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NO. COA02-160

NORTH CAROLINA COURT OF APPEALS

Filed: 5 November 2002

ISIDRO FRANCO-FAVELA,
Plaintiff

v.

LEONARD WESTER, d/b/a WESTER FARMS and WESTER FARMS, LLC,
Defendants.

Franklin County
No. 99 CVD 605

Appeal by plaintiff from judgment filed 29 August 2001 by Judge Daniel F. Finch in Franklin County Superior Court. Heard in the Court of Appeals 9 October 2002.

Alice Tejada for plaintiff-appellant.

Constangy, Brooks & Smith, LLC, by Jill S. Cox and A. Robert Bell, III, for defendants-appellees.

TYSON, Judge.

Isidro Franco-Favela ("plaintiff") appeals from summary judgment entered in favor of Leonard Wester d/b/a Wester Farms and Wester Farms, LLC ("defendants") on plaintiff's breach of employment contract claim. We affirm.

I. Facts

Plaintiff, a Mexican national, was issued a temporary visa pursuant to the H-2A federal program, 8 U.S.C. § 1101(H)(ii)(a), in 1996. The program allowed him to perform agricultural labor in the

United States for authorized employers. Wester Farms, acting through the North Carolina Growers Association ("NCGA"), employed foreign temporary agricultural workers under the H-2A program. Defendants had been employing H-2A workers for labor on a seasonal basis since 1991.

Defendant Wester Farms is a farming operation located in Louisburg, North Carolina. In 1996, defendants grew and harvested jalapeno peppers, banana peppers, hot cherry peppers, bell peppers cucumbers, hay, wheat, soybeans, and tobacco. One and a half acres of the 3,000 acre farm was devoted to the production of bell peppers grown at the request of a private individual.

In 1996, defendants entered into a written employment agreement with plaintiff entitled "Agricultural Work Agreement", ("Agreement"). Federal regulations require certain mandatory productivity standards for piece rate work to be set out in the written job offer if meeting the standards is a condition for job retention. 20 C.F.R. § 655.102(b)(9)(ii)(B) (1998). The Agreement did not set a mandatory productivity standard for harvesting bell peppers.

During plaintiff's employment from 28 July 1996 through 14 August 1996, he was assigned to picking jalapeno and banana peppers and harvesting tobacco. According to plaintiff, he also picked bell peppers. Plaintiff received two written warnings for poor performance, one for low production and the other for failure to follow supervisor's orders. The warning for poor performance

stated a "FAILURE TO COMPLY WITH APPLICABLE PRODUCTION STANDARDS (i.e., 5 BUCKETS PER HOUR)."

Plaintiff was guaranteed the prevailing adverse effect wage rate of $5.80 per hour for each payroll period. All H-2A employees were guaranteed the wage rate whether they were compensated on an hourly rate or piece rate. The distinction was based on the tasks to which employees were assigned. Employees who picked banana or jalapeno peppers were paid at a specified rate for each bucket picked. Tobacco workers were paid hourly. Piece rate employees who picked more than the expected rate per hour received more than the hourly wage. Those workers who were less productive did not suffer a wage loss below the guarantee and were given "make-up pay" to earn the hourly wage.

Defendants used a system involving tokens for the harvesting of piece rate crops. Each worker was given a plastic token in exchange for each bucket picked and presented. The tokens were counted at the end of the shift, and the number turned in by each employee was entered into the payroll records. The system of tokens was not used for harvesting bell peppers.

On 15 August 1996, plaintiff signed a voluntary resignation of his employment with defendant. The resignation form was written in English and Spanish. Plaintiff testified that he recalled nothing about the circumstances under which he signed the form, but he admitted his signature. Defendants advised plaintiff that there was no work for him and escorted plaintiff to the bus station after paying him on 15 August 1996. Plaintiff's original employment

agreement set his employment period from 28 July 1996 through 1 November 1996.

Plaintiff contacted an attorney on the way to the bus station. Plaintiff filed a complaint alleging breach of the employment contract on 30 July 1999. The trial court after a bench trial issued summary judgment in favor of defendants on 29 August 2001.

II. Issues

Plaintiff argues that the trial court committed reversible error by: (1) denying plaintiff's Rule 15(b) motion to amend the complaint to conform to the evidence presented at trial that tended to show that plaintiff was terminated for failure to meet productivity requirements imposed by the defendants in the harvesting of peppers, (2) admitting into evidence defendants' Exhibits Thirteen, a warning notice and Fifteen, a computer printout, (3) finding facts Thirteen and Fourteen, that defendants' pay system for bell pepper harvest was hourly pay rather than on a piece rate and that defendants did not apply a mandatory productivity standard in the harvest of bell peppers when there was insufficient evidence and the findings are contrary to the evidence presented at trial, and (4) concluding as a matter of law that (a) plaintiff voluntarily resigned from his employment with defendants and (b) plaintiff did not establish that he was unlawfully terminated. Plaintiff alleges that these conclusions are not supported by any competent evidence and are contrary to the evidence presented at trial.

III. Denial of the 15(b) Motion to Amend the Complaint

We review the trial court's decision to deny plaintiff's Rule 15(b) of the North Carolina Rules of Civil Procedure motion for abuse of discretion. *Marina Food Assoc, Inc. v. Marina Restaurant, Inc.*, 100 N.C. App. 82, 89, 394 S.E.2d 824, 828 (1990).

> 'When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.'

Roberts v. Memorial Park, 281 N.C. 48, 56, 187 S.E.2d 721, 725 (1972) (quoting N.C. R. Civ. P. 15(b) (2001)). If the non-raising party objects to the new evidence, the court may allow for amendment of the pleadings and shall do so freely when the merits will be served and the objecting party fails to show that the admission of such evidence would prejudice him in maintaining his action or defense. *Id.* at 56-57, 187 S.E.2d at 725-26.

Defendants argue this issue is moot after the trial court found that plaintiff voluntarily resigned. This finding serves as a sufficient and separate basis for its ruling. The evidence outside of the complaint relates to plaintiff's failure to meet production standards for harvesting banana and jalapeno peppers which allegedly related to plaintiff's discharge. Since the trial court found that plaintiff voluntarily resigned, he was not discharged.

The trial court's finding of voluntary resignation was actually a conclusion of law. It is reviewable *de novo* by this Court. Substantial evidence in the record supports the trial court's findings of fact which support the conclusions of law. This issue is moot.

IV. Admission of Defendants' Exhibits Thirteen and Fifteen

Plaintiff argues that the court committed reversible error in admitting defendants' Exhibits Thirteen, the warning notice for not following instructions and Fifteen, the computer printout. Plaintiff contends that both should have been excluded by granting plaintiff's Rule 37 of the North Carolina Rules of Civil Procedure motion, or in the alternative, both are hearsay not within an exception.

Our standard of review of a trial court's decision whether to deny a Rule 37 motion to exclude evidence or to admit evidence is an abuse of discretion. *Segrest v. Gillette,* 96 N.C. App. 435, 442, 386 S.E.2d 88, 92 (1989), *rev'd on other grounds,* 331 N.C. 97, 414 S.E.2d 334, *reh'g denied,* 331 N.C. 386, 417 S.E.2d 791-92 (1992).

A. Denial of Plaintiff's Rule 37 Motion

Plaintiff contends that defendants' submission of a second warning, allegedly given to plaintiff during his employment, and the submission of a computer printout of plaintiff's employment record less than a week before trial on 24 July 2001 showed noncompliance with previous discovery requests and unfairly surprised plaintiff.

Plaintiff moved to exclude the documents and for sanctions pursuant to Rule 37(d). Plaintiff had made discovery requests for any information regarding discipline and termination of any workers

during the time the plaintiff worked for defendants. Plaintiff contends that the new evidence, particularly Exhibit Fifteen, a computer printout which contained a written note, "TERMINATED 8/15/96. WONT [sic] PRIME TOB.", unfairly surprised plaintiff a week before trial and alerted him to a potential new defense, that he was terminated because he would not prime tobacco.

In response to plaintiff's motion for sanctions for discovery noncompliance, defendants argued that (1) their timely objections to plaintiff's interrogatories and document requests as overbroad were sufficient responses required by the discovery rules, and (2) their actions did not fall within those contemplated in Rule 37(d).

Our Supreme Court in *Bumgarner v. Reneau,* 332 N.C. 624, 422 S.E.2d 686 (1992), upheld the exclusion of evidence subsequently introduced at trial where the offering parties had not supplemented their prior discovery responses which were no longer accurate because of newly offered evidence.

Bumgarner is distinguishable from the facts at bar. The new evidence in *Bumgarner* made the prior responses incorrect. Here, defendants' new evidence did not change the validity of prior responses. Rule 26(e) of the North Carolina Rules of Civil Procedure states that a party is under no duty to supplement his response to include information later acquired, except where a party knows that his prior response was incorrect when made or no longer correct due to new circumstances. There was no duty to supplement the discovery, and the defendants promptly replied to the discovery requests in the form of an objection. These are

sufficient reasons for the trial judge within his discretion to withhold sanctions.

The trial judge did not abuse his discretion in allowing Exhibits Thirteen and Fifteen into evidence despite the claimed surprise to plaintiff.

B. Exhibits Thirteen and Fifteen are Hearsay

Plaintiff also challenges the admission into evidence of Exhibits Thirteen and Fifteen as error. Plaintiff contends that both are hearsay and that neither meets the requirements of the business records exception. Hearsay is defined as an out-of-court statement "offered in evidence to prove the truth of the matter asserted.” N.C. R. Evid. 801(c) (2002). Hearsay is not admissible except as provided by statute or by the North Carolina Rules of Evidence.

The trial court found Exhibits Thirteen and Fifteen to be hearsay allowed into evidence through the business records exception. The business records exception requires a showing that the evidence is

> [a] memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

N.C. R. Evid. 803(6) (2002). "Trustworthiness is the foundation of the business record exception." *State v. Miller,* 80 N.C. App. 425, 429, 342 S.E.2d 553, 556 (1986) (citation omitted).

Plaintiff contends that both documents are unreliable and lack trustworthiness as well as other essential elements of the business record exception. Neither exhibit evidences the requirement that the record be made at or near the time of the act, event or condition. Exhibit Thirteen, the Warning Notice, contains no date, is not signed by plaintiff or defendants, and does not indicate it was ever given to plaintiff. Defendant Wester substantiated its reliability through testimony that it was his common practice to write the worker's name at the top, provide the worker a copy, and place it in his personnel file. We hold that Exhibit Thirteen, having been routinely kept in the ordinary course of business as testified to by Wester, was properly admitted.

Exhibit Fifteen bears no indication of the date it was made. The date on the bottom of "8/10/99" occurred nearly three years after plaintiff left the farm and does not qualify it for the exception. In addition, Leonard Wester was not competent to testify regarding NCGA's regular practice for maintaining its records. Wester was not familiar with the NCGA's system for business entries.

The trial judge found Defendant Wester to be a qualified authenticating witness for Exhibit Fifteen based upon his membership on the board of the NCGA, his access to the records of the NCGA, and his knowledge of what the records contained. Wester

was not familiar with the NCGA's documenting process. The trial court erred in admitting Exhibit Fifteen under the business records exception. There was no competent evidence that Wester knew how the NCGA managed their entries. We find that the admission of Exhibit fifteen is harmless error as it does not directly contradict the trial court's conclusion of voluntary resignation.

V. Findings of Fact Thirteen and Fourteen

Plaintiff argues that the trial court's findings that defendants' pay system for the bell pepper harvest was hourly rather than on a piece rate and that defendants did not apply a mandatory productivity standard in the bell pepper harvest were not supported by evidence.

Plaintiff contends that defendants' payroll records contradict the testimony of defense witnesses, Wester and Martinez. The payroll records indicate crops coded as 11, 12, and 13 were "piece work." Wester could not conclusively identify any of the codes, but indicated that codes 11 and 12 were likely jalapeno and banana peppers. There is no evidence that code 13 was anything other than bell peppers, or that indicates code 13 was for bell peppers. Plaintiff never testified that he was to be paid a piece rate for bell peppers although he testified that he was required to fill up a certain number of buckets which is characteristic of a piece rate.

Martinez and Wester testified that bell pepper harvesters were always paid by the hour. The trial court resolves conflicts in the

testimony. The trial court's findings of fact are supported by substantial evidence.

Plaintiff argues that the factual findings are incomplete because plaintiff's work in banana and jalapeno peppers was not considered. Findings Nine, Eleven, and Twelve concern the harvest of banana and jalapeno peppers and payment on a piece rate basis.

When parties have waived a jury trial as they have at bar, the trial court's findings of fact have the effect of a jury verdict and are conclusive on appeal provided there is competent evidence to support them, even where the evidence might support contrary findings. *Highway Church of Christ, Inc. v. Barber,* 72 N.C. App. 481, 484, 325 S.E.2d 305, 307 (1985). Plaintiff has failed to show why the trial court's findings that defendants' pay system for bell peppers was hourly and that defendants did not apply a mandatory productivity standard in harvesting bell peppers should be disturbed. There is competent evidence through the testimony of defense witnesses to support the findings. Plaintiff offered collateral evidence, rebutted by defendants, that defendants violated the employment agreement by imposing a productivity requirement and piece rate payment on the harvested banana and jalapeno peppers that was not authorized by the federal government for those crops. Plaintiff's complaint only alleges a breach of his employment agreement concerning bell peppers, not banana or jalapeno peppers.

VI. Conclusions of Law

Plaintiff argues that the court erred in concluding as a matter of law that (1) plaintiff voluntarily resigned from his employment at Wester Farms and (2) plaintiff had not established that defendants had terminated him for an unlawful reason of the employment agreement.

A trial court's conclusions of law are reviewable *de novo.* *Shear v. Stevens Building Co.,* 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992) (citation omitted).

There was sufficient evidence provided by the voluntary resignation form and the testimony of Wester and Martinez for the trial court to conclude as a matter of law that plaintiff voluntarily resigned. Plaintiff contends that he was rushed and did not have time to fully read the document before he signed. Plaintiff's cultural anthropologist indicated that working immigrants will sign anything put in front of them by their employer. The trial court resolved the factual conflicts to find that defendants did not cause plaintiff to be rushed or pressured into signing his resignation.

Plaintiff did not establish that defendants fired him for an unlawful reason. Plaintiff received a warning for low productivity, and plaintiff testified as to having worked on a piece rate for the banana and jalapeno peppers. There is no evidence linking these actions to plaintiff's termination. Defendant Wester refuted the inference that plaintiff was fired for low productivity in harvesting bell peppers by testifying that only

cucumbers had a mandatory productivity requirement for that year.

Under our standard of review, we find no reversible error in the conclusions of law. The trial court's conclusions of law that plaintiff voluntarily resigned his employment are based upon findings of fact that are supported by substantial evidence.

We affirm the judgment of the trial court.

Affirmed.

Judges McCULLOUGH and BRYANT concur.

Report per Rule 30(e).