equipment was that Lewis had stopped working for the Company, not because Lewis was behind in his payments. Therefore, Lewis claims that the trial court erroneously concluded that the breach was due to Lewis’s failure to provide insurance and his being a payment behind in his contract.

The Company urges this court to affirm the trial court’s findings that Lewis breached his agreement by quitting to contract only through the Company, and also because Lewis was at least one payment behind and did not have insurance on the equipment at the time of repossession. The Company contends that these findings are not contrary to the evidence, and therefore, not clearly erroneous. We agree.

The evidence presented proves that the four checks issued from Johnson Timber to Richard Lewis and sent to the Company were not received by the Company until after the equipment was repossessed. These checks were never endorsed by Lewis nor did he authorize the Company to endorse his name to those checks. Also, Lewis missed at least one weekly payment. The first check received from Johnson Timber was dated May 24, 2007, almost two weeks after Lewis quit contracting through the Company on May 11, 2007. There was no check submitted for the week of May 17, 2007, and Lewis gave no explanation. Finally, Lewis failed to supply the Company with weekly settlement sheets showing tonnage hauled to validate the amount of the checks issued by Johnson Timber. This would have been necessary in order for the Company to insure it was receiving \$1.50 per ton of timber hauled.

The Company claims that it had obtained insurance on the equipment and added the cost of the premium to the debt owed. According to his testimony, after Lewis quit working for the Company, he had not placed any insurance on the equipment. Therefore, we cannot say that the trial court's findings, that Lewis was at least one payment behind and that he did not have insurance on the equipment at the time of the repossession, were clearly erroneous. Accordingly, we affirm.

Affirmed.

VAUGHT and HUNT, JJ., agree.