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STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0752

Hotepsekhemwy Arisekheru,
Appellant,

vs.

Scott Johnson,
Respondent.

Filed April 14, 2009
Affirmed
Poritsky, Judge[*]

Ramsey County District Court
File No. 62-C0-07-001737

Hotepsekhemwy Arisekheru, 3025 30th Avenue South, P.O. Box 7455, Minneapolis, MN 55407 (pro se appellant)

Scott Johnson, 397 North Fry Street, St. Paul, MN 55104 (pro se respondent)

Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and Poritsky, Judge.

U N P U B L I S H E D O P I N I O N

PORITSKY, Judge

Hotepsekhemwy Arisekheru appeals the district court's decision against him in his personal-injury action on two grounds. First, he argues that the district court wrongfully

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

denied him a jury trial because he proceeded in forma pauperis. Second, he argues that the evidence was insufficient to support the district court's factual findings. We conclude that (1) because Arisekheru never indicated to the district court that he wanted a jury trial, he is not entitled to a new trial, and (2) the evidence sufficiently supports the district court's factual findings. Accordingly, we affirm.

FACTS

On September 12, 2003, Hotepsekhemwy Arisekheru was at his rented music studio. Respondent Scott Johnson is the owner of the building. Arisekheru alleges that as he stood on a chair to adjust some posters, a light fixture fell from the ceiling, swung toward him, struck him, and caused him to fall. No one witnessed the incident.

On February 23, 2007, Arisekheru, acting pro se, filed a personal-injury action against Johnson, seeking $75,000 to $100,000 in damages. Both he and Johnson filed informational statements. Arisekheru's statement did not indicate whether he requested or waived a jury trial. On April 4, 2007, the district court issued a scheduling order, which noted that neither party had requested a jury trial.

At the pretrial conference, Johnson asked the district court whether he could still request a jury trial, and the district court responded that he could. As a result, the pretrial order stated that the case was set for a jury trial. The pretrial order also had several other requirements that the parties had to comply with before trial, including providing "a list of requested jury instructions and a proposed special verdict form."

On March 3, 2008, the parties appeared for trial. The district court informed them that a jury trial would not occur because neither Johnson nor Arisekheru had provided

jury instructions or a proposed special-verdict form as required by the pretrial order. Neither Arisekheru nor Johnson objected, and the case proceeded as a trial by the court. Arisekheru, his girlfriend, and Johnson testified. Afterwards, the district court issued its findings of fact, conclusions of law, and an order for judgment in favor of Johnson. Arisekheru now appeals.

D E C I S I O N

When neither party has moved for a new trial, this court examines only the questions of "whether the evidence sustains the findings of fact and whether such findings sustain the conclusions of law and the judgment." *Gruenhagen v. Larson*, 310 Minn. 454, 458, 246 N.W.2d 565, 569 (1976). Unless clearly erroneous, findings of fact will be upheld. Minn. R. Civ. P. 52.01.

I

Arisekheru contends that he was denied his right to a jury trial because he was proceeding in forma pauperis. In Minnesota, the right to a jury trial is "inviolate," regardless of the amount in controversy. Minn. Const. art. 1, § 4. Parties may waive the right to a jury trial. *See* Minn. R. Civ. P. 38.02 (listing waiver situations). At the onset, we note that this case is not about waiver. The issue presented here is whether a party is entitled to a new trial on the ground that he was deprived of his right to a jury trial when he was given a reasonable opportunity to request a jury trial but failed to do so.

"A trial court has a duty to ensure fairness to a pro se litigant by allowing reasonable accommodation so long as there is no prejudice to the adverse party." *Kasson State Bank v. Haugen*, 410 N.W.2d 392, 395 (Minn. App. 1987). Here, we conclude that

allowing Arisekheru to have another trial would cause Johnson prejudice, because he would be subjected to the expense and inconvenience of a second trial, through no fault of his own. The remaining question is whether the district court made a "reasonable accommodation" for Arisekheru on the issue of a jury trial.

Arisekheru had a number of opportunities to simply inform the district court that he wanted a jury trial. Most notably, he was clearly presented with the choice of a jury or court trial when he filed his informational statement. Minn. R. Gen. Pract. 111.02 requires that within 60 days after the case is filed, the parties submit informational statements to provide district courts with information "to manage and schedule the case." The rule further requires that each party submit such a statement on a form mandated by the rule, which asks the party to indicate "[w]hether a jury trial is requested or waived." Accordingly, the form submitted by Arisekheru contained the following request for information:

> 8. A jury trial is: □ waived by consent of _____ pursuant to R. Civ. P. 38.02
> (specify party)
>
> □ requested by _____, (NOTE: Applicable fee must be enclosed.)
> (specify party)

Arisekheru declined to respond. In addition, question 10 on the Informational Statement asks for "any additional information which might be helpful to the court when scheduling this matter." Arisekheru had the opportunity to request a jury trial or at least inquire about one in response, but he did not do so.

On April 4, 2007, the district court issued the required scheduling order. *See* Minn. R. Gen. Pract. 111.03 (requiring district court to issue scheduling order with specific information, including whether case is set for jury trial). The scheduling order noted that "[a] jury trial has not been requested" with the phrase "has not" appearing in bold type. At this point, if Arisekheru wanted a jury trial, he had the opportunity to contact the district court, but did not do so. He did inquire, however, about other items in the scheduling order, such as the required mediation. He wrote to the mediator about Johnson's failure to attend mediation and indicated that he had spoken with someone at the courthouse about this situation before contacting the mediator. Thus, Arisekheru appears to have been able to contact the district court about items listed in the scheduling order, but the record shows no correspondence about a request for a jury trial. If Arisekheru had wanted a jury trial, he had an obligation to make the district court aware of this fact when the scheduling order informed him that neither party had requested one.

At the pretrial conference on January 7, 2008, Johnson asked the court about the fact that "a jury [had] not been requested." Johnson then informed the court that he wanted a jury trial. Before the court remarked about whether a party proceeding in forma pauperis could have a jury trial, Arisekheru had the opportunity to request a jury trial, or at least inquire about one. Again, he was silent on the matter. (The court's remark is discussed below.)

Arisekheru's final opportunity occurred the day of the trial. The district court denied Johnson's request for a jury trial because of noncompliance with the pretrial order's requirements. Here, too, Arisekheru had an opportunity to mention that he was requesting a jury trial, but he did not do so.

Much of Arisekheru's argument centers on a remark made by the court at the pretrial conference, where the court said, "[Arisekheru] filed in forma pauperis, and I won't approve in forma pauperis for a jury trial." This was a gratuitous and improvident remark. It was gratuitous because it was not in response to a request by Arisekheru for a jury trial. It was an off-the-cuff remark made during an informal conversation with Johnson and was not even addressed to Arisekheru. And it was improvident because it was not a ruling, although it may have appeared that way to a pro se litigant. Moreover, the court did not provide a legal basis for his remark, and nothing in the record indicates whether it was a correct statement of law. The in forma pauperis statute does not directly address jury trials and their associated fees. *See* Minn. Stat. § 563.01, subds. 3–8 (2008) (authorizing certain persons to proceed in forma pauperis and authorizing payment of expenses). The statute directs court administrators to perform their duties without charge, but does not specifically address whether this duty includes supplying a jury to an in forma pauperis litigant. *Id.*, subd. 4.

Whether or not the court's remark is supported by law, we recognize that Arisekheru may have been reluctant to pursue the issue of a jury trial thereafter, for fear of antagonizing the judge. But from the start of the lawsuit until the time the remark was made at the pretrial conference, Arisekheru had several opportunities to request a jury

trial. Indeed, based on Arisekheru's actions since the start of the case, the court may well have thought that Arisekheru, like many pro se litigants, wanted to try the case to a judge. For these reasons, we conclude that the court's remark, while unfortunate, does not entitle Arisekheru to a new trial.

We further conclude that the district court made reasonable accommodations for Arisekheru. Until this appeal, Arisekheru at no time mentioned that he wanted a jury trial. Because Arisekheru took no action when he was given reasonable opportunities to request a jury trial, he cannot now complain that he was denied his right to one. District courts are not, and should not have to be, mind readers.

II

Arisekheru also contends that the factual findings about his witness and his records about the light fixture were erroneous. As noted earlier, a district court's findings of fact "shall not be set aside unless clearly erroneous" regardless of whether they were based on oral or documentary evidence, "and due regard shall be given to the opportunity of the [district] court to judge" the witnesses' credibility. Minn. R. Civ. P. 52.01. The district court receives this deference because it hears all the testimony, observes the testifying witnesses' demeanor, and has a familiarity with the entire case's circumstances. *Stiff v. Associated Sewing Supply Co.*, 436 N.W.2d 777, 779 (Minn. 1989).

Specifically, Arisekheru first complains: "It was indicated that I had no witnesses when I did." Arisekheru's witness testified at his trial. But the district court did not state that Arisekheru had no witness. The court's order merely stated that no witnesses saw the alleged incident. The record supports this statement. Arisekheru's witness did not

see the September 12th incident, which Arisekheru freely admitted at the pretrial conference and in his brief to this court. The witness testified only that Arisekheru returned home bloody one night, but she provided no date or testimony as to the cause of his injury. Arisekheru misinterpreted the district court's finding of fact.

Second, he complains: "[The court] mentions the fact that none of my records support my contention that my injuries were caused by a falling swining [sic] light fixture . . . ." The records about the light fixture do not support Arisekheru's contention that the light fixture caused his injuries. His September 30 complaint against the building did not mention a fallen light fixture or being struck by a light fixture, even though it allegedly occurred 18 days earlier. None of the inspection letters after October 25, 2002, indicates that any electrical fixtures needed repair. Johnson testified that Arisekheru did not complain to him about the injury, and the district court accepted Johnson's testimony. *See J.L.B. v. T.E.B.*, 474 N.W.2d 599, 603 (Minn. App. 1991) (noting that district court's determination was within its "discretion as fact finder and evaluator of weight and credibility of evidence"), *review denied* (Minn. Oct. 11, 1991). Because the allegations in the medical and dental records are statements made by Arisekheru, the probative value of the records depends on Arisekheru's credibility, and, as noted, on that issue we defer to the district court. Thus, the district court's finding of fact about the records was not clearly erroneous.

The district court did not find Arisekheru or his version of events credible. We give deference to a district court's credibility findings because it heard all the testimony

and observed the witnesses. *See Stiff*, 436 N.W.2d at 779. Because the record supports the district court's findings of fact, they are not clearly erroneous.

Affirmed.

_____

Judge Bertrand Poritsky