FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

OLLIE HABHAB,

Plaintiff-Appellant/ Defendant to Counterclaim,

vs.

RENA VENNER,

Defendant-Appellee/ Counterclaimant.

Filed April 24, 1984

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Appeal from the Iowa District Court for Hamilton County - Dale E. Ruigh, Judge.

Plaintiff appeals from the dismissal of his breach of contract claim and from the judgment for defendant on her counterclaim in this action involving a contract to move a corn crib. AFFIRMED.

Terry W. Guinan of Terry W. Guinan Law Office, Fort Dodge, for plaintiff-appellant/defendant to counterclaim.

Keith Van Doren of Bottorff & Van Doren, Webster City, for defendant-appellee/counterclaimant.

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

Plaintiff appeals from the dismissal of his breach of contract claim and from the judgment for defendant on her counterclaim in this action involving a contract to move a corn crib. On appeal, plaintiff asserts: (1) the defendant did not breach the contract until she failed to pay him for his work, which payment allegedly was not due until after November 1, 1974, so the suit filed November 1, 1979, was not barred by the five-year statute of limitation; (2) there was not substantial evidence that plaintiff breached the contract; (3) the court's finding that plaintiff had failed to establish an oral contract between the parties having the terms pleaded was not supported by substantial evidence; (4) there was not substantial evidence that plaintiff failed to do the work in a workmanlike manner; (5) there was not substantial evidence to support the trial court's conclusion that some damage to the crib was caused by plaintiff; and (6) the trial court should have awarded plaintiff damages measured by the contract price for work actually done.

I. Scope of Review. Since this is an action at law, our review is on assigned error only. Iowa R. App. P. 4. Metropolitan Transfer Station, Inc. v. Design Structures, Inc., 328 N.W.2d 532, 535 (Iowa Ct. App. 1982). The trial court's findings of fact have the force of a special verdict and are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1); R.E.T. Corporation v. Frank Paxton Company, Inc., 329 N.W.2d 416, 419 (Iowa 1983). Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion. City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978). We view the evidence in the light most favorable to the judgment. Muchmore Equipment, Inc. v. Grover, 315 N.W.2d 92, 101 (Iowa 1982).

II. Statute of Limitations. Iowa Code section 614.1(4) establishes a five-year statute of limitations for suits based on unwritten contracts. The trial court found the statute to have run on this claim.

The statute of limitations is an affirmative defense which the defendant

must prove by a preponderance of the evidence. Baines v. Blenderman, 223 N.W.2d 199, 203 (Iowa 1974). Defendant's claim is that the present action needed to be filed prior to November 1, 1979, in order to avoid the bar of section 614.1(4) as the cause of action arose prior to November 1, 1974. Habhab claims that this breach was anticipatory and that the statute did not begin to run until the time that an alleged payment of services was due to him, which time was after November 1, 1974.

The general rule is that a cause of action on a contract accrues and the limitation period begins to run when the contract is breached. See Glass v. Minnesota Protective Life Ins. Co., 314 N.W.2d 393, 397 (Iowa 1982); Brown v. Ellison, 304 N.W.2d 197, 200 (Iowa 1981). The evidence indicated that Habhab was hired to move the crib off of its present foundation and then to put the crib back on once the foundation work was completed. Mrs. Venner became disenchanted with Habhab's work; she testified that sometime in the middle of October, 1974, and prior to Habhab's work being completed, she told Habhab to "pack up his stuff and get off the place." Venner obtained another contractor, Zitterell-Mills Company, to finish the work. One of Zitterell's employees indicated that in mid-October, 1974, Habhab was on Venner's premises and observed the fact that different workers were completing his job.

The trial court found that the oral contract was breached in mid-October of 1974 when Venner ordered Habhab off of the property. The evidence supports that conclusion. Therefore, we find no error in its ruling that the statutory five-year limitation had run on plaintiff's claim.

III. Oral Contract and Plaintiff's Performance. Even assuming, arguendo, that the statute had not run on his claim, we find Habhab could not have recovered in any event.

First of all, Habhab plead an oral contract under which Venner was supposed to pay him $30.00 per hour for his time and $100.00 per day for use of his

equipment. The rule is that a contract relied on must be established as plead. Economy Hog & Cattle Powder Co. v. Honett, 222 Iowa 895, 899, 270 N.W. 842, 845 (1937). The burden is on Habhab to establish the contract relied upon. See id. at 899, 270 N.W. at 845.

Habhab's evidence as to the nature of the contract is based exclusively on his own testimony. Habhab produced no time records for himself or his employees; he produced no bills concerning the use of his equipment. Under these circumstances, we find it much more likely that the contract agreed upon was a "lump sum" contract as Venner's testimony alleged. Therefore, since Habhab has failed to establish the contract as plead, he cannot now attempt to recover on another contract. See id. at 900.

Furthermore, we find no merit to Habhab's claim that the trial court erred in finding that there was not an oral contract. The trial court only found that there was no oral contract as plead by Habhab.

Secondly, when a contractor fails to substantially comply with the specifications under the contract, he is barred from recovering the contract price agreed upon. Sioux City v. Western Asphalt Paving Corporation, 223 Iowa 279, 300, 271 N.W. 624, 637 (1937). The evidence indicates that Habhab did not substantially perform his duties under the contract. In construction contracts it is implied, unless there is an express contrary agreement, that the job will be done in a reasonably good and workmanlike manner. See Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972).

Even though Habhab testified that he worked eight hours a day for two weeks, we find that there is substantial evidence in the record supporting the trial court's finding that Habhab's work performance was sporadic; and even though Habhab testified that the crib was in the same shape before and after moving it, we find the evidence more likely indicates that because Habhab failed to take adequate precautions in moving the crib, the crib was damaged by his performance.

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Therefore, since Habhab is in default, having breached the contract by delivering defective work, he could only hope to recover after a deduction is made for Venner's damages. See Dobbs, Remedies § 12.24 (1973). Since Venner's damages exceeded any amount possibly due to Habhab, Habhab could not recover on the contract at all.

Furthermore, we find there was sufficient evidence to support the trial court's finding that damages totaling $943.88 were sustained as a result of Habhab's activities. The trial court calculated damages according to the testimony of an employee of Zitterell-Mills, which company was hired to finish the job, and according to Zitterell's attendant bills itemizing the work done. We find such to be proper.

We find no merit in Habhab's contention that Venner cannot sue for damages. We believe the court correctly awarded recovery in accordance with accepted principles. See Williams v. Hair Stadium, Inc., 334 N.W.2d 354 (Iowa Ct. App. 1983).

Venner's claim would generally be subject to the five-year statute of limitations. However, Habhab failed to plead the defense. As such, Venner's claim is not barred. See McCleeary v. Wirtz, 222 N.W.2d 409, 416 (Iowa 1974).

AFFIRMED.