

FSM SUPREME COURT APPELLATE DIVISION

ERSINA V. GEORGE,) APPEAL CASE NO. K9-2007
)
Appellant,)
)
vs.)
)
WEBSTER GEORGE,)
)
Appellee.)
_____)

OPINION

Argued: December 17, 2009
Decided: January 12, 2010

BEFORE:

Hon. Martin G. Yinug, Associate Justice, FSM Supreme Court
Hon. Dennis K. Yamase, Associate Justice, FSM Supreme Court
Hon. Ready E. Johnny, Associate Justice, FSM Supreme Court

APPEARANCES:

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For the Appellee: Snyder H. Simon, Esq.
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HEADNOTES

Appellate Review – Standard of Review – Civil Cases

The standard of review for findings of fact is whether the trial court's findings are clearly erroneous. When trial court findings are alleged to be clearly erroneous, an appellate court will find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing the entire body of the evidence and construing the evidence in the light most favorable to the appellee, the appellate court is left with a definite and firm conviction that a mistake has been made. The trial court's findings are presumptively correct. George v. George, 17 FSM Intrm. 8, 9-10 (App. 2010).

Constitutional Law – Due Process; Evidence

It is constitutional error for a trial court to rely on exhibits never identified, described, or marked

at trial, but the trial court does not commit reversible error when there was extensive testimony and cross-examination of witnesses concerning the exhibits' contents. In such an instance, it is the witness testimony that is the evidence before the court. George v. George, 17 FSM Intrm. 8, 10 (App. 2010).

Appellate Review – Standard of Review – Civil Cases; Constitutional Law – Due Process

When the trial court did not rely on unadmitted evidence to reach its decision and when there was substantial trial testimony from which the trial court could reasonably find that the defendant owed the plaintiff \$6,220.52, the trial court decision did not violate the defendant's due process rights and its factual finding that \$6,220.52 was the amount owed was not clearly erroneous. George v. George, 17 FSM Intrm. 8, 10 (App. 2010).

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COURT'S OPINION

DENNIS K. YAMASE, Associate Justice:

This appeal is from the Kosrae State Court's September 17, 2007 decision, George v. George, 15 FSM Intrm. 270 (Kos. S. Ct. Tr. 2007), which awarded plaintiff Webster George \$6,220.52, as the balance due on defendant Ersina V. George's open account at the plaintiff's store. We affirm the trial court judgment. Our reasons follow.

I. BACKGROUND

Webster George ("Webster") filed suit against his former employee, Ersina George ("Ersina") for money owed him on an open account that she had at his store, where she had worked and but which is no longer in business. Ersina's payments on the open account had been made through deductions from her paycheck. Webster sought damages of \$6,220.52 in principal, \$8,211.06 in pre-judgment interest, and \$2,164.74 in costs and attorney fees. George, 15 FSM Intrm. at 272 (Kos. S. Ct. Tr. 2007). Three witnesses, two bookkeepers and their supervisor, testified for the plaintiff, *id.* at 273-74, and were extensively cross-examined by defense counsel. They identified and testified about the contents of the last ledger sheet of the defendant's open account and that the final balance on that sheet was \$6,220.52. The plaintiff never moved to admit that ledger sheet into evidence.

The trial court awarded Webster the \$6,220.52 in principal on the grounds that Ersina acknowledged that she owed some amount and that Webster had proven that amount by the preponderance of the evidence, *id.* at 274-75, but held that Webster was not entitled to prejudgment interest or attorney's fees, *id.* at 275-76. Ersina then appealed.

II. ISSUES PRESENTED AND STANDARD OF REVIEW

Ersina George contends that the trial court erred 1) by holding that she owed Webster George \$6,220.52, which was the last entry on the last ledger page of her open account with Webster George, and 2) by awarding that amount when, in her view, it was not supported by substantial evidence and is clearly erroneous.

Our standard of review for findings of fact is whether the trial court's findings are clearly erroneous. M/V Kyowa Violet v. People of Rull ex rel. Mafel, 16 FSM Intrm. 49, 60 (App. 2008). When trial court findings are alleged to be clearly erroneous, we can find reversible error only: 1) if the trial court findings were not supported by substantial evidence in the record; or 2) if the trial court's factual finding was the result of an erroneous conception of the applicable law; or 3) if, after reviewing

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the entire body of the evidence and construing the evidence in the light most favorable to the appellee, we are left with a definite and firm conviction that a mistake has been made. See Narruhn v. Aisek, 13 FSM Intrm. 97, 99 (Chk. S. Ct. App. 2004), *aff'd*, 16 FSM Intrm. 236 (App. 2009). The trial court's findings are presumptively correct. Ponape Island Transp. Co. v. Fonoton Municipality, 13 FSM Intrm. 510, 513 (App. 2005).

III. ANALYSIS

Ersina contends that the trial court should not have entered judgment against her for \$6,220.52 because the ledger page was never admitted into evidence and that amount was the last entry on the last ledger page of her open account with Webster. She also contends that there is no, or not enough other, evidence to support a judgment for that amount so that therefore the judgment must be vacated and remanded to the trial court for further evidentiary hearings. Thus, the sole issue before us is whether there was sufficient evidence before the trial court for it to have rendered judgment in the amount of \$6,220.52 when the ledger sheet showing that amount was never offered or admitted into evidence.

A careful review of the trial transcript reveals that there was extensive unchallenged testimony by the record custodians, who were familiar with Webster's records, about the contents of the last ledger sheet of Ersina George's open account, including its starting balance (\$6,545.56) and the last amount owed (\$6,220.52). This was elicited on both direct and cross-examination.

We have previously held that it is constitutional error for a trial court to rely on exhibits never identified, described, or marked at trial, but that the trial court does not commit reversible error when there was extensive testimony and cross-examination of witnesses concerning the exhibits' contents. Thomson v. George, 8 FSM Intrm. 517, 523 (App. 1998); *cf.* Waguk v. Kosrae Island Credit Union, 6 FSM Intrm. 14, 18 (App. 1993) (court did not hold it was error when exhibits were identified and marked at trial but never introduced, and where there was extensive testimony and cross examination of witnesses concerning these exhibits' contents). In such an instance, it is the witness testimony that is the evidence before the court. The trial court did not rely on the unadmitted ledger sheet to reach its decision. It explicitly stated that "based on the testimony of Plaintiff's witnesses about the ledger and the balance, the Court finds the evidence weighs slightly to the Plaintiff and that it is more probably true than false that Defendant owes the amount of \$6,220.52." George, 15 FSM Intrm. at 274-75.

We conclude that since the trial court did not rely on unadmitted evidence (the ledger sheet) to reach its decision and since there was substantial trial testimony from which the trial court could reasonably find that the defendant owed the plaintiff \$6,220.52, the trial court decision did not violate the defendant's due process rights. The trial court's factual finding that \$6,220.52 was the amount owed was not clearly erroneous.

IV. CONCLUSION

Accordingly, the trial court decision is affirmed.

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