IN THE COURT OF APPEALS OF IOWA

No. 6-402 / 95-1420

CITY OF DES MOINES,

Plaintiff-Appellant,

vs.

VALLEY PLBG. CO., INC., d/b/a RHINER'S PLUMBING COMPANY, INC., and CAPITOL INDEMNITY CORPORATION,

Defendants-Appellees.

FILED
OCT 25 1996
CLERK SUPREME COURT

Appeal from the Iowa District Court for Polk County, Richard G. Blane II, Judge.

The City of Des Moines appeals a district court judgment, following a jury trial, in favor of defendants on the city's action for breach of promise under a performance bond to make repairs of defects resulting from alleged faulty workmanship. **AFFIRMED.**

Susan A. Low, Assistant City Attorney, Des Moines, for appellant.

Thomas Henderson and John F. Fatino of Whitfield & Eddy, P.C., Des Moines, and Kathryn S. Barnhill of Barnhill & Goodman, P.C., Des Moines, for appellees.

Heard by Sackett, C.J., and Habhab and Vogel, JJ.

SACKETT, C.J.

Plaintiff-appellant City of Des Moines, Iowa, appeals following a jury verdict denying it recovery on an agreement termed a "Performance, Maintenance and Payment Bond for Private Construction Contracts." Defendants-appellees Valley Plumbing Co. and Capitol Indemnity Corporation entered into the agreement with plaintiff City after defendant Valley Plumbing contracted with Cosgriff Construction Co.[1] to construct sanitary sewer improvements in a proposed subdivision located in the boundaries of plaintiff. The agreement contained, among other things, a provision both defendants agreed at their own expense to remedy specified defects that might occur within four years of plaintiff's acceptance.

On March 4, 1994, plaintiff sued both defendants contending they had breached their agreement to make repairs. On appeal, plaintiff contends (1) the trial court erred in granting defendant Capitol Indemnity's oral motion on the day of trial to preclude plaintiff from mentioning defendant Capitol Indemnity was a surety and excising its name from all exhibits; (2) the trial court abused its discretion in denying plaintiff the right to call a rebuttal witness as a discovery sanction; and (3) plaintiff did not have a fair trial and the verdict was against the weight of the evidence.

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[1] Cosgriff Construction Co. is not a party to this suit.

I. Excising Defendant Capitol Indemnity's Name. The first question we address is whether the trial court correctly excised any reference to defendant Capitol Indemnity from the trial.

Plaintiff contends the trial court ruling was error because defendant Capitol Indemnity was a party to the suit and its promises were contained in the agreement that formed the basis for the suit. Plaintiff advances it can find no precedent to exclude from jury consideration the existence of a party to an agreement on which suit was brought.

Defendants contend (1) error was not preserved; (2) the issue of defendant Capitol Indemnity's responsibility did not come into play until the jury found defects from defendant Valley Plumbing and, consequently, there was no prejudice; and (3) the evidence was properly excludable under Iowa Rules of Evidence 403 and 411.

Defendants rely in part on *Garnac Grain Co. v. Blackley*, 932 F.2d 1563 (8th Cir. 1991) to support their contention defendant Capitol Indemnity was correctly excluded. In *Garnac*, the court addressed the question of whether evidence of money that plaintiff, who sought recovery for malpractice against an accounting firm for failure to discover embezzlement by plaintiff's employee, received from their bonding company was inadmissible under Federal Rule of Evidence 411, providing:

> Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.

Garnac Grain Co. v. Blackley, 932 F.2d 1563, 1570 (8th Cir. 1991) (citing Federal Rule of Evidence 411).

The bonding company in *Garnac* had not made an agreement with the adverse party in that case nor was the bonding company a party to the lawsuit. *Garnac* does not support defendant Capitol Indemnity's position on this issue.

We do not find applicable either Iowa Rule of Evidence 403, providing for exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time, or Iowa Rule of Evidence 411, as to liability insurance coverage. The issue is not one of evidence. Rather, it is one of excluding the name of a party to a lawsuit.

Examination of the agreement shows defendants agreed to be jointly and severally bound. The agreement further shows both defendants agreed at their own expense to remedy defects by reason of workmanship or materials.

The trial court incorrectly ruled on the motion to exclude the name of a defendant to the action. We do not, however, find plaintiff has shown the required prejudice to justify reversal.

II. Denial of Testimony of Rebuttal Witness as Discovery Sanction. Plaintiff next contends the trial court abused its discretion in denying the testimony of a rebuttal witness, Carrier, as a discovery sanction.

Discovery was closed April 21, 1995. Plaintiff filed a witness list May 4, 1995. Carrier was not on the list. On May 17, 1995, five days before trial, plaintiff

amended interrogatory answers and identified Carrier and fifteen other witnesses. The statement of their knowledge was, "The following people have lived in the area and would have observed the damage."

The trial court found plaintiff had not used due diligence in finding the witnesses before discovery closed. Defendants contend the exclusion was an appropriate discovery sanction and Carrier's testimony was not as probative as urged by plaintiff.

We review for an abuse of discretion. *Sullivan v. Chicago & N.W. Transp. Co.*, 326 N.W.2d 320, 324 (Iowa 1982); *Loftsgard v. Dorrian*, 476 N.W.2d 730, 732-33 (Iowa App. 1991).

At all times plaintiff had access to information that would have identified Carrier. Plaintiff did not identify Carrier separately, but included him on a list of fifteen other witnesses. The issue of Carrier's testimony was made known to plaintiff early in the case. While there may have been other sanctions less severe, the trial court did not abuse its discretion in utilizing the sanction it did.

We have considered all issues and affirm the trial court.

AFFIRMED.

Vogel, J., concurs; Habhab, J., specially concurs.

HABHAB, J. (specially concurring)

I concur in the result only.