

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
AUG 8 1989

KIRK COMPANY, a Washington corporation,)
)
Plaintiff-Counter-)
Defendant-Appellant,)
)
v.)
)
FRANK MIRABAL,)
)
Defendant-Counter-)
Claimant-Appellee.)

ROBERT L. HOECKER
Clerk

No. 87-2663
(D.C. No. 87-480M)
(D. N.M.)

ORDER AND JUDGMENT*

Before MOORE, BALDOCK, and BRORBY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The cause is therefore ordered submitted without oral argument.

Plaintiff commenced this diversity action in the United States District Court for the District of New Mexico, alleging defendant owed plaintiff over \$23,000 for Christmas trees plaintiff delivered to defendant in 1984. Defendant answered the

* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

complaint, denying liability, and asserted a counterclaim against plaintiff, alleging plaintiff owed defendant approximately \$11,000 as credit on defendant's account due to the untimeliness of plaintiff's delivery of Christmas trees to defendant in 1982. The jury returned a verdict in favor of defendant on both claims and awarded defendant judgment in the amount of \$11,329.68. Plaintiff appeals.

On appeal, plaintiff asserts the jury's verdict was not supported by sufficient evidence. Plaintiff does not challenge the jury instructions. At trial, plaintiff failed to move for a directed verdict. Failure to move for a directed verdict prior to submission of the case to the jury bars appellate review of the sufficiency of the evidence. Koch v. City of Hutchinson, 814 F.2d 1489, 1496 (10th Cir.19) (quoting Brown v. Poland, 325 F.2d 984, 985-86 (10th Cir. 1963)), reh'g granted on other grounds, 847 F.2d 1435 (10th Cir. 1987); Holmes v. Wack, 464 F.2d 86, 89-90 (10th Cir. 1972).

The judgment of the United States District Court for the District of New Mexico is **AFFIRMED**.

The mandate shall issue forthwith.

**ENTERED FOR THE COURT
PER CURIAM**