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MAR 31 1980

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAT BROWN,

)

Plaintiff-Appellee,

)

Filed March 31, 1980

vs.

)

FRANK WILAMOSKY,

)

Defendant-Appellant.)

0-12

2-63475

Appeal from Marion District Court - M. C. Herrick, Judge.

Appeal of judgment for plaintiff in contract action. - Affirmed in part, Vacated in part, and Remanded.

Robert J. Spayde, of Spayde & Rielly, Oskaloosa, for defendant-appellant.

Garold F. Heslinga, of Heslinga & Heslinga, Oskaloosa, and George Lind, Oskaloosa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, and Johnson, JJ. Carter, J., takes no part.

PER CURIAM

Defendant, William Wilamosky, appeals judgment for plaintiff, Pat Brown, in contract action. We affirm in part, vacate in part and remand.

Wilamosky, an Ohio resident, contracted with the Veterans Administration to paint a water tower on the grounds of the V.A. Hospital in Knoxville. He removed his work crew due to inclement weather and orally subcontracted with Brown, a Knoxville native, to complete exterior sandblasting and painting. Brown filed this action seeking recovery on the oral contract and for additional items allegedly authorized by Wilamosky. The trial court found Brown was entitled to quantum meruit for labor and expenses and awarded him judgment in the amount of \$4793.51. On appeal, Wilamosky raises several questions.

I. Admission of Evidence.

Wilamosky asserts alleged business records introduced as plaintiff's exhibit No. 1 were erroneously admitted because Brown failed to show they were made in the ordinary course of business in a manner assuring their trustworthiness and reliability. We find the evidence offered complied with the requirements of section 622.28, The Code 1979, as interpreted by State v. Anderson, 159 N.W.2d 809, 815 (Iowa 1968). The evidence offered here was recorded by Brown and his wife as expenses were incurred. Brown testified his wife served as secretary to his firm and they worked together. Based on Brown's testimony, the trial court could find the records were made in the course of business on or at the time of the act and that the sources of information and method of recording were such to indicate their trustworthiness and reliability. The trial court did not abuse its discretion by admitting exhibit No. 1.

Wilamosky next challenges the admission of exhibit No. 2, which consisted of bills for supplies purchased by Brown, into evidence. At trial, Wilamosky's counsel objected to the exhibit on several grounds but none of them related to their ability to qualify as business records. Wilamosky's sole ground for reversal here is that exhibit No. 2 did not fall under the business record rule and thus was admitted erroneously. That ground was not presented to the trial court and will not be considered here. Dickman v. Truck Transport, Inc., 224 N.W.2d 459, 465 (Iowa 1974).

Wilamosky also claims opinion evidence was admitted erroneously. Brown

testified to his opinion on procedures and fees relative to water tower projects in general; Wilamosky asserts Brown was not qualified to give such expert testimony. As stated in Doe v. Ray, 251 N.W.2d 496, 501 (Iowa 1977), "We are committed to a liberal rule on the admission of opinion evidence. [citation]. Generally the admission of such evidence rests largely within the trial court's discretion which we will not disturb on appeal absent manifest abuse." See also Shinrone, Inc. v. Tasco, Inc., 283 N.W.2d 280, 288-89 (Iowa 1979). Brown testified as to his opinion based on his knowledge of the painting business in general and this project in particular. Brown was a professional painter and the fact Wilamosky hired him for the water tower job gives credence to his knowledge of the subject. Since an adequate factual foundation for the opinion testimony was present, no manifest abuse of discretion occurred when the trial court admitted the opinion testimony of Brown.

II. Finding of Oral Contract.

The finding Wilamosky agreed to pay Brown labor and material costs beyond the original \$5500 oral contract price is challenged as unsupported by the evidence. Findings of fact are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1). A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. Briggs Transportation Co., Inc. v. Starr Sales Co., Inc., 262 N.W.2d 805, 808 (Iowa 1978). In evaluating sufficiency of evidence, we view it in its light most favorable to sustaining the court's judgment and need consider only evidence favorable to the judgment whether or not it is contradicted. Id. Brown testified he contracted with Wilamosky to paint the tower for \$5500. The record includes testimony and evidence of conduct reasonably supporting the finding Wilamosky originally agreed to pay Brown \$5500 for his labor and to reimburse him for expenses. It also supports the finding Wilamosky authorized additional work. Thus, we affirm the trial court's findings.

III. Recovery allowed.

As a general rule, one who pleads an express contract alone cannot recover on an implied contract or quantum meruit. Carlson v. Maughmer, 168 N.W.2d 802, 803 (Iowa 1969). However, an implied contract may be found on a point not covered by an express one and restitutionary recovery may be proper on that implied agreement. Id. In this

case, the trial court found recovery in quantum meruit was proper since Brown ceased performance when Wilamosky breached the contract. Wilamosky asserts since Brown raised only a claim of express contract in his pleadings, he could not recover in quantum meruit.

We find, although the trial court incorrectly stated quantum meruit recovery necessarily followed a breach that caused cessation of performance, this case was a proper one for quantum meruit recovery. However, we cannot concur with the awarding of relief solely in quantum meruit.

Two agreements were in issue. The first was the express contract to paint the tower for \$5,500 labor costs plus expenses. That contract covered all points of compensation; thus, since Brown's petition raised only contract damages on the initial agreement, recovery for Wilamosky's breach of it should have been for expectancy loss not quantum meruit.

The second agreement for work beyond the painting contract did not specify terms of compensation. Since no fixed sum was set for the additional labor, recovery for the reasonable value of services rendered was permissible. See Olberding Construction Company, Inc. v. Ruden, 243 N.W.2d 872, 875 (Iowa 1976); Denniston & Partridge Company v. Mingus, 179 N.W.2d 748, 751 (Iowa 1970).

Thus, we hold the trial court's award on solely quantum meruit was incorrect since that recovery was possible only on the second agreement. Relief for breach of the first contract should be in the form of expectancy damages since Brown chose to sue on the contract, which clearly fixed the rate of compensation. This is not a case where recovery in quantum meruit on the first contract can be fairly characterized as an issue tried by consent. See Roth v. Bluffs City Motors, Inc., 186 N.W.2d 634, 636 (Iowa 1971). Accordingly, we vacate the recovery awarded below.

While we believe the findings of the trial court support awards of damages on the first contract and recovery in quantum meruit on the second, the record is inadequate to allow us to assess what those awards should be. The evidence of Brown's labor expenses in the record does not segregate the work performed on the initial contract from that provided in the agreement for extra services. Therefore, we must remand for the limited purpose of receiving evidence on the labor charges attributable to each of

the two agreements. On receipt of that evidence, the trial court shall determine Brown's expectancy under the initial contract and award damages in that amount as limited by the contract price, as reduced by prepayments. See S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 208, 111 N.W.2d 681, 684 (1961). Additionally, the reasonable value of services rendered on extras called for by the second agreement shall be assessed and the appropriate award in quantum meruit entered. Ruden, 243 N.W.2d at 875.

Wilamosky also contends the trial court erred by refusing to allow him credit for expenses incurred. The trial court found Wilamosky's counterclaim was not supported by the evidence. We reject Wilamosky's contention this issue is one of law; it is one of fact and we find, under the standards set out in Division II, the trial court finding is supported by the evidence.

Wilamosky sought new trial below but we find the trial court did not abuse its discretion by denying his motion for new trial. We affirm the findings of the trial court except as we vacate the recovery granted and remand for the limited purpose of receiving additional evidence and entry of an appropriate award.

AFFIRMED IN PART, VACATED IN PART AND REMANDED.