COURT OF APPEALS
DECISION
DATED AND RELEASED

November 15, 1995

NOTICE

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62(1), STATS.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-2077

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

QUALITY ENERGY PRODUCTS, INC., a Wisconsin corporation,

Plaintiff-Appellant-Cross Respondent,

v.

IRA SAFER, d/b/a COUNTERTOP WHOLESALERS,

Defendant-Respondent-Cross Appellant.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Washington County: JAMES B. SCHWALBACH, Judge. *Affirmed*.

Before Anderson, P.J., Brown and Snyder, JJ.

PER CURIAM. Quality Energy Products, Inc. appeals and Ira Safer, d/b/a Countertop Wholesalers, cross-appeals from a judgment resolving their claims and counterclaims. Because the trial court correctly concluded that the proof at trial was insufficient, we affirm.

Safer did remodeling work as a subcontractor for Quality. After the Quality-Safer relationship broke down, Quality sued Safer to recover what it characterized as loans and advances from 1989 to 1992.[1] Safer counterclaimed that commissions were due him from Quality and that he did not receive his personal property from Quality's office when the relationship terminated.

Jack Marston, Quality's president, testified that he and Safer entered into an agreement whereby Quality would advance funds to pay subcontractors and place advertising for remodeling projects and Safer would handle the other aspects of each remodeling job. Costs would be deducted from the job price and the profits would be paid 45% to Quality and 55% to Safer because he had out-of-pocket expenses. Marston testified that he did not have an agreement to reimburse Safer for mileage or telephone calls.

Marston began doing business with Safer as "Capitol Contractors" in late 1989 when Safer received the first advance.[2] Marston offered his ledger as proof that Safer received advances and loans of $4061.18 in 1989 to cover costs Safer was incurring on jobs in progress. However, the ledger did not list any jobs performed by Quality and Safer in 1989, and Marston could not identify the jobs.[3] Safer never repaid the funds he received in 1989.

Safer testified that he and Marston first went into business together in 1989 as Capitol Contractors. Safer testified that Marston intended to fund the business and they would split the profits 50/50. Safer testified that the 1989 advances and advertising charges were related to the operation of Capitol Contractors, but he was uncertain to which jobs they applied. Capitol Contractors was in business from approximately mid-1989 to the end of 1990. At that point, Capitol Contractors was dissolved, and Safer was employed as a subcontractor by Quality Energy Products and profits were split 55/45. Safer later testified that the parties had agreed to a 60/40 split.

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[1] Although the appellant's brief states that Quality sued to recover commissions and advances up to 1993, the documents entered into evidence at trial did not show any transactions in 1993.

[2] In his deposition, Marston testified that he and Safer began doing business in the spring of 1991.

[3] The first job appearing on the ledger is dated February 15, 1990.

Safer testified that at the time he was paid commissions, he did not challenge the figures because he did not have any records. Upon seeing the documents Quality intended to submit at trial, Safer recalculated the transactions from 1990 to 1992 and concluded that Quality owed him $4701.13 in commissions, plus his expenses.

Safer stated that he retrieved his personal property from the hallway outside of Quality's office on the same weekend that Marston set the items out. However, Safer claimed that items valued at approximately $350 were missing.

Marston then returned to the witness stand to testify that he never agreed to pay Safer's expenses and that each time a job's profit was calculated, Safer received a copy of the calculations. Additionally, Safer made copies of every job file and kept them in his briefcase. Safer never challenged the accuracy of the breakdowns. Safer never made any claim for additional commissions before Quality sued him. Marston claimed that there was nothing of value in the boxes he put into the hall.

In argument, Safer contended that he was underpaid commissions by $4701.13. Marston contended that Safer received loans and advances in 1989 and owed Quality $4061.18.

The trial court found that Quality did not prove that Safer owed loans and advances from 1989 in the amount of $4061.18 because there were no jobs listed for 1989 on Quality's ledger and there was inadequate proof that Quality made the advances. The trial court further found that: (1) Safer was double-billed for advertising costs on a project and should be credited $385.46; (2) Safer was to receive 55% of net profits per remodeling job, but the trial court declined to recalculate Safer's commissions; and (3) Safer did not establish with the requisite degree of certainty any entitlement to reimbursement for mileage and other expenses or that he lost personal property when it was removed from Quality's offices. The trial court found that Quality owed Safer $790.17. Quality appeals, and Safer cross-appeals.

We conclude that the trial court's findings of fact are not clearly erroneous. *See* § 805.17(2), STATS. Both Marston and Safer testified that they began doing business in late 1989 as Capitol Contractors. The plaintiff in this case was Quality Energy, and no proof was offered that Capitol's claim against Safer for funds advanced in 1989 had been assigned to Quality or that Quality and Safer did any jobs in 1989. Therefore, the trial court's finding that there was insufficient proof that Safer was indebted to Quality is not clearly erroneous. Furthermore, Safer did not offer sufficient proof in support of his counterclaim for commissions. There were conflicts in the testimony. It was the trial court's responsibility to assess the credibility of the witnesses, ***Village of Big Bend v. Anderson,*** 103 Wis.2d 403, 410, 308 N.W.2d 887, 891 (Ct. App. 1981), and resolve those conflicts.

Safer complains that the trial court erred in refusing to recalculate the commissions due him. However, there was insufficient testimony as to the manner in which profits were to be split, particularly because Safer gave conflicting testimony regarding the allocation of profits.

Safer moves for RULE 809.25(3), STATS., costs on the ground that Quality's appeal is frivolous. Each party appealed from the final judgment and that judgment has been affirmed as to each. While neither party prevailed, the court does not find either the appeal or the cross-appeal to be frivolous under RULE 809.25(3)(c).

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.