FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RAYMOND L. WAGEHOFT,	)	
Plaintiff-Appellee/ Cross-Appellant,	)	Filed December 18, 1985
	)	535
vs.	)	
PATRICIA A. BERGSTROM and **PERPETUAL SAVINGS AND LOAN ASSOCIATION,**	)	5-519 84-1942
Defendants-Appellants/ Cross-Appellees.	)	

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

Defendant homeowner appeals and plaintiff workman cross-appeals the district court's foreclosure of a mechanic's lien. **AFFIRMED AS MODIFIED.**

Patricia C. Kamath, Iowa City, for defendants-appellants.

Alan R. Bohanan of Rate, Nolan, Bohanan, Moen & Lucas, Iowa City, for plaintiff-appellee.

Considered by Oxberger, C.J., and Snell and Schlegel, JJ.

PER CURIAM

On August 4, 1983, defendant Patricia Bergstrom and plaintiff Raymond Wagehoft entered into a contract providing that Wagehoft would remodel a portion of Bergstrom's unfinished basement for $5,700. As the work was progressing, Bergstrom became dissatisfied with workmanship and materials, and finally, on the advice of her lawyer, locked one of the workmen off the job for a few hours one day in early September. The workmen did eventually enter the house that day and completed the project except for installing a stove and replacing a cabinet door, both of which were on order. On September 9, Wagehoft presented a bill for $6,074.24 (including charges for extra work not included in the original contract price) to Bergstrom, but no payment of any amount was made. Wagehoft filed a mechanic's lien on September 12, 1983, in the Johnson County District Court. Wagehoft filed a petition for foreclosure of a mechanic's lien on December 13, 1983, for the balance of the contract and the value of extra work performed. Bergstrom counterclaimed for improper workmanship and other elements of damage.

The court awarded Wagehoft the contract price plus the value of extra work performed, less a credit for repairs, for a net judgment of $5,227.00 and foreclosed the mechanic's lien against Bergstrom's real property. Attorney fees were not included in the trial court's award. Immediately that same day after trial, but before judgment, Wagehoft submitted an affidavit concerning his attorney's fees. He then timely filed a motion for enlargement and modification of judgment for attorney fees. The motion was denied by the trial court. Plaintiff has cross-appealed on this ground.

An action to enforce a mechanic's lien is in equity. Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 191 (Iowa Ct. App. 1984). Our review in equity cases is de novo. Iowa R. App. P. 4. The Iowa Supreme Court has stated that

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"In mechanics' 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." McDonald v. Welch, 176 N.W.2d 846, 849 (Iowa 1970). The mechanic's lien claimant must prove his performance under the construction contract to recover the balance due on the contract and to foreclose the lien. Huffman v. Hill, 245 Iowa 935, 938, 65 N.W.2d 205, 206 (1954). "However, a technical, exact and perfect performance is not necessary. Substantial performance is all that is required." Id.

> "Substantial performance", as defined by the cases, permits only such 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 remediable 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. So much is allowed in building contracts because of the hardship to the contractor if slight, unintentional deviations should bar his recovery.

Farrington v. Freeman, 251 Iowa 18, 24, 99 N.W.2d 388, 391 (1959) (quoting Littell v. Webster, 152 Iowa 206, 215, 131 N.W. 691,694 (1911)). Where substantial performance is proven by the builder, he is entitled to the contract price less deduction for the value of any defects in performance. Farrington, 251 Iowa at 23, 99 N.W.2d at 391; Peterman v. Hardenbergh, 250 Iowa 931, 933, 97 N.W.2d 152, 154 (1959).

We find that Wagehoft met his burden to prove substantial performance under the construction contract. He began with an unfinished basement and constructed a kitchen, a sleeping area with a closet, and a bathroom. Wagehoft is entitled to recover the contract price of $5,700 less $529.52 for shelving and a kitchen range that were deleted. Wagehoft is also entitled to recover $512.76 for extra work involving increased sheetrocking and water closet repair.

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Therefore, judgment for Wagehoft without taking into consideration defects in construction is $5,683.24.

The parties agree, however, that the remodeling was not without defect. Therefore, Bergstrom will receive some deduction from the balance due. At issue remains the extent of the defects and the necessity for reconstruction.

The evidence presented at trial showed that the ceiling drywall is defective. The joints are starved, which means that there are noticeable gaps in the seams where the sheetrock is taped giving the ceiling an uneven appearance. Wagehoft himself testified that he had problems with the drywall, made three attempts to refinish or texture the ceiling, and was still not personally satisfied with its appearance.

The evidence also established that the vinyl floor covering is defective. The vinyl is fractured in two places where the top wearing layer of vinyl is torn.

The measure for the deduction for the value of these defects in performance is the reasonable cost of correcting the defects or completing the omissions where the correction or completion does not involve unreasonable destruction of the work done by the contractor or unreasonable economic waste. Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972) (citing 13 Am. Jur. 2d Building and Construction Contracts § 79 at 79 and 5 Corbin on Contracts § 1089 at 485).

Bergstrom offered testimony of a drywall expert that the cost to remove and replace the defective drywall would be $850. The evidence established that this estimate was a necessary and reasonable amount.

Bergstrom also offered testimony of a floor covering expert that the cost to tear up and replace the vinyl was $987.95 with vinyl costing $8.99 a square yard. This amount is clearly excessive. First of all, the existing vinyl chosen

by Bergstrom was purchased for $2.49 a square yard. Furthermore, Bergstrom's and Wagehoft's experts testified that a common and inexpensive method of repair is to "cut and patch" rather than to replace the entire floor. Bergstrom's expert estimated that the cost of patching these vinyl fractures would be between $65 and $85. In light of the nature of this remodeling project, we find that it is not reasonable or necessary to replace the entire flooring when the fractures can be adequately and reasonably patched for $85.

We conclude that Bergstrom is entitled to total credit for Wagehoft's defective performance of $935. Therefore, Wagehoft shall recover $4,748.24.

Fitness for Intended Purpose. Bergstrom also contends that the trial court erred by not applying the standard of fitness for intended purpose. Bergstrom argues that this remodeling project was intended to establish a basement apartment in her home and that, as a result of Wagehoft's negligent performance of the construction contract, the remodeled area is virtually not habitable.

In a dwelling construction contract entered into by a future homeowner and a builder, the Iowa Supreme Court has held that "it is implied, unless there is express contrary agreement, that 'the building will be erected in a reasonably good and workmanlike manner and will be reasonably fit for the intended purpose.'" Busker, 203 N.W.2d at 303 (quoting Markman v. Hoefer, 252 Iowa 118, 123, 106 N.W.2d 59, 62 (1960)).

The supreme court in Kirk v. Ridgway, 373 N.W.2d 491, 496 (Iowa 1985), recently extended this implied warranty to the situation where a homeowner purchases a house already built. In Kirk, the court concluded that "in the sale of a home, there is an implied warranty that it has been constructed in a reasonably good and workmanlike manner and that it will be reasonably fit for its intended purposes." Id.

The purpose of allowing a homeowner to recover under the implied warranty theory is well evidenced by the cases which have applied it. It allows a homeowner to recover for the cost of repairs caused by latent defects in building construction not capable of discovery by careful inspection at the time the homeowner took possession. See Kirk, 373 N.W.2d at 494 (several years after purchase exterior paint peeled); Busker, 203 N.W.2d at 303 (months after homeowner moved in, concrete in garage, driveway, and patio cracked); see also Semler v. Knowling, 325 N.W.2d 395, 397 (Iowa 1982) (one year after sewer installation, system backed up and continued to do so every three to six months).

Following existing case law, the implied warranty of workmanship has no application in the present situation. We decline to extend the doctrine to cover a basement remodeling project that has patent defects upon completion. Furthermore, we have recognized that Bergstrom is entitled to recover the cost for repairing Wagehoft's defective construction. This is the same method of computing damages that is used under the implied warranty theory.

Attorney Fees. On cross-appeal, Wagehoft asserts that the trial court erred in denying him reasonable attorney fees. He relies on Iowa Code section 572.32 (1985) which provides that "In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials directly to the defendant, the plaintiff, if successful, shall be awarded reasonable attorney fees."

After the trial of the case was completed, Wagehoft demanded judgment for attorney fees and filed an itemized statement identifying the work done and the attorney fees charged. The court in its October 2, 1984, order did not award attorney fees. On October 3, Wagehoft filed a motion for enlargement and modification of judgment. The court denied this motion finding that Wagehoft did not submit evidence on the issue of attorney fees during trial and, therefore, was not entitled to recover them.

While the statute does not afford the court the opportunity to exercise discretion in determining whether attorney fees should be awarded or not, it does allow the court discretion to determine the reasonableness of the amount of such an award. In light of Wagehoft's defective performance, we conclude that a reasonable award of attorney fees to Wagehoft is $2,000, rather than the $3,209.25 submitted.

AFFIRMED AS MODIFIED.

Snell and Schlegel, JJ., concur; Oxberger, C.J., specially concurs.

OXBERGER, C.J., (concurring specially).

I would grant the full amount of attorneys fees requested.