

IN THE COURT OF APPEALS OF IOWA

FILED

JUN 25 1985

CLERK SUPREME COURT

DEAN SNYDER,

Plaintiff-Appellant,

vs.

LIBERTY L. ACRES, LTD., A Corporation,)
and KENNETH L. LOGEMANN and
REBECCA L. LOGEMANN,

Defendants-Appellees.

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Filed June 25, 1985

5-136
84-798

Appeal from the Iowa District Court for Worth County - Ralph F. McCartney, Judge.

Plaintiff contractor appeals from the judgment in a mechanics lien foreclosure action. AFFIRMED AS MODIFIED.

Thomas A. Lovell of Stillman, Goranson, Stone & Lovell, Clear Lake, for plaintiff-appellant.

David E. Funkhouser of Brown, Kinsey & Funkhouser, Mason City, for defendants-appellees.

Considered by Oxberger, C.J., and Donielson and Hayden, JJ.

DONIELSON, J.

Plaintiff contractor appeals from the judgment in a mechanics lien foreclosure action, asserting that evidence was insufficient to support two specific credits that the trial court offset against the amount of recovery. Defendants assert that they are entitled to a ten percent discount off of the contract price. We affirm as modified.

The plaintiff in this action, Dean Snyder, entered into a contract with the defendants for the construction of two buildings joined by a common wall. The original agreement between the parties called for a payment of \$141,747. Subsequently, the written agreement was orally modified in several respects. Disagreements arose culminating in plaintiff's commencement of a mechanic's lien foreclosure action.

Following trial to the court, various claims of the parties were offset against each other, resulting in a net award to the plaintiff of \$3,788. Plaintiff filed notice of appeal. No notice of cross-appeal was filed.

An action to enforce a mechanic's lien is in equity. Iowa Code § 572.26 (1985). Consequently, our review is de novo. Iowa R. App. P. 4.

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Snyder's first claim is that the trial court erred in allowing an \$11,000 credit for concrete stall dividers which were deleted from the project. It is not disputed that the dividers called for in the original contract were eliminated. However, plaintiff argues that the concrete was used elsewhere in the construction of the building and thus the credit was excessive. Specifically, Snyder points to the fact that the building as it currently stands has higher concrete walls than called for in the original contract; it is alleged that when this is considered, it is apparent that the defendants received all but 40 lineal feet of 8-inch-high walls and that the credit should be reduced accordingly.

The original contract called for the construction of two buildings joined by a common wall. One building measured 80 feet by 160 feet (building 1); the other measured 80 feet by 200 feet (building 2). The walls for both buildings were to be 8 inches wide and 8 inches high; building 1 required 360 feet of concrete wall (including the common wall) and building 2 required 400 lineal feet. The original contract also set forth specifications for the 8 inch by 48 inch stall dividers which were eventually eliminated. They required 440 lineal feet of concrete.

As the plaintiff indicated, the walls actually built were 4 feet high in building 1 and 2 feet high in building 2, rather than the 8 inches provided for in the original contract. Obviously, additional concrete was used for this additional height. We agree with the plaintiff that the credit should be reduced to reflect this fact.

Thus, it is necessary to determine the amount of concrete called for in the contract to build the walls and stall dividers. We will then compare this to the amount of concrete actually used. Snyder has presented this court with these computations in terms of lineal feet of concrete used. However, in order to be consistent with the trial court, we will compute the amount of concrete used in terms of cubic feet (length x height x width). We note at the outset that the height and width of the concrete walls are expressed in terms of inches. In order to determine cubic feet, it will be necessary to express the measurements in terms of feet or fractions thereof rather than inches.

The following represents our calculation of the cubic feet of concrete required by the original contract to construct the walls and stall dividers:

	length	x	height	x	width	=	cubic feet
Building 1	360		.67		.67	=	161.60
Building 2	400		.67		.67	=	179.56
Stall dividers	440		4.00		.67	=	<u>1179.20</u>
Total Cubic Feet							1520.36

We now compute the cubic feet for the higher walls which were actually constructed:

	length	x	height	x	width	=	cubic feet
Building 1	360		4		.67	=	964.80
Building 2	400		2		.67	=	<u>536.00</u>
Total Cubic Feet							1500.80

It is apparent from our calculations that the original contract called for 19.56 cubic feet of concrete which was not used ($1520.36 - 1500.80 = 19.56$). The defendant is entitled to a credit for the cost of this amount of concrete. Unfortunately, the record before this court does not aid us in assigning a dollar figure to the cost of 19.56 cubic feet of concrete. The contract does not contain an itemization of cost; it only sets forth the total cost of the construction project. We note that in determining that the defendants were entitled to an \$11,000 credit, the trial court apparently relied on defendants' Exhibit M. Testimony indicates that Exhibit M was an estimate from the plaintiff of the cost of 568 lineal feet of concrete stall dividers at 7 feet 4 inches high. We have carefully examined the exhibit in question and conclude that it is not sufficient to aid us in our determination of price. While it may be self-explanatory to someone familiar with construction projects and the terminology, we are unable to compute a price based on this document without a considerable degree of speculation.

We therefore direct the trial court to determine the amount defendants were charged per cubic foot of concrete. Plaintiff will be entitled to a judgment of \$14,788¹ less a credit to defendants for the cost of 19.56 cubic feet of concrete including labor. We are not unaware of the fact that materials other than concrete may have been needed to build the stall dividers. If such is the case, it would certainly be more accurate to include the cost of these additional materials

¹This amount reflects the \$3,788 judgment awarded by the trial court plus \$11,000 for the credit which we have determined to be excessive.

as part of the credit. However, since neither party to this action addressed this on appeal, we do not consider it necessary to require additional fact-finding concerning the type or cost of materials other than concrete.

II.

Snyder also claims the trial court erred in awarding defendants a \$7,636 credit for overhead doors purchased by the defendants. The record indicates that defendant Logemann paid the \$7,636 directly to Overhead Door of Mason City under the assumption that he would receive proper credit from Snyder. Snyder claims that the doors provided for in the original contract only cost \$6,000 and the credit should be reduced accordingly. We disagree.

It is apparent from the record that the doors contemplated in the original contract and the doors actually constructed were different. However, plaintiff's claim that the doors in the original contract cost \$1,636 less is based upon speculation. The record is devoid of any indication of the cost of these doors. We are not willing to reduce the credit when there is no factual basis to do so in the record. We therefore defer to the judgment of the trial court and conclude that the credit of \$7,636 was proper.

III.

Although no notice of cross-appeal was filed, the defendants raise an additional issue in their brief concerning an alleged ten percent discount on the price of the construction project. We are not inclined to consider this issue since it is not properly before this court. A party cannot avail himself of an appeal by the other party and ask the court to review an adverse portion of the judgment absent a cross-appeal. See Iowa R. App. P. 5.

AFFIRMED AS MODIFIED.