IN THE COURT OF APPEALS OF IOWA

FILED
MAY 28 1987
CLERK SUPREME COURT

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LEONARD FOSTER d/b/a FOSTER CONSTRUCTION COMPANY,

Plaintiff-Appellant,

vs.

FAGRE CONSTRUCION CO., INC., IOWA DEPARTMENT OF TRANSPORTATION: FIDELITY AND GUARANTY INSURANCE COMPANY d/b/a UNITED STATES FIDELITY & GUARANTY COMPANY; OSCEOLA COUNTY, IOWA,

Defendants-Appellees.

Filed May 28, 1987

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86-291

Appeal from the Iowa District Court for Osceola County (No. 11131) - Thomas Hamilton, Judge.

Plaintiff appeals from dismissal of claim. **AFFIRMED.**

Victoria L. Herring, West Des Moines, *for plaintiff-appellant.*

James D. Hart, of Anderson, Peizer & Hart, Estherville, for defendants-appellees Fagre Construction and Fidelity and Guaranty Insurance.

Thomas J. Miller, Attorney General, and Merrill M. Peters, Attorney General, for defendant-appellee IDOT.

Michael E. Thole, County Attorney, for defendant-appellee county.

Heard by Snell, P.J., and Schlegel, and Sackett, JJ.

SACKETT, J.

We must determine whether the trial court properly dismissed plaintiff claims of subcontractor for highway construction work. The issues evolved from a claim brought by Appellant Leonard Foster. Foster, a subcontractor, held two subcontracts with Appellee Fagre Construction Company, Inc., the general contractor. Foster filed suit contending he had completed his subcontracts with Fagre and performed all conditions required of him.

There were two subcontracts, one for $14,732.48 and one for $12,051.22. Foster admitted Fagre had made payments on both contracts by paying for steel and labor. Foster claimed in his petition a balance was due of $4,685.07 on one contract and $1,523.35 on the other. Foster asked for judgment against Fagre and its surety, United States Fidelity & Guaranty Co. Certain moneys from the project had been held by the Iowa Department of Transportation. Foster further requested the court determine what portion of the money held by the Iowa Department of Transportation should be paid to Foster. Foster also requested attorney fees. Fagre admitted Foster contracted to furnish labor and materials but alleged Foster failed to furnish them. Fagre also counter claimed for $2,912.24 contending Foster had been overpaid.

The matter was tried to the court. Foster presented his evidence. After Foster rested his case, Fagre moved for a directed verdict. The motion was overruled. Fagre then called one witness. After that witness testified the trial court adjudicated plaintiff's claim as having no value. The court further determined Foster did not complete his portion of the contract and Fagre had to come in and do the job because Foster did not have sufficient personnel to do the job. The trial court made these findings on the record. The trial court then made a written order in which he adjudicated Foster's claim as having

no value and dismissed the claim. We determine the trial court adjudicated the claim against the plaintiff and also sustained Fagre's motion to dismiss.

Foster appeals contending (1) the case should be reviewed de novo and no weight should be given to the findings made by the trial court because of the trial court's evident hostility toward Foster, (2) the trial court's ruling should be reversed because the trial court erred in sustaining plaintiff's motion for directed verdict, (3) the terms of the contract can be modified and the trial court erred in holding Foster had to prove that he completely proved the written contract, and (4) Foster's failure to perform may be excused or waived as a result of obstructions provided by Fagre. We will address plaintiff's argument in the sequence made.

I. Scope of Review

Foster claims this cause is under Iowa Code chapter 573 and therefore is subject to de novo review. Foster cites no authority to support the proposition that actions under chapter 573 are subject to de novo review. Failure to cite authority in support of an issue may be deemed waiver of that issue. Iowa App. P. 14(a)(3).

The petition in this action was filed at law. It sought money damages and further equitable relief. It was tried as a legal action in the trial court. We determine the instant case was treated as a law action by the trial court and we consider it a law action on appeal. See Citizens Savings Bank v. Sac City State Bank, 315 N.W.2d 20, 24 (Iowa 1982); Life Investors Insurance Co. of America v. Heline, 285 N.W.2d 31, 35 (Iowa 1979).

Foster then argues if we review the record de novo we will determine the claim should not have been dismissed. Foster makes some general statements as to what the record made on his claim shows. However, even if this case

were subject to de novo review, nowhere in division I of Foster's brief are references made to the place in the record where facts supporting Foster's claim against Fagre appear. See Iowa R. App. P. 14(a)(5). Iowa R. App. 14(a)(5) requires the following:

> . . . The argument shall contain . . . with citations . . . and to the pertinent parts of the record . . . . (Emphasis added.)

We have, however, reviewed the record. We fail to find evidence which would support a finding plaintiff did in fact complete the contract as alleged in his petition nor do we find proof to support a finding plaintiff was entitled to additional funds.

II. Motion For Directed Verdict

Foster argues in considering a motion for directed verdict this court should view the evidence in the light most favorable to him. We agree. See Larkin v Bierman, 213 N.W.2d 487, 488 (Iowa 1973). Foster then argues applying this standard the defendant's one witness cannot rebut the entire framework of and implications flowing from Foster's case. Foster fails to direct us to that portion of the record where the alleged framework and implications appear. See Iowa R. App. P. 14(a)(5). On our review of the record, considering the evidence in the light most favorable to Foster, we fail to find evidence to support a finding he completed his contract and is entitled to additional funds. See Iowa R. App. P. 14(f)(2)-(3).

III. Modification Of Contract And Excused Failure To Perform

Foster next seeks to argue the court erred in holding he had to prove the written contract because the contract may be modified or performance excused. Foster's petition sought relief claiming each contract had been completed with the prime contractor and all conditions required of him had been performed. Therefore, in order to recover it was Foster's burden to show a full, complete

and substantial performance of the subcontract. Sheer Construction v. W. Hodgman and Sons, Inc., 326 N.W.2d 328, 332 (Iowa 1982).

The issues of modification, excuse and waiver of Foster to perform are raised for the first time on appeal. They were not presented to the trial court and will not be considered for the first time on appeal. See Shill v. Carriage Corp., 353 N.W.2d 416, 420-21 (Iowa 1984).

IV. Trial Court Hostility

Intertwined in Foster's other claims is his contention that because the trial court exhibited hostility toward him no weight should have been given to the trial court's findings. The record reflects the trial court encouraged settlement, held a pre-trial conference, encouraged the parties to organize their evidence and encouraged Foster to mark some 52 proposed exhibits rather than just dump those exhibits on the court. The trial court did comment that one of Foster's witnesses was "long-winded" but contends he did so to indicate if the trial was only going to take one day, as indicated by counsel, it would not be accomplished if Foster testified at length. While the trial court might have exercised more tact, there is no evidence the trial court was hostile to Foster.

Foster argues the trial court erred in listening to Foster's evidence, overruling the motion for directed verdict and then hearing one witness "and without ample time to review the law, contract documents and exhibits offered, cavalierly decided to dismiss the action." However, Foster has not pointed to any evidence that he was precluded from presenting. Foster has the burden of proof and must introduce facts to support the allegations of his petition. See Haynes v. Dairyland Mutual Ins. Co., 199 N.W.2d 83 (Iowa 1972); Verschoor v. Miller, 259 Iowa 170, 143 N.W. 385 (Iowa 1966). Moreover, in trial court Foster did

not make an offer of proof of additional evidence he wished to introduce. Consequently no error, if one was made, was preserved on this issue. Foster does not argue nor does the record indicate Foster was prevented from calling any witness, presenting any exhibits or cross-examining any witnesses. It was the defendant's case that was cut short We therefore affirm the trial court.

AFFIRMED