IN THE COURT OF APPEALS OF IOWA

No. 9-248 / 98-0561
Filed May 26, 1999

JOSEPH SITZES d/b/a ALL-RITE SITES, PROFESSIONAL SERVICES and LANDA PAINTING, INC.,
Appellants,

vs.

FIRST AVENUE RAMP, L.C.,
Appellee.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Two contractors appeal and defendant parking garage cross-appeals from the district court's findings following trial on an action to foreclose two mechanic's liens.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

Peter C. Riley of the Tom Riley Law Firm, P.L.C., Cedar Rapids, for appellants.

William G. Nicholson of White & Johnson, P.C., Cedar Rapids, for appellee.

Heard by Huitink, P.J., and Streit and Mahan, JJ. Sackett, C.J., takes no part.

HUITINK, P.J.

Joseph Sitzes d/b/a All-Rite Sites Professional Services and Landa Painting, Inc. appeal and First Avenue Ramp, L.C. cross-appeals from the district court's judgment in an action to foreclose two mechanic's liens. We affirm in part, modify in part, and remand for further proceedings.

I. Background Facts and Proceedings.

Sitzes and Landa performed various painting, cleaning, and repair services under separate oral agreements with First Avenue. Upon completion of its services, Landa billed First Avenue $1631. Sitzes' bill for its services was $24,618.54, after credit for partial payment by First Avenue. First Avenue declined to pay either bill citing excessive charges for labor and services and substandard workmanship.

Landa subsequently filed a mechanic's lien claiming it was owed $1631, plus statutory interest from January 2, 1996. Sitzes filed a mechanic's lien claiming $24,618.54, plus statutory interest from January 25, 1996. Both filed a petition to foreclose their respective mechanic's liens on April 30, 1996. In May 1996, both sent First Avenue additional invoices stating their intent to charge First Avenue one and one-half percent interest per month on the unpaid balances claimed.

At trial, the disputed issues included the reasonable value of each contractor's services and quality of workmanship. The district court found Landa performed all of the services claimed and entered judgment against First Avenue for $1631, plus

five percent interest from January 2, 1996, and ten percent interest from the date the judgment was entered.

The court found, with the exception of priming, painting, and cleaning specified metal surfaces, the services and materials Sitzes provided substantially met prevailing local standards. The court also found the reasonable value of Sitzes' services was $19,500. This amount was reduced by $2000 for payment received, $1069.25 for sales tax on labor, $6 for sales tax on hauling, and a $49.95 credit for materials that were returned. Judgment for $16,382.82 was entered in favor of Sitzes. The court also awarded Sitzes five percent interest from January 25, 1996 until the date of judgment, and ten percent interest thereafter.

In post-trial motions, Sitzes and Landa sought one and one-half percent statutory monthly interest on the unpaid balance of First Avenue's account. Sitzes also sought restoration of a portion of the sales tax on labor denied by the district court. The district court overruled all post-trial motions.

On appeal, Sitzes argues the district court erroneously reduced the amount of his claim for services. Sitzes also claims the district court erroneously denied sales tax and awarded insufficient interest in its judgment. Landa's appeal is limited to the amount of interest awarded.

On cross-appeal, First Avenue contends the district court should have further reduced the value of the services provided by both Landa and Sitzes.

II. Standard of Review.

An action to enforce a mechanic's lien is in equity. *Sulzberger Excavating, Inc. v. Glass*, 351 N.W.2d 188, 191 (Iowa App.1984). Consequently, review is de novo. Iowa R. App. P. 4. "In mechanic's lien cases, involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs." *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa App. 1994)(citing *McDonald v. Welch*, 176 N.W.2d 846, 849 (Iowa 1970)).

III. Foreclosure of Mechanic's Liens.

When a contractor has substantially complied with a contract it is entitled to recover the contract price with deductions for any defects or incompletions. *S. Hanson Lumber Co. v. DeMoss*, 253 Iowa 204, 208, 111 N.W.2d 681, 684 (1961). The contractor has the burden of proof to show substantial performance with the contract. *Farrington v. Freeman*, 251 Iowa 18, 23, 99 N.W.2d 388, 391 (1959). Substantial performance allows only 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 the other portions of the building, and may be compensated for through deductions in the contract price. *Moore's Builder & Contractor, Inc. v. Hoffman*, 409 N.W.2d 191, 193 (Iowa App. 1987). Once a contractor has met its burden to show substantial performance, the

property owner has the burden to show any defects or incompletions which may be deducted from the contract price. *Nepstad*, 527 N.W.2d at 406.

The proper measure of damages in an action to foreclose a mechanic's lien is the reasonable value of the plaintiff's services rendered and labor and material furnished to the defendant owners up to the time the work was completed and the contract terminated. *McDonald*, 176 N.W.2d at 847.

The record indicates Sitzes was initially hired to power wash the first floor of the First Avenue Ramp, paint a stairwell, clean the skywalk area, clean windows, and sweep the entire ramp. There were no bids or estimates requested and Sitzes was hired on a time and material basis.

Joseph Sitzes testified any additional work included in his final billing was requested by the ramp's managers, Jalayn White and Bebe Davis. He also testified concerning the hourly rates charged and the amount of time and material required to complete the requested work. Sitzes' version of the quality and value of his services was supported by expert testimony from other contractors in the Cedar Rapids area.

White and Davis denied authorizing any additional work. First Avenue also offered expert testimony indicating much of Sitzes' work was substandard and the amount of its billings were excessive.

We find Sitzes' version of the extent of work performed and authorized by ramp management more credible than other evidence on this issue. Much, if not all, of the disputed work was performed while ramp management was on the work site.

It seems to us improbable that the extensive additional work claimed would have continued unnoticed or without inquiry from ramp management. We accordingly find Sitzes performed the services claimed and has met his burden to show substantial performance of his contract with First Avenue.

Landa's evidence of substantial performance is equally persuasive. The amount charged was based on a written bid plus $370 for extra work Landa also claims was authorized by First Avenue management. Because Sitzes and Landa have sufficiently proved substantial performance, the burden shifts to First Avenue to show the value of any defects or incompletions that may be deducted from the amount of the contractor's respective billings. *Nepstad*, 527 N.W.2d at 406.

The opinions of First Avenue's expert were premised on his conclusion that other painting contractors could have completed the same work in less time and for less money. In view of other expert testimony supporting the reasonable value of Sitzes' and Landa's services, we find these assertions insufficient to support an inference that their charges were unreasonable.

Evidence concerning quality of workmanship in this case was similarly conflicting. Even if we were to agree with First Avenue's claims, a careful examination of the record fails to reveal evidence of the cost required to correct any alleged deficiencies resulting from substandard workmanship by either Landa or Sitzes. Without the benefit of such evidence, the amount of any deductions from the

final contract price is merely conjectural. First Avenue has accordingly failed to meet its burden to show the value of any such defect or incompletion.

We conclude Sitzes should have been awarded the full amount of its claim ($24,618.54) against First Avenue. We also conclude the district court properly awarded Landa the full amount of its claim.

IV. Interest.

A. Iowa Code Section 535.11. Both Sitzes and Landa assert on appeal the district court erred in refusing to grant interest pursuant to Iowa Code section 535.11. That code section provides:

> 1. Except where the parties have agreed in writing for the payment of a different finance charge or rate of interest, a creditor may charge a finance charge on the unpaid balances of an account receivable at a rate not exceeding that permitted by subsection 3 or 4 of this section if the creditor gives notice as required by subsection 2 of this section.
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> 2. As a condition of imposing a finance charge under this section, the creditor shall give notice to the debtor as follows:
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> b. In a transaction that is not subject to the Truth in Lending Act, the creditor shall give written notice to the debtor at the time the debt arises. The notice shall be contained on the invoice or bill of sale evidencing the credit transaction, and shall disclose the rate of the finance charge and the date or day of the month before which payment must be received if the finance charge is to be avoided. With respect to open accounts, this notice shall be given at the time credit is initially extended; provided that additional advance notice in writing shall be given to the debtor not less than ninety days prior to any change in the terms of the agreement or of rate of the finance charge or date payment is due. For purposes of this paragraph, notice is given if the invoice or bill of sale is delivered with the goods, whether or not the debtor is present at the time of delivery.
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> 5. As used in this section . . . "open account" means an account receivable consisting of debt arising from the extension of open-end credit, as defined in section 537.1301.

Iowa Code § 535.11 (1995).

It is undisputed neither Sitzes nor Landa provided notice of the finance charge on the invoices they originally sent to First Avenue after work was completed. Indeed the original invoices contain no mention of interest whatsoever. Sitzes and Landa contend they later complied with the section 535.11 notice provisions, however, when they sent an amended invoice detailing their intent to add a finance charge to First Avenue's unpaid balance. In doing so, Sitzes and Landa rely on the language of the statute dealing with finance charges on "open accounts." They contend they complied with the notice provisions by providing a ninety-day notice of their intent to change the terms of the agreement or rate of finance charge.

We reject Sitzes' and Landa's position. We find they have not complied with the statute's notice provisions concerning accounts receivable. Additionally, the transactions involved herein do not qualify as "open accounts." *See* Iowa Code §§ 535.11(5); 537.1301(29)(defining "open account" for purposes of imposition of finance charges). They cannot, therefore, avail themselves of the requirements of section 535.11(2)(b) by providing notice of the finance charge after the debt had already arisen.

B. Statutory Interest. We find the district court erred in awarding the plaintiffs prejudgment interest of only five percent. We find Sitzes and Landa are

entitled to statutory interest as outlined in Iowa Code sections 535.2 and 535.3. Accordingly, we remand to the district court to enter judgment awarding Sitzes and Landa statutory interest of five percent from the date of their respective invoices giving rise to the mechanic's lien at issue here. *See* Iowa Code § 535.2. The statutory rate of interest is to increase to ten percent per annum, commencing the date of the plaintiffs' filing of their petition in equity to foreclose their liens. *See* Iowa Code § 535.3; *see also Macal v. Stinson*, 468 N.W.2d 34, 35 (Iowa 1991)(citations omitted).

V. Sales Tax.

The district court declined to award Sitzes $1069.25 as sales tax assessed on the labor performed on the parking ramp. Sitzes claims the district court's refusal to award sales tax was in error.

Iowa Code section 422.43(10) provides:

> There is imposed a tax of five percent upon the gross receipts from the rendering, furnishing, or performing of services. . . .

Iowa Code section 422.43(11) outlines specific services subject to the tax provided for in subsection 10:

> The following enumerated services are subject to the tax imposed on gross taxable services: . . . painting, papering, and interior decorating; . . . janitorial and building maintenance or cleaning . . . .

Sitzes was entitled to sales tax claimed for labor. The district court's contrary conclusions were erroneous.

VI. Summary.

The judgment of the district court is affirmed in part, modified in part, and remanded for entry of judgment in conformity with this opinion.

AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.

No. 98-0561. [9-248] SITZES v. FIRST AVENUE RAMP, L.C.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge. **AFFIRMED IN PART, MODIFIED IN PART, AND REMANDED.** Heard by Huitink, P.J., and Streit and Mahan, JJ. Opinion by Huitink, P.J. Sackett, C.J., takes no part. (8 pages $3.20)

Sitzes and Landa performed painting, cleaning, and repair services under separate oral agreements with First Avenue. Landa billed First Avenue $1631. Sitzes' bill for its services was $24,618.54, after credit for partial payment. First Avenue declined to pay either bill citing excessive charges for labor and services and substandard workmanship. Landa filed a mechanic's lien claiming it was owed $1631, plus statutory interest from January 2, 1996. Sitzes filed a mechanic's lien claiming $24,618.54, plus statutory interest from January 25, 1996. Both filed a petition to foreclose their respective mechanic's liens. In May 1996, both sent First Avenue additional invoices stating their intent to charge First Avenue one and one-half percent interest per month on the unpaid balances. The district court found Landa performed the services claimed and entered judgment for $1631, plus five percent interest from January 2, 1996, and ten percent interest from the date judgment was entered. Judgment for $16,382.82 was entered in favor of Sitzes. The court also awarded Sitzes five percent interest from January 25, 1996 until the date of judgment, and ten percent interest thereafter. ***Foreclosure of Mechanic's Liens.*** Sitzes was hired to power wash the first floor of the First Avenue Ramp, paint a stairwell, clean the skywalk area, clean windows, and sweep the entire ramp. Sitzes testified any additional work included in his billing was requested by the ramp's managers, Jalayn White and Bebe Davis. White and Davis

No. 98-0561. [9-248] SITZES v. FIRST AVENUE RAMP, L.C. (continued)
denied authorizing any additional work. We find Sitzes' version of the extent of work performed and authorized by ramp management more credible than other evidence on this issue. We find Sitzes performed the services claimed and has met his burden to show substantial performance of his contract. Because Sitzes and Landa have sufficiently proved substantial performance, the burden shifts to First Avenue to show the value of any defects or incompletions that may be deducted from the amount of the contractor's respective billings. The opinions of First Avenue's expert were premised on his conclusion that other painting contractors could have completed the same work in less time and for less money. An examination of the record fails to reveal evidence of the cost required to correct any alleged deficiencies resulting from substandard workmanship by either Landa or Sitzes. Without such evidence, the amount of any deductions from the final contract price is merely conjectural. First Avenue has failed to meet its burden to show the value of any such defect or incompletion. We conclude Sitzes should have been awarded the full amount of its claim ($24,618.54). ***Interest.*** Both Sitzes and Landa assert on appeal the district court erred in refusing to grant interest pursuant to Iowa Code section 535.11. We reject Sitzes' and Landa's position. We find they have not complied with the statute's notice provisions concerning accounts receivable. Additionally, the transactions involved herein do not qualify as "open accounts." They cannot, therefore, avail themselves of the requirements of section 535.11(2)(b) by providing notice of the finance charge after the debt had already arisen. ***Sales Tax.*** The district court declined to award Sitzes $1069.25 as sales tax assessed on the labor performed on the parking ramp. Sitzes was entitled to sales tax claimed for labor. The district court's contrary conclusions were erroneous.