

APR 29 1980

CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

**JEROME V. ZIMMERMAN, d/b/a
ZIMMERMAN FARM SUPPLY,,**

Plaintiff-Appellee,

VS.

MOFFATT CORPORATION,

Defendant-Appellant.

Filed April 29, 1980

0-92
2-63783

Appeal from Pottawattamie District Court - Harold L. Martin, Judge.

Defendant appeals judgment for plaintiff in action to collect payment due on a building contract; plaintiff cross-appeals on trial court's calculation of deductions from contract price for undelivered materials and cost of repair. Vacated and remanded with instructions.

Frank W. Pechacek, Jr. of Smith, Peterson, Beckman & Willson, Council Bluffs,
for defendant-appellant.

Raymond E. Pogge of Pogge, Root & Steege, Council Bluffs, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, Moffatt Corporation, appeals judgment for plaintiff, Jerome V. Zimmerman, in action to collect payment due on a building contract. On appeal, defendant asserts plaintiff failed to prove he fulfilled his contractual obligations and thus was not entitled to recover on the contract, and it proved by a preponderance of the evidence consequential damages so as to allow recovery on its counterclaim. On cross-appeal, plaintiff asserts trial court incorrectly calculated deductions from contract price for undelivered materials and construction defects. We vacate the trial court judgment and remand for entry of order in accordance with this decision.

Our review of this equitable proceeding is de novo. Iowa R. App. P. 4. While we are not bound by the findings of the trial court, such fact-findings are entitled some weight, especially when considering the credibility of witnesses. Iowa R. App. P. 14(f)(7).

I.

Plaintiff filed his petition on October 26, 1977, asserting: His company, Zimmerman Farm Supply, contracted with defendant to supply material and labor to construct a grain bin, install a power sweep in an existing bin, install augers connecting the bins and the dryer, thereby providing a complete grain-dryer system; plaintiff fulfilled his contractual obligations; and defendant refused to pay the amount allegedly due. Having previously filed a mechanic's lien, plaintiff prayed for judgment for the balance due on the contract and foreclosure of the mechanic's lien. Defendant denied plaintiff's satisfaction of the contract and any contractual liability. Later, defendant counterclaimed, asserting the contract was breached by defects in the plaintiff's work, which resulted in certain consequential damages, finally claimed to be \$35,900.

The case was tried to the court on September 15, 1978. Plaintiff testified he supplied the required work and materials, with certain minor exceptions, and he was unable to complete the project because of defendant's failure to move a grain dryer. Defendant's president, Lynn Moffatt, Jr., testified that after plaintiff repositioned the floor in the holding bin to install the power sweep, the floor collapsed, resulting in losses to defendant from its inability to use the bin. Moffatt described various

materials, totalling \$2,165, called for in the contract that he claimed were never delivered. He also denied any responsibility of the corporation for moving the grain dryer and asserted plaintiff's obligation to do so. In its judgment and decree filed June 4, 1979, trial court found plaintiff supplied material and labor of \$10,116.08, from which it deducted \$1500 as the reasonable cost of repairing the collapsed floor, \$2165 for materials not delivered, and \$1000 for defendant's prepayment. The court entered judgment for plaintiff for \$6,451.08, ordered foreclosure of the mechanic's lien, and dismissed defendant's counterclaim.

II.

Defendant contends plaintiff is not entitled to judgment on the contract because plaintiff breached the contract by not providing a completed grain-drying system. Although trial court found plaintiff failed to supply all materials required by the contract and plaintiff admits he failed to complete the project, we find plaintiff substantially performed the contract. Defendant bears the burden for breaching the contract and plaintiff is entitled to recovery for his substantial compliance.

This holding turns squarely on a factual issue: who was responsible for repositioning defendant's grain dryer so plaintiff could install certain augers and complete the grain-drying system? Each party insists the other assumed this responsibility. Repositioning the grain-dryer required the use of a large crane because of a wagon hopper tank mounted on the dryer's top.

Plaintiff testified he and Moffatt agreed defendant would turn the dryer unit. Moffatt testified plaintiff agreed "to bring his boom truck, which he had, I guess, that he used in erection in his other bins and left [sic] that wagon box there, down there off of me. Then I was to turn that dryer around." Moffatt testified he was unable to remove the wagon box from the dryer because he did not have the proper equipment. Trial court apparently gave greater credence to plaintiff's testimony than Moffatt's since it granted plaintiff recovery under the contract. As trial court possessed a better opportunity than this court to assess the witnesses' credibility, we give weight to its judgment and find defendant had the responsibility to reposition its grain dryer to allow plaintiff to complete the contract. Iowa R. App. P.14(f)(7). This conclusion is

supported to a limited extent by other testimony in the record. See generally Garretson v. Harlan, 218 Iowa 1049, 1058, 256 N.W. 740, 754 (1934).

Plaintiff substantially complied with the contract up to the point of installing the augers to and from the grain dryer. He had installed the power sweep in the holding bin, repaired certain holes, and constructed a new storage bin. Due to defendant's failure to turn the dryer, plaintiff was unable to complete the contract. In such a case, plaintiff is excused from complying further with the contract in order to recover under the contract. See Brown v. Needles, 186 Iowa 878, 884, 170 N.W. 804, 806 (1919).

After plaintiff installed a power sweep in the holding bin, he repositioned its old floor. This floor allegedly collapsed after the bin was filled with grain. Defendant contends plaintiff failed to perform substantially his contractual obligation not only by failing to complete the system, but also by this faulty installation of the floor in the holding bin. Although a close question, we find plaintiff did substantially comply with the contract to the point of defendant's breach.

Substantial performance

permits only omissions or deviations from the contract as are inadvertent or unintentional, are not due to bad faith, do not impair the structure as a whole, are remedial without doing material damage to other parts of the building in tearing down and reconstructing, and may without injustice be compensated for by deductions from the contract price.

Farrington v. Freeman, 251 Iowa 18, 23, 99 N.W.2d 388, 391 (1959) (quoting from Littell v. Webster County, 152 Iowa 206, 215, 131 N.W.2d 691, 694, 132 N.W. 426 (1911)); see Lautenbach v. Meredith, 240 Iowa 166, 172, 35 N.W.2d 870, 874 (1949). Thus, substantial, although not perfect, performance of a building contractor allows a contractor to receive the contract price less a deduction for the value of the defects. Huffman v. Hill, 245 Iowa 935, 938, 65 N.W.2d 205, 206-07 (1954). Plaintiff bears the burden of proving substantial performance. Id.

While the collapsed floor may constitute a defect, it is not so substantial to prevent plaintiff from proving substantial compliance. There was no showing plaintiff intentionally or in bad faith caused the floor to be installed so it would collapse. Plaintiff testified the floor could be repaired for approximately \$1100 without any

material damage to the bin. Allowing defendant a credit for the cost of repair against the contract price fairly compensates both parties upon a finding of substantial performance. See S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 208, 111 N.W.2d 681, 684 (1961); Farrington, 251 Iowa at 23, 99 N.W.2d at 391; Huffman, 245 Iowa at 938-39, 65 N.W.2d at 206-07 (1954). This is not a case of an uncured material breach. See Roland A. Wilson and Associates v. Forty-O-Four Grand Corp., 246 N.W.2d 922, 925-26 (Iowa 1976).

Where the contractor completes a portion of the work required under the contract before the owner breaches, the basic rule allows the contractor to recover the contract price, less the cost to complete the contract and deductions for any defects or incompletions. See Corwin v. Wallace, 17 Iowa 374, 378 (1864); cf. M. Capp Manufacturing Co. v. Hartman, 260 Iowa 24, 29, 148 N.W.2d 465, 468 (1967) (lost profit awarded to builder without employing contract price less cost of completion formula). See generally 5 A. Corbin, Contracts § 1094 (1964); D. Dobbs, Handbook on the Law of Remedies, § 12.24, at 913 (1973); R. Hillman, Contract Remedies, Equity, and Restitution in Iowa § 9.4(B), at 219 (1979); Restatement of Contracts § 346 (1964). Here, plaintiff is entitled to the contract price (\$11,914) less: labor cost to complete the contract (\$500); materials not delivered or installed (\$2311.20); deductions for defects in the holding bin's floor (\$1500); and defendant's prepayment (\$1000). We vacate trial court's erroneous calculation of damages and order judgment for plaintiff be entered for \$6602.80.

Defendant contends the trial court's deduction of \$1500 does not adequately compensate him for damages arising from the collapsed bin floor. In his counterclaim defendant claimed the following damages: Labor to remove corn from bin after collapse of floor (\$150); damage to value of floor (\$3400); loss of storage for two years (\$3250); spoilage (\$7150); field losses on four hundred acres of corn that could not be harvested with higher moisture content because of lack of grain-drying capacity (\$22,000). We find the \$1500 adequate to cover defendant's damages.

Damages for a builder's unsatisfactory performance have traditionally been measured in two ways. See R. Hillman, Contract Remedies, Equity and Restitution in Iowa § 9.1 (1979). Defendant seeks to use in part the value measure that awards the

difference between the value of the work as actually received and the value of the work as promised under the contract. Id. However, in this case we find the cost measure, which measures the cost of repairing the defective work, is the more appropriate measure. See Capitol City Drywall Corp. v. C. G. Smith Construction Co., 270 N.W.2d 608, 612 (Iowa 1978); Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972); Hayes v. Ramsey, 205 Iowa 167, 170, 217 N.W. 808, 809 (1928). Where, as here, the cost of repair is less than the decrease in value it is generally unfair to award the higher amount. See Hansen v. Andersen, 246 Iowa 1310, 1314-15, 71 N.W.2d 921, 924-25 (1955). Plaintiff testified the cost of repair would be about \$1100, which we find is a reasonable estimate of the cost of repair. Although plaintiff claims the required material might have been furnished by the manufacturer without charge, we find such a prediction too speculative.

Defendant's other claimed damages must be examined individually to determine their validity. Recovery is possible only for damages naturally arising from the defect, Meyer v. Nottger, 241 N.W.2d 911, 920 (Iowa 1976), and not preventable or aggravated by defendant, DeWaay v. Muhr, 160 N.W.2d 454, 456-57 (Iowa 1968). The labor cost of removing the corn from the bin was a recoverable amount. Defendant's other consequential damages, however, were either not sufficiently proven (spoilage loss) or a result of defendant's failure to mitigate by repairing the bin (loss of storage space and field losses). Plaintiff testified the collapse of the floor did not reduce the airflow sufficiently to cause any spoilage. Plaintiff also testified replacing the bin floor would have taken approximately one day. Moffatt testified the floor collapsed so near to the floor it prevented the necessary airflow to retard spoilage, and he sought to minimize the damage by removing the allegedly damaged corn and feeding it to his livestock. He did not explain, however, why he allowed the bin to remain in its unusable state for almost two years after discovery of the defect. On this point, we once again look to the trial court for its assessment of the witnesses' credibility and their testimony. Iowa R. App. P. 14(f)(7). See also Kunzman v. Cherokee Silo Co., 253 Iowa 885, 887-90, 114 N.W.2d 534, 538 (1962). The trial court award of \$1500 adequately covered the cost of repair, spoilage, and labor costs resulting from the collapsed bin floor.

IV.

Plaintiff's cross-appeal challenges the trial court's deduction of \$2165 for materials not received by defendant. Initially, we note plaintiff failed to cite any authority in support of his argument. We need not review any assignment of error when the complaining party cites no supporting authority, Arthur Elevator Co. v. Grove, 236 N.W.2d 383, 393 (Iowa 1975), and the argument may be deemed waived. Miller v. International Harvester Co., 246 N.W.2d 298, 304 (Iowa 1976). Regardless of plaintiff's omission, we find it necessary to review the equipment deduction. The original contract price was \$11,914. From this the net cost (list price less twenty per cent discount) of equipment not delivered should be deducted as part of the cost to complete. See Capitol City Drywall Corp., 270 N.W.2d at 612. This amount is \$1732. The equipment not installed should also be deducted as part of the cost to complete. Id. This amount is \$579.20. This equipment not installed should be returned to plaintiff.

We vacate the judgment of the trial court and remand this case to the trial court for entry of an order for judgment for plaintiff for \$6602.80, with simple interest thereon at an annual rate of five per cent from November 15, 1976, to June 4, 1979, foreclosure of the mechanic's lien, and dismissal of defendant's counterclaim. Each party shall pay one-half of the costs of this appeal.

VACATED AND REMANDED WITH INSTRUCTIONS.