

FILED
DEC 27 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

DONALD D. DANIELSON d/b/a)
DANIELSON CONSTRUCTION CO.,)

Plaintiff-Appellee,)

Filed December 27, 1979

vs.)

DALE S. AXMEAR,)

Defendant-Appellant.)

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2-63060

Appeal from Keokuk District Court - Richard J. Vogel, Judge.

Defendant appeals judgment in contract action for plaintiff construction company alleging the trial court erred by granting plaintiff recovery, by improperly assessing credits for work completed by defendant and by allowing plaintiff to amend his petition at trial. - Affirmed.

Robert J. Spayde, of Spayde & Reilly, Oskaloosa, for defendant-appellant.

Garold Heslinga, of Heslinga & Heslinga, Oskaloosa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Defendant Dale S. Axmear appeals judgment in contract action for plaintiff Donald D. Danielson, d/b/a Danielson Construction Company. Affirmed.

Defendant contracted with plaintiff for construction of a grain storage bin. Plaintiff brought this action seeking payment under agreements the parties had made and after granting defendant's motion to enlarge and amend, the trial court entered a final award of \$6295.92 for plaintiff. Defendant's motion for new trial was denied and this appeal followed.

I. As stated in Sandhorst v. Mauk's Transfer, Inc., 252 N.W.2d 393, 395 (Iowa 1977):

Our review in this law action is on errors assigned. We review the record in a light most favorable to the judgment and if supported by substantial evidence the fact findings are binding on us and will not be disturbed. However, we are not precluded from inquiry as to whether trial court applied erroneous rules of law which materially affected the decision. We are not bound by the trial court determinations of law. (citations omitted).

II. Defendant first contends plaintiff failed to perform under the contract and asserts plaintiff's recovery is barred as a matter of law. He claims the issue centers on contract construction and asserts the lower court's alleged erroneous ruling is not binding on appeal. We find, however, the issue is not one of construing the obligations imposed by the parties' agreements; rather it is whether the plaintiff performed his obligations under them. That issue is factual:

Where the facts are in dispute or where different reasonable inferences may be drawn from undisputed facts, it is the province of the jury to determine from all the facts and circumstances whether one has performed, has substantially or sufficiently performed, is ready to perform, or has failed to perform his contract.

17 Am. Jur. 2d Contracts § 355 (1964).

The trial court found plaintiff performed under the contracts. Since the evidence, taken in a light most favorable to the judgment, substantially supports that finding, it is binding on appeal. Given that, as a matter of fact, plaintiff performed under the contract, his recovery was not barred as a matter of law and the trial court properly permitted such a recovery.

III. Defendant next alleges the trial court improperly assessed damages because it

did not give him full credit for work he completed on the auger system of the storage bin. The trial court allowed defendant credits totaling \$3434.17 and this determination was based on documents introduced by the parties. We find substantial evidence supports the trial court's assessment of the credits to which defendant was entitled and therefore, the finding is binding on appeal. Iowa R. App. P. 14(f)(1); Sandhorst, 252 N.W.2d at 395.

IV. Defendant also claims the trial court erred by not awarding him damages for plaintiff's delay in completing the storage bin. The trial court's judgment stated "some delay was brought about by defendant's change in plans" and also the parties orally agreed the bin would be ready for storage of the next year's crop. The court further stated defendant's claimed damages due to delay were too speculative to be considered.

Essentially, we think the trial court denied defendant's prayer for damages due to unexcused delay because it found insufficient evidence supporting such a recovery. While defendant did not have to establish damages with "mathematical precision," Conrad v. Dorweiler, 189 N.W.2d 537, 540 (Iowa 1971), he bore the burden of establishing delay and damages resulting from delay. When viewing the record in a light most favorable to the judgment, we cannot say the trial court lacked support for its denial of delay damages.

V. Defendant's final contentions deal with plaintiff's recovery on an oral contract collateral to the written one for construction of the storage bin. Defendant claims the trial court erred by allowing plaintiff to amend his petition at trial to include a prayer for recovery on the oral contract. He further claims recovery on the oral contract should have been barred by the statute of limitations.

Iowa R. Civ. P. 88 states "Leave to amend, including leave to amend to conform to the proof, shall be freely given when justice so requires." The decision whether to allow amendment, when a responsive pleading already has been filed, is a matter for the trial court's discretion and an appellate court is reluctant to find an abuse of discretion in a trial court ruling granting or denying a party leave to amend. Johnston v. Percy Const., Inc., 258 N.W.2d 368, 370 (Iowa 1977). Based on our review of the record here, we cannot conclude the trial court abused its discretion by granting plaintiff leave to amend his petition.

Further, we believe the trial court reasonably could have found the oral contract

was incident to the written agreement upon which the original petition was based. The oral contract was to move a propane tank that would be used in connection with the storage bin under construction. Since the amended pleading related to the original transactions or occurrences, it relates back to the date of the original pleading as if it were a part of it. Iowa R. Civ. P. 89. Therefore, recovery on the oral contract, as sought in the amended petition, was not barred by the statute of limitations.

We have reviewed all contentions of the defendant and find no reversible error on the part of the trial court.

AFFIRMED.