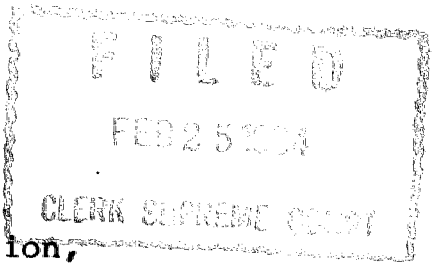
IN THE COURT OF APPEALS OF IOWA

No. 3-306 / 92-1211



RICK MILLER CONSTRUCTION, INC., An Iowa Corporation,

Plaintiff-Appellee,

vs.

RENE MESERAULL,

Defendant-Appellant,

THOMAS MESERAULL,

Defendant.

Appeal from the Iowa District Court for Linn County, Kristin L. Hibbs, Judge.

Homeowner appeals from a district court judgment enforcing contractor's mechanic's lien and rejecting her counterclaim for damages. **AFFIRMED AS MODIFIED.**

Benjamin W. Blackstock and Eric C. Syverud of Blackstock Law Offices, Cedar Rapids, for appellant.

Karen A. Volz of Ackley, Kopecky & Kingery, Cedar Rapids, for appellee.

Considered by Sackett, P.J., Habhab, J. and Peterson, S.J.*

*Senior judge from the 1st Judicial District serving on this court by order of the Iowa Supreme Court.

HABHAB, J.

Homeowner Rene Meseraull appeals from a district court judgment enforcing contractor's mechanic's lien and rejecting her counterclaim for damages based on defects in performance.

On March 12, 1989, a fire extensively damaged Rene Meseraull's house in southeast Cedar Rapids. The fire began in the basement and caused both structural and cosmetic damage. Meseraull obtained an estimate for restoration work from Rick Miller Construction.[1] Miller and Meseraull's insurer, Allied Insurance, ultimately agreed to a repair estimate of $54,984.

Meseraull did not sign Miller's proposal on repair costs, however, the parties reached an oral agreement. Meseraull asked that certain items be eliminated from the estimate for a credit. Meseraull also asked Miller to perform certain remodeling, which included bringing the older home into compliance with the modern housing code. The cost of the project changed as the work progressed as 1) Miller gave Meseraull credit for changes in the original estimate and 2) Meseraull continued to add and make changes to the remodeling project. According to Miller, the total restoration cost, after the adjustment, was $47,351.50, and the cost of remodeling was $13,049.72.

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1. Rene Meseraull filed a counterclaim for damages against plaintiff, Rick Miller Construction, Inc., also known as Miller Construction, and Rick Miller, individually. We will refer to both as Miller.

The insurance company paid Miller directly the first installment of $18,328.07. Miller was also paid $970 which was given to Meseraull to pay a roofer she had contracted with independently. Prior to receipt of the second installment, Miller and Meseraull's relationship deteriorated. Meseraull was dissatisfied with Miller's progress and the quality of his work. When Meseraull received the second installment payment, she did not apply it towards the balance due on the Miller account.

In February of 1990, Meseraull and Miller went through the house and prepared a "punch list" of work that was yet to be completed. Meseraull added to the list, and Miller continued to work on items shown on the punch list until February 14th. At this point, the parties engaged in several lock changes. After being locked out a second time, Miller made no further attempts to enter the property to complete his work.

Miller filed a mechanic's lien and a petition to enforce the lien. Meseraull filed an answer and a counterclaim, seeking numerous setoffs for substandard performance, damages based on medical expenses incurred on her and her daughter's part, and damages, including punitive damages, based on Miller's actions in locking her out of the home.

The district court ruled that Miller was entitled to $42,073 less an $18,328.07 credit for a previous installment payment and setoffs of $882.95 for carpet, $120

for kitchen repair, $22.50 for repair of a light switch hole, $135 for additional work on a dining room hutch, and $10 for refitting a heat register hole.

The court ruled that Meseraull failed to prove Miller's work was substandard or unauthorized. The court ordered Miller to return certain items taken from Meseraull's house. The court rejected Meseraull's claim for damages. Finally, the court ordered each party to pay their own attorney fees. Meseraull appeals.

I. Scope of Review.

Both parties agree the action to enforce the mechanic's lien and the counterclaim for damages were tried in equity. Therefore our review of these proceedings is de novo. Iowa R. App. P. 4. While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Substantial Compliance.

Meseraull's first claim is that Miller did not substantially perform his obligation to restore her home.

The burden of proof regarding the showing of substantial performance rests with the plaintiff-contractor. Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 194 (Iowa App. 1987). When the contractor has substantially complied with his

contract, he is entitled to recover the contract price with deductions for any defects or incompletions. Id.

> Substantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to other portions of the building, and may be compensated for through deductions from the contract price.

Id. at 193 (citation omitted).

There is no dispute the house was totally uninhabitable in 1989 after the fire. In a letter dated February 15, 1990, Meseraull admitted the repairs were 99% complete and the housing inspector had approved the home for occupancy. Meseraull moved in the next day.

From the evidence presented in the record, we find that Miller has established the terms of the parties' contract and shown a substantial performance of its terms.

III. Defects or Incompletions.

Meseraull next claims the district court allowed payment for work that was defective and incomplete. Although the burden of proof regarding the showing of substantial performance rests with plaintiff-contractor, the defendant-homeowner has the burden of showing any defects or incompletions. Id.

Meseraull claims Miller's work caused the basement to leak. Meseraull offered no expert testimony regarding why the basement leaked or estimates regarding repair.

Meseraull's boyfriend testified he believed Miller's work caused the basement to leak. However, he had not done any investigation to see what caused the leak. He admitted that he was just speculating and that he was not an expert in basement leakage problems.

Meseraull and Miller have hundreds of disputes about the work done or not done. For the most part we agree with the district court that Meseraull has not met her burden in establishing these defects. We note that her account was already credited for some of the defects or incompletions she continues to complain about on appeal. We also agree with the set-offs the district court allowed. In addition we find Meseraull has proven defects in the painting of the house and should be allowed a set-off of $488.60. We modify the district court decision accordingly.

IV. Other Damages.

A. Medical Expenses. Meseraull also seeks reimbursement of her and her daughter's medical expenses. She testified she incurred $2279.56 in medical expenses due to the stress caused by Miller's actions. Meseraull also claims she incurred $18,000 in medical expenses when her daughter, who suffers from cystic fibrosis, developed respiratory problems as a result of negligent repairs by Miller. Meseraull argues Miller aggravated her daughter's condition by leaving debris in the heating register holes and by negligently installing the upstairs toilet. The

toilet leaked water causing mold to grow on the kitchen ceiling.[2] However, Meseraull made no effort to remove the mold from the ceiling until eighteen months after Miller stopped work.

Meseraull offered no medical records or bills to support her claim. She offered no expert testimony linking her or her daughter's medical expenses to the mold or to any other acts or omissions by Miller. We agree with the district court Meseraull has not sufficiently linked these medical expenses to the defects in Miller's work.

B. Lock-out. Meseraull seeks emotional and economical damages for Miller locking her out of her home and converting her personal belongings. She also seeks punitive damages.

Meseraull hired an independent floor contractor to sand the floors. Miller testified items were removed before the floor sanding took place with the plan of returning them at the completion of the job. He did not attempt to hide the fact that he was in possession of the items. During a July 20, 1990, inspection he volunteered the fact that the items were still in his warehouse. At the time of trial, Miller was still in possession of these items. The district court ordered Miller return these items to Meseraull.

The evidence also indicates that on February 13 and 14, 1990, the parties engaged in several lock changes. Miller

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2. In division III we have already established Meseraull is entitled to a set-off of $120 for the damage to the kitchen ceiling.

testified he changed the locks when he discovered a key was missing. He stated he was concerned because the floor contractor was working on the floors at that time. When Meseraull discovered she was locked out, she switched the locks again so she would have access to the house. When Miller found the locks changed, he authorized his employees to change the locks a second time. Meseraull, then changed the locks again. After being locked out a second time, Miller made no further attempts to enter the property to complete his work. At the time the lock-changing incidents took place, Meseraull had not moved back into the house and was residing elsewhere.

Miller claims he attempted to reach Meseraull throughout this time frame, but was unable to. Meseraull testified she had spoken to Miller and that he informed her she was being locked out because she had not paid him. The district court found Miller to be more credible on this issue.

Meseraull claims she is entitled to punitive damages. An award of punitive damages is appropriate when a party acts with actual or legal malice. Barnhouse v. Hawkeye State Bank, 406 N.W.2d 181, 184 (Iowa 1987). Actual malice is shown by such things as personal spite, hatred, or ill will. Id. Legal malice is established by showing wrongful conduct committed with a willful or reckless disregard for

the rights of another. Id. More than mere negligence must be shown. Id.

The district court found Meseraull is not entitled to damages, punitive or otherwise for the lock-out incident. We agree.

V. Attorney Fees and Costs.

Both parties have asked for appellate attorney fees. After considering our decision on the issues raised on appeal, we find an award of appellate attorney fees would not be appropriate.

Miller asks this court to assess the entire costs of this appeal against Meseraull for unnecessarily including materials in the appendix. Meseraull's counsel designated the entire trial transcript to be included in the appendix.

Costs may be assessed for appendix materials which are unnecessary or have no bearing on the issues appealed. Webb v. Giltner, 468 N.W.2d 838, 841 (Iowa App. 1991). We remind the parties that the entire record is available to this court for examination. Although, we find some of the appendix pages to be unnecessary, we decline to assess the entire cost of this appeal to Meseraull.

Cost assessed three-fourths to Meseraull, one-fourth to Miller.

AFFIRMED AS MODIFIED.