

IN THE COURT OF APPEALS OF IOWA

No. 0-583 / 99-0925

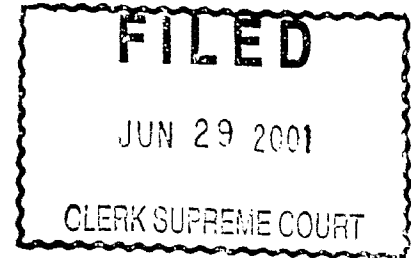
Filed June 29, 2001

**ROLAND BOOTH, d/b/a WESTERN
STATES EXCAVATING,
Plaintiff-Appellee,**

vs.

**PILOT CORPORATION, CENTAUR ELECTRICAL
CONTRACTORS, INC., BOUCHER MASONRY
CONTRACTING, INC., SWAIN CONSTRUCTION, INC.,
A & S CONCRETE RECYCLING, INC., and COLORADO
MACHINERY,
Defendants,**

**PIONEER GROUP, INC.,
Defendant-Appellant.**



**SWAIN CONSTRUCTION, INC.,
Plaintiff-Appellee/Cross-Appellant,**

vs.

**PILOT CORPORATION, CENTAUR ELECTRICAL
CONTRACTORS, INC., BOUCHER MASONRY
CONTRACTING, INC., ROLAND BOOTH, d/b/a
WESTERN STATES EXCAVATING and
COLORADO MACHINERY,
Defendants**

**PIONEER GROUP, INC.,
Defendant-Appellant/Cross-Appellee.**

Appeal from the Iowa District Court for Pottawattamie County, Timothy
O'Grady, Judge.

Defendant Pioneer appeals following the entry of judgment on lien
foreclosure and breach of contract actions. Pioneer contends (1) it is not liable to
plaintiff due to a contractual "pay if paid" clause, (2) it is not liable because it did

not authorize any additional work, and (3) the plaintiff failed to prove any extra work was necessary. Plaintiff Swain cross-appeals contending the trial court erred in concluding (1) its lien waiver applied to an oral contract with defendant Pioneer, and (2) its claim against defendant Booth was not asserted in the pleadings. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

H. Daniel Smith of Dwyer, Smith, Gardner, Lazer, Pohren, Rogers & Forrest, Omaha, Nebraska, and Gail E. Boliver, Marshalltown, for appellant-Pioneer Group, Inc.

Shannon Dell'Orfano and Jack Ruesch of Telpner, Peterson, Smith & Ruesch, Council Bluffs, for appellee-Swain Construction, Inc.

Steven H. Krohn of the Smith Peterson Law Firm, Council Bluffs, for appellee-Roland Booth d/b/a Western States Excavating.

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

MILLER, J.

Defendant/Appellant Pioneer Group, Inc. ("Pioneer") appeals the entry of judgment, following bench trial, in favor of the Plaintiff/Appellee Roland Booth, d/b/a Western States Excavating ("Booth"), on a mechanic's lien foreclosure action. Pioneer contends (1) it is not liable to Booth because the "Subcontract Agreement" between it and Booth unambiguously required it be paid by the owner as a condition precedent to the payment of Booth (it is a "pay if paid" clause), and it was not paid for the work claimed by Booth, (2) it is not liable because the owner of the property did not approve or waive any change orders for additional work by Booth, and (3) Booth failed to prove any additional work, and thus additional payment, was necessary, because the extra work claimed by Booth was in fact covered under the parties' original contract. Plaintiff/Cross-Appellant Swain Construction, Inc. ("Swain") cross appeals arguing the trial court erred in concluding a lien waiver executed by it applied to an oral contract between Swain and Pioneer regarding a rock crusher, because Pioneer did not assert the release as a defense in its pleadings.¹ We affirm in part, and reverse in part and remand.

I. BACKGROUND FACTS

In 1995, Pilot Corporation ("Pilot") a company engaged in building, owning and operating truck stops, contracted with Pioneer, a Colorado construction company, to be the general contractor for a new truck stop in Council Bluffs,

¹ There was originally a second issue in Swain's cross-appeal regarding a claim against Booth. However, because the supreme court entered summary reversal on that issue on June 13, 2000 it is no longer at issue in this appeal. The supreme court denied Swain's motion for summary reversal regarding its claim against Pioneer and thus we must address that issue here.

Iowa, to be built on land owned by Pilot. Pioneer subcontracted with Booth for certain demolition and grading work, providing him with plans and specifications for the job. The project was overseen by Pilot's Director of Design, Bill Mulligan ("Mulligan") and John Francis ("Francis"), the project supervisor.²

The project site had existing structures and concrete on it. Booth's first proposal to Pioneer provided for full demolition and removal of the existing structures and concrete and "importing" gravel from an off-site location. This bid proposal was rejected by Pioneer. A second proposal by Booth called for the demolition of the existing structures and concrete, to crush the existing concrete on site and then use the resulting gravel as base and grade for new paving. This second proposal saved \$20,000 in site preparation by crushing the concrete on site as opposed to importing it from off-site. Pioneer forwarded this second proposal to Pilot by unsigned fax. Booth received oral direction from David Black ("Black"), the president of Pioneer, to proceed with the project in late June 1995. Booth actually began work on July 5, 1995.

After receiving approval to proceed from Pioneer, Booth contracted with Swain and A&S Concrete Recycling, Inc. ("A&S") to crush the concrete on site and to haul dirt and gravel.³ Swain and Booth agreed to disassemble and move the required concrete crushing machine, owned by A&S, to the job site. In the second week of July 1995, after Booth had already begun the work on the job, Black told Booth to stop demolition because Pioneer and Pilot were considering changing in the demolition/grading plan to demolish only part of the existing concrete. Booth contacted Swain and held up the crushing machine.

² Pilot is not a party to this appeal.

³ A&S is a subsidiary of Swain and is not involved in this appeal.

Approximately two weeks later Booth was told to remove concrete only up to the south end of the existing building and leave the remaining pavement in place. Booth received these instructions primarily from Black but also from Francis. The amount of concrete being crushed under the revised plans was less than the amount that was to have been crushed under the original plans. Based on the revised plans Booth decided the job was no longer large enough to require the concrete crusher be moved on site and he and Swain agreed to haul concrete to A&S for crushing instead.

Swain indicated to Booth that it expected to be paid for the "down time" on the crushing machine. Swain claimed \$24,000 for disassembly costs and down time for its machine. Booth, Black and Linda Swain-Armstrong ("Armstrong") met in August of 1995 to discuss Swain's claim. Booth and Armstrong testified at trial that the parties agreed to pay Swain \$17,000, with \$14,500 coming from Pioneer and \$2,500 from Booth. Black testified that Pioneer only agreed to pay Swain the \$14,500 if it did not otherwise use Swain's trucking and crushing services. Neither Booth nor Armstrong recalled the promise to pay from Pioneer as being conditional.

Booth also claims there were several additional charges, submitted through "change orders" that were authorized by Pioneer and Pilot. Booth testified that when faced with a need or request for work beyond the terms of the contract, he sought oral approval from Black. When he had approval, Booth proceeded with the work and documented the change later with a written change order, often well after the work had been completed.

Swain and Booth each filed a mechanic's lien against the Pilot property. Each subsequently brought a lawsuit seeking foreclosure. Swain's foreclosure suit named Pilot, Pioneer, Booth and others as defendants. Booth's named Pilot, Pioneer, Swain and others as defendants. Swain later amended his petition to add a count asserting a claim against Pioneer and Booth for the \$17,000 he claimed they had agreed to pay him for the down time on the rock crusher. Pilot filed a counterclaim against Pioneer alleging Pioneer had breached its contract with Pilot to hold it harmless from mechanic's lien claims. Pioneer filed counterclaims against Pilot alleging Pilot owed it for payments made to subcontractors and alleging breach of contract and negligence in its role as architect for the project. These and various other counterclaims and cross-claims were consolidated and tried together.

Following trial and post-trial motions the court entered judgment finding Pioneer liable to Booth in the amount of \$158,298.32. Booth's mechanics lien was foreclosed and judgment entered in favor of Pilot against Pioneer for any sums Pilot had to pay Booth as a result of the foreclosure.

Pioneer appeals contending (1) the "pay if paid" clause in the subcontract agreement unambiguously shows it was not liable to Booth because it was not paid by Pilot for the work now claimed by Booth, (2) it cannot be held liable for the work performed under the change orders because Pilot, as owner of the property, did not approve the change orders or waive the approval process required by the Pilot-Pioneer contract, and (3) Booth failed to prove the additional work was necessary and not contemplated in the original, underlying contract. Swain has cross-appealed arguing that the court erred in concluding its lien

waiver applied to the oral contract between it and Pioneer regarding the rock crusher.

II. STANDARD OF REVIEW

An action to enforce a mechanic's lien is in equity. Iowa Code §572.26 (1995). Both Swain's and Booth's mechanic's lien foreclosures were filed as equity actions. All amendments, counterclaims and cross-claims are part of those two lawsuits. Pioneer asserts that our scope of review is de novo. Swain agrees. Booth states no disagreement. Equity cases are to be reviewed de novo. Iowa R. App. P. 4. Our review is de novo.

III. MERITS – PIONEER'S APPEAL

A. "Pay If Paid" vs. "Pay When Paid" Contract Provisions

One section of the Pioneer-Booth subcontract is labeled, "PAYMENT." Concerning progress or partial payments by Pioneer to Booth for work performed, it provides that "as a condition precedent to any such payment, like payment has been made by Owner to Contractor" Concerning final payment, it provides that "as a condition precedent, like payment has been made by Owner to Contractor" Pioneer urges these contract provisions unambiguously required it be paid by Pilot as a condition precedent to payment to Booth, the evidence is clear it was not paid for the work covered by Booth's claim, and the trial court therefore erred in entering judgment in favor of Booth. Booth responds that (1) Pioneer waived any claim concerning an unfulfilled condition precedent by not asserting it as an affirmative defense in a responsive pleading, (2) the subcontract provisions in question are properly construed only as terms for payment ("pay when paid") rather than conditions precedent ("pay if

paid”), (3) even if construed as a condition precedent, the provisions relate only to the amount that was to be paid to Booth “under the subcontract,” which has been paid, and not to amounts to be paid by Pioneer for “extras” beyond the work to be done under the subcontract, for which judgment was entered, and (4) even if the provisions in question are construed as conditions precedent, the evidence establishes either that Pilot made all payments due to Pioneer thus fulfilling the condition, or the condition was not fulfilled due to actions of Pioneer. For the reasons that follow we agree with Booth’s fourth contention, that either Pilot made all payments due to Pioneer, or Booth is not prevented from recovering from Pioneer because any failure of Pilot to pay Pioneer in full is due to actions of Pioneer.

As discussed in somewhat more detail below, despite contract provisions requiring that work beyond the original Pioneer-Booth subcontract be approved in writing before the work was undertaken, Pilot, Pioneer and Booth in fact usually handled such matters by verbal consultation and authorizations. The verbal approvals would sometimes approve only the scope of the added work and not the amount to be paid, but normally approved an estimated amount to be paid as well. Booth would eventually submit change orders for the additional items to Pioneer which would review them, sometimes rather summarily, and then forward them to Pilot for approval and eventual payment.

After Booth’s work was completed, Black on behalf of Pioneer discussed with Pilot certain outstanding and unpaid change orders for work done by Booth beyond the initial scope of the Pioneer-Booth subcontract. These change orders were for work which had been at least verbally authorized and approved by

Pioneer and most of which had been at least verbally authorized and approved by Pilot. Pioneer agreed with Pilot to accept as payment an amount that was substantially less than the amount called for by the change orders Pioneer had approved for Booth's extra work, and executed a lien waiver which waived the right to any lien for work done or material furnished on the project.

This litigation has raised and involved numerous claims among and between the several parties, including a claim by Pioneer against Pilot for a certain contractor's fee on the final change order (which related to Booth's work). Pioneer has nevertheless sought no other additional compensation from Pilot. The evidence thus establishes that Pioneer has been fully paid by Pilot, and there is no substantial, credible evidence that Pioneer has not been paid any amounts owed to it by Pilot.

We therefore find the condition precedent asserted by Pioneer to have been fulfilled. However, even if the facts might be viewed as showing Pioneer was not paid in full by Pilot, any shortfall in payment is the result of Pioneer agreeing to accept a certain amount from Pilot and not seek the rest of the amounts called for by the change orders that it, Pioneer, had approved for Booth's work. Having agreed to accept a certain amount as full payment by Pilot, Pioneer cannot now assert it has not been paid in full by Pilot.

B. Owner's Approval of Change Orders

The Pioneer-Booth subcontract provided in part:

Any deviations, changes and/or additional work must be authorized in writing by an officer of [Pioneer]. Any such deviations, changes and/or additional work not so authorized in writing by an officer of [Pioneer] will be at [Booth's] risk and expense.

It also provided that each party was familiar with the Pilot-Pioneer contract, that contract was incorporated into their subcontract, and Booth was bound to Pioneer by the terms of the Pilot-Pioneer contract. The Pilot-Pioneer contract required that change orders be approved in writing by Pilot.

Pioneer asserts that Booth's mechanic's lien foreclosure action seeks to impose liability on the owner, Pilot; that Pilot cannot be held liable on change orders unless it approved the change orders or waived the change order process called for by the Pilot-Pioneer contract; and there is no evidence that Pilot approved the change orders on which Booth seeks to recover or waived the change order process concerning those change orders.

Booth responds that the record clearly establishes Pilot knew of or consented to Booth's extra work, and waived any change order requirement in the Pilot-Pioneer contract. It also notes that Pilot has not appealed from the judgment establishing and foreclosing Booth's mechanic's lien against Pilot's property, and asserts that Pioneer therefore has no standing to assert Pilot's right to require written approval of work undertaken by Booth beyond the scope of the original subcontract. We pass the standing issue and address the question of whether Pilot knew of and consented to Booth's extra work, and waived the change order process otherwise required by the Pilot-Pioneer contract.

Booth had previously done work on other projects for Pioneer. Those projects involved Pioneer-Booth contracts or subcontracts that, similar to the Pioneer-Pilot subcontract in this case, required Pioneer's written approval for work beyond the scope of the original contract, that is for "change order" work. In Booth's previous experiences with Pioneer they only occasionally followed the

contractual requirements for written approval of change orders before work would be done. In order that the projects not be delayed, when Booth was asked to or needed to do work beyond the scope of the original agreement he would discuss it with someone from Pioneer, give a price or estimated price, receive verbal approval, and then proceed with the work. The work would in fact often be completed before any "paperwork" occurred. Pioneer and Booth followed the same pattern on the project involved in the present lawsuits.

Mulligan, Pilot's director of design and construction, testified that in early 1995, in Pilot's corporate offices, he and Pilot's construction manager, Francis, met with Black and Black's brother, Eric Black, and informed the Blacks that no change order work, no work that would cost Pilot money, was to be done unless they had the approval of Francis or Mulligan. He testified he informed the Blacks that "they need to call us" and "[i]f they can't give us a hard price, give us a ballpark figure," and that "verbally is fine." He agreed that he sometimes did, as in this case, "give 'em a verbal go ahead and do it for [a certain dollar amount] plus or minus and we'll worry about the paper work later because we need to get the job on the run." Pioneer had previously done five projects for Pilot that were similar to the project involved in the present lawsuits. The terms of the contracts on those projects were similar to the terms of the contracts on this project. Francis had performed duties on those projects similar to his duties on this project.

Francis testified that although the Pilot-Pioneer contract required any change order to the work to be approved in writing by Pilot before the work could be done, and although in some cases this happened, in fact most change order

work was discussed and approved verbally, and some of such work was even complete before a change order was signed.

During the course of this project there were many changes in the scope of Booth's work, and corresponding changes in the scope of Pioneer's work, and eventually many change orders. Many of the changes in the scope of work were requested by Pilot. Pilot had an on-site construction superintendent, Charles Demare, who acted in that capacity on a day-to-day basis. Mulligan was on the project at least every third week on average. Most all of the changes in the scope of work were discussed, agreed to by Pilot, and in progress before any written change orders were prepared or signed. Many of the change orders were signed after the work contemplated by a change order was in fact completed.

Several principles stated in an earlier case cited by both parties bear on the question before us. They are:

In the absence of statutory modification, subcontractors are also bound by the terms of the contract between the owner and the principal contractor. A written change order requirement, however, is not of the essence of the contract, but is a detail in the performance. This type of requirement can be waived by the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards the requirement, and a promise to pay for extra work, orally requested by the owner and performed in reliance thereon.

A waiver of a written change order requirement does not entitle a subcontractor to perform extra work without any approval whatsoever. The general rule is that recovery can be had for extra work only if it was performed with the knowledge or consent of the adverse party.

Central Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa Ct. App. 1986) (citations omitted).

In Mulligan and Francis' early 1995 meeting with the Blacks, Pilot arguably expressly waived the written change order requirement of the contract that Pilot and Pioneer later entered. More importantly, however, Pilot waived that requirement by knowing of, agreeing to, and acquiescing in the extra work by Booth, the items of which were verbally discussed and approved, together with estimated prices, before being undertaken. Its course of dealing repeatedly disregarded the requirement, for reasons of apparent benefit to it, and by verbal approval of the items of work which carried estimated prices promised to pay for the work. Booth's extra work was performed with the knowledge and consent of both Pioneer and Pilot.

We conclude Pilot waived the requirement that "change order" work receive Pilot's prior written approval.

C. "Extras" vs. "Part of Contract"

Pioneer claims that the work claimed by Booth to be beyond the scope of the Pioneer-Booth subcontract, primarily related to "extra rock", was in fact part of the original subcontract. Pioneer further claims that even if some of the rock was "extra," Booth has failed to prove how much was extra because he has failed to prove what part of the rock actually provided was over and above any base amount required by the plans and specifications. Booth responds that the evidence establishes Booth did not agree to provide rock for the project and therefore the trial court properly determined Booth was entitled to judgment for its charges for rock and related work. We find, as the trial court did, that the stronger evidence supports Booth's position.

Pilot wanted the project started in July 1995 and completed no later than November 1995. Pilot gave Pioneer notice to proceed in early July and Pioneer gave Booth notice to proceed in early July. However, it is important to note that through late May, June and July there were ongoing discussions between Pilot and Pioneer, and between Pioneer and Booth, concerning the scope of Pioneer's work and Booth's work respectively. In particular there were ongoing discussions as to whether existing concrete would be completely demolished and hauled away and crushed rock purchased and placed as base or existing concrete would be demolished, crushed and used in whole or part for needed base. It is also important to note that although work proceeded in early July, and most demolition work was completed by late July or very early August, the Pilot-Pioneer contract was not finalized until sometime in early August and the Pioneer-Booth subcontract was not entered and a work order issued until August 23.

Pioneer's original proposal to Pilot included as an alternative bid the demolition and removal of existing concrete at a cost of \$50,423.00. This cost came from a bid Pioneer had received from an excavating company, Fucinaro. The proposal also included Pioneer providing "stone base" at a cost of \$169,992.00. This cost came from a bid Pioneer had received from a company named Henningsen.

Pilot was interested in controlling its costs for the project and sought input from Pioneer, and perhaps others, concerning how it might minimize costs. Black provided Francis a comparison of two alternatives. One involved a total cost of \$220,000, included approximately \$50,000 for demolishing and hauling

existing concrete, and providing new rock base at a cost of approximately \$170,000. The second involved demolishing concrete, crushing it on site and using it as base at a cost of \$200,000.

As noted above, Booth had worked on projects for Pioneer on several previous occasions. Black invited Booth to bid parts of Pioneer's intended work. Booth was interested in only the demolition and excavation parts of the project. Booth submitted two proposals, one dated June 13 and a second dated June 21. The first specified "labor only" for placing and compacting road base, and included as an alternative bid using crushed concrete as material at an added cost of \$129,063. This first proposal was not accepted by Pioneer, as Booth was not the low bidder, and it did not become part of the eventual Pioneer-Booth subcontract. In ensuing discussions Black informed Booth that if Booth wished to get part of the job Booth had to at least match the low numbers Pioneer had received, because those would be the numbers Pioneer "turned in to Pilot."

Booth's second proposal, as his first, contains no mention of providing rock or stone for base for any part of the project. Black acknowledged in his deposition that it did not appear either of Booth's two proposals included providing new rock or stone. Where the first proposal had included "Demo of structure and site" at a cost of \$122,969, the second proposal included "Remove concrete, crush, place & compact for site" at a cost of \$200,000. The \$200,000 cost for this work in Booth's June 21 proposal is the same cost that Black had provided to Pioneer under its alternative for crushing existing concrete and using it for base. Further discussions occurred between Pilot and Pioneer after work started on or about July 5. As of late July Pilot had decided to demolish existing

concrete only to a certain line. The Pilot-Pioneer contract that was finalized in early to mid-August provided for this more limited demolition. The August 23 Pioneer-Booth work order, part of the subcontract between them, contains a "DESCRIPTION OF WORK" to be performed by Booth. The first line is very similar in language to the first line of Booth's June 21 proposal, and provides that Booth is to "demo/haul/crushed concrete/compact on site" for a price of \$150,000. The evidence is clear that the other listed items cannot be reasonably construed as requiring Booth to supply rock base.

Pioneer acknowledges that some rock fill and rock base was "extra," specifically rock for filling soft spots that were discovered during the project and rock needed because of grade changes. It strenuously argues, however, that the Pioneer-Booth subcontract required Booth to provide rock base for the project because the subcontract incorporates plans and specifications which in turn note required rock base. It points out that the subcontract requires Booth to provide and do all things necessary "for the construction and completion of the work per plans, specs, proposal and work order," and provides that Booth agrees the plans and specifications are sufficient, and Booth is to perform all other work included in the plans and specifications which may not be particularly referred to in the subcontract "if such other work is usually performed by the trade or trades covered under this Agreement unless such other work is expressly excluded herein." Booth in turn refers to Black's deposition testimony, discussions and communications between Booth and Pioneer, and certain acts and communications of Black's which Booth urges demonstrate Pioneer recognized

throughout the project that the Pioneer-Booth subcontract did not require Booth to provide rock base.

Booth has the stronger argument. The provisions of the subcontract concerning “work” and “other work” do not themselves in any manner define or describe the scope of work to be done by Booth. They do, however, refer in part to the “proposal” and the “work order” as defining the work to be done. The evidence shows that Booth did not intend to include rock base in his proposals, Black on behalf of Pioneer recognized that fact, and Booth’s proposals in fact did not include rock base. The August 23 work order and its “DESCRIPTION OF WORK” contains nothing that either expressly or by necessary implication includes rock base material, or the labor or equipment for providing it, as a responsibility of Booth’s. The work order’s terms are more specific and detailed than other terms of the subcontract relied on by Pioneer, and therefore should control over those other terms. See *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991). Finally, to the extent there may arguably be any ambiguity in the work order’s terms, the evidence shows Pioneer drafted the work order. Accordingly, any such ambiguity must be construed against Pioneer. *Id.*

We conclude the rock base and labor associated with providing it was not an obligation of Booth’s under the Pioneer-Booth subcontract.

Pioneer also urges that Booth’s claim must fail for failing to prove how much rock was “extra” because Booth has failed to prove what part of the rock actually provided was over and above any amount required by the plans and specifications. As pointed out by Booth, the fallacy in Pioneer’s argument is its

erroneous assumption that there was some amount of rock Booth was to have provided in the first instance. For reasons discussed above we have found there was not.

D. Conclusion

We affirm the trial court on Pioneer's appeal.

IV. MERITS--SWAIN'S CROSS-APPEAL

The trial court found Black, Booth and Armstrong agreed to settle Swain's claim for down time on its crushing machine for \$17,000, to be paid \$14,500 from Pioneer and \$2,500 from Booth. It found Swain was entitled to recover \$14,500 from Pioneer.

Swain filed a motion for enlarged and amended findings and conclusions. It pointed out that the trial court had not entered judgment for the \$14,500. It also pointed out that the trial court had not made a finding that Swain was entitled to recover the \$2,500 from Booth, and had not entered judgment for that amount.

In ruling on Swain's and other post-trial motions, the trial court declined to enter judgment for the \$2,500, stating Swain's petition for foreclosure did not show Swain made claim against Booth for \$2,500 or that Swain ever prayed for judgment against Booth for that amount. Swain had, however, done so by amendment to its petition. The amendment, in a separate count, asserted a claim against Pioneer and Booth based on alleged breach of the oral settlement agreement concerning the rock crusher. On appeal the Iowa Supreme Court summarily reversed as to the \$2,500 claim and remanded for the limited purpose for entering judgment against Booth for the \$2,500. Accordingly, Swain's appeal now involves only its claim against Pioneer for \$14,500.

In ruling on Swain's post-trial motion the trial court in effect reversed itself, finding that Swain had released its claims against Pioneer, Pilot and the property itself by executing a February 16, 1996 lien waiver and accepting payment from Pioneer as "full and final payment from Pioneer and Pilot." This quoted language appeared on the check from Pioneer to Swain for \$102,163.72. The lien waiver executed by Swain upon receipt of that amount stated that in consideration of the payment Swain released any right to claim any lien, "against the property, owner or general contractor," and that the amount was received in "full payment of account in which Pioneer Group, Inc. and Pilot Corporation are responsible. . . ."

Swain claims that the trial court erred when it determined the lien waiver executed by Swain applied to the oral contract between Swain and Pioneer regarding the rock crusher, because Pioneer did not plead the release as a defense and offered no evidence in that regard. We agree that Pioneer did not plead the release as a defense and for the reasons that follow reverse and remand on this issue.

As an affirmative defense to Swain's petition to foreclose its mechanic's lien, Pioneer pled that Swain had "waived and released all lien claims to the property" However, Swain thereafter filed and served an amendment, adding a count II, which asserted a claim against Pioneer (and Booth) for breach of the oral settlement agreement concerning the rock crusher. In its answer to Swain's amendment Pioneer asserted several affirmative defenses, including the statute of frauds, failure of consideration, and failure to state a claim against Pioneer. It did not, however, assert that Swain's claim had been released. It did not mention lien waivers, mention the term "release," or plead facts that in any

manner referred to lien waivers or could be construed as pleading release as a defense.

Our rules of civil procedure provide, in relevant part:

Any defense . . . which alleges any matter in justification, excuse, *release*, or discharge . . . must be specially pleaded.

Iowa R. Civ. P. 86 (emphasis added) (formerly rule 101). Accordingly, in order for the defense of release to be at issue in a case, it must be pled as an affirmative defense. See *Jones v. Thompson*, 240 Iowa 1024, 1034, 38 N.W.2d 672, 676 (1949) (holding that under former rule 101 a defense of consummated release must have been specially pleaded). Pioneer did not plead release as a defense to Swain's claim of breach of the oral settlement agreement. Therefore, release was not an issue as to that claim.

As noted above, in its original ruling the trial court found that Pioneer had agreed to pay \$14,500 to settle Swain's claim. On our de novo review we make the same finding. We also agree with the trial court's initial conclusion, made before it ruled on post-trial motions, that Swain is entitled to recover that amount. Because release was not at issue as to that claim we conclude the trial court erred in concluding, in its ruling on post-trial motions, that Swain's recovery was barred by release. We conclude reversal of the trial court's ruling on Swain's claim is required.

We do note that we can uphold a trial court's ruling on any ground appearing in the record, whether urged in the trial court or not. See *Sievers v. Iowa Mut. Ins. Co.*, 581 N.W.2d 633, 637 (Iowa 1998). We could affirm the trial court's ruling on the basis of release if the issue of release was tried by consent, even if not pled as an affirmative defense. See *Molo Oil Co. v. River City Ford*

Truck Sales, Inc., 578 N.W.2d 222, 229 (Iowa 1998) (holding that affirmative defenses were properly submitted, although not pled, where litigated and supported by evidence). Pioneer might argue that its defense of release, although not pled, was tried by consent. However, although a court considers a matter tried by consent when a party introduces evidence without objection on an issue not raised by the pleadings, consent will not be found where the evidence was also admissible on an issue encompassed within the pleadings. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). The evidence concerning release upon which Pioneer relies, the lien waiver and check, was relevant and admissible on the issue of Pioneer's waiver defense to Swain's mechanic's lien foreclosure count, an issue encompassed within the pleadings. Accordingly, we will not find that an unpled defense of release was tried as to Swain's claim of breach of an oral settlement agreement.

V. DISPOSITION

We affirm on Pioneer's appeal. On Swain's cross-appeal we reverse and remand to the trial court for entry of judgment in favor of Swain and against Pioneer in the amount of \$14,500. Costs on appeal are taxed to Pioneer.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.