FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

GREAT PLAINS SUPPLY COMPANY OF NEW HAMPTON,

Plaintiff-Appellee,

vs.

IRVIN BROWN,

Defendant-Appellant.

Filed April 29, 1980

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2-63520

Appeal from Bremer District Court - R. E. Clough, Judge.

Defendant appeals from Trial court decree confirming and foreclosing plaintiff's mechanic's lien on real estate owned by defendant. AFFIRMED.

Christopher F. O'Donohoe of O'Donohoe, O'Connor & O'Donohoe, New Hampton, Iowa, for defendant-appellant.

Michael K. Kennedy of Kennedy & Kennedy, New Hampton, Iowa, for plaintiff-appellee.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

CARTER, J.

Defendant appeals from trial court decree confirming and foreclosing plaintiff's mechanic's lien on real estate owned by defendant. Plaintiff's claim resulted from labor and materials furnished in construction of a pole building on defendant's farm. We affirm the trial court's decree.

I. Jurisdiction. We first address a jurisdictional issue. Although not raised by the parties, we are required to consider it. Decatur-Moline Corp. v. Blink, 283 N.W.2d 347, 348-49 (Iowa 1979). It concerns whether defendant's notice of appeal is timely.

On March 16, 1979, the trial court filed a document identified as "ruling," which contained the court's findings of fact and conclusions of law pursuant to Iowa R. Civ. P. 179(a). This ruling also stated that "judgment should be and is hereby entered in favor of plaintiff and against defendant for the sum of $13,199.52 (the amount found owing)." It was further provided therein "plaintiff is directed to draft and submit to the court [a] proposed order providing for the foreclosure of Mechanic's Lien within fifteen days from the filing of this ruling in the event plaintiff desires to proceed with foreclosure proceedings."

In accordance with the latter directive, a decree of foreclosure was prepared, submitted to the court, signed by the judge, and duly entered on April 12, 1979. Notice of appeal was filed by defendant on May 14, 1979.

In a ruling on post-trial motions, the trial court characterized the March 16, 1979 ruling as a final judgment. If this characterization is correct, any appeal from the issues adjudicated in that ruling would have to be taken within thirty days of its entry pursuant to Iowa R. App. P. 5(a). If the record is so viewed, defendant's notice of appeal was untimely.[1]

In spite of the possibility that a contrary view might be possible under Lyon v. Willie, 288 N.W.2d 884, 887 (Iowa 1980), we choose not to characterize the March 16 ruling as a final judgment. While we recognize that Lyon recognizes the possibility of two final judgments in the same action, we fail to see how this was either necessary or appropriate in the present action. The action was brought for purposes of foreclosing a mechanic's lien. This is a special proceeding with which no other cause of action may be joined. Section 572.26, The Code. In view of this statute and the prayer of plaintiff's petition for foreclosure of its lien, we find that the April 12, 1979 decree of

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[1] As a result of our holding in division II of this decision, this time is not enlarged as a result of a timely motion for new trial. See Qualley v. Chrysler Credit Corp., 261 N.W.2d 466, 468 (Iowa 1978); Union Trust & Savings Bank v. Stanwood Seed & Grain, Inc., 158 N.W.2d 1, 3 (Iowa 1968).

foreclosure is appropriately the only final judgment on plaintiff's claim and that in spite of the language contained therein, the March 16 ruling was not a prior final judgment for moneys owed on an account. Based upon this construction of the entries shown, we find defendant's notice of appeal to be timely.[2]

II. Defendant's Post-Trial Motions. While we hold that defendant's notice of appeal is timely as a result of having been taken within thirty days of final judgment, we find that his post-trial motions for new trial and to reopen the evidence, filed April 16, 1979, were untimely. The time for filing such motions is measured not from the entry of final judgment, but rather from the time of "verdict, report or decision." Iowa R. Civ. P. 247.[3] The time for so moving is fixed at ten days. Id. As such, defendant was required to file said motions within ten days of the March 16, 1979 ruling or seek an extension of time prior to the expiration of such time. We, therefore, do not consider any issues presented in defendant's post-trial motions which do not otherwise inhere in the final judgment.

III. The Merits. On the merits of defendant's appeal, it appears that plaintiff in the present action was entitled to the judgment entered in its favor except to the extent the defendant can establish defects in performance or failure of performance which would entitle him to some offset against that sum. We reject defendant's assertion that plaintiff failed to substantially perform its agreement and, therefore, is entitled to recover nothing. On the issue of claimed offsets, the trial court found that there were some defects in performance that had not been corrected by plaintiff. It ruled, however, that the evidence was insufficient to form any basis for the court to compensate defendant therefor under established rules for determining damages in construction cases. In so ruling, the trial court relied, in part, on the rules announced in Busker v. Sokolowski, 203 N.W.2d 301, 303-04 (Iowa 1972). Our consideration of all of the evidence in view of the principles stated in Busker leads to the conclusion that the trial court was correct. The decree of the trial court is affirmed.

AFFIRMED.

All judges concur except Snell, J., who specially concurs.

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[2] Defendant is aided in this respect by the fact that the thirtieth day following the entry of the final decree of foreclosure fell on a Saturday. In accordance with section 4.1(22), The Code, defendant's filing of the notice of appeal the following Monday was timely.

[3] This rule refers to motions for new trial. Motions to reopen the evidence are not expressly recognized in the Rules of Civil Procedure. Because such motion, as made in the present case, is a request for a partial new trial, we hold it is governed by similar time requirements.

SNELL, J. (specially concurring)

Although I concur in the result reached by the majority, I cannot escape the conclusion that the trial court's March 16, 1979 ruling was a final judgment activating the time period for filing defendant's motions to re-open and for new trial, and for filing notice of appeal. That ruling established plaintiff's entitlement to a judgment in the amount of $13,119.52, plus interest, and defendant's obligations to pay. The parties' rights, therefore, were adjudicated to the extent that the trial court could not return them to their original positions. The April 12, 1979 decree, providing for foreclosure of the mechanic's lien, constituted a second final judgment adjudicating further rights of the parties. See Lyon v. Willie, 288 N.W.2d 884, 887 (Iowa 1980). The foreclosure decree was merely the means of implementing the judgment that had already been rendered on March 16, 1979.

I do not believe we can ignore the trial court's comments regarding its ruling. The trial court stated, "It was the intention of this court that the ruling of March 15, 1979, filed March 16, 1979, be a final judgment subject to appeal and that any later Mechanic's Foreclosure Decree be supplemental only as enforcement of the primary judgment." It is clear from this statement that this is the type of two-judgment situation referred to in Lyon. 288 N.W.2d at 887.

Neither can I agree with the majority's statement that section 572.26 and the prayer for relief in plaintiff's petition lead to the conclusion that the foreclosure decree is the only final judgment on plaintiff's claim. Section 572.26 only prohibits other causes of action to be joined with an action to enforce a mechanic's lien. In the case at bar, it is clear that the claim for personal judgment and the claim for foreclosure of the mechanic's lien arose out of the same cause of action. That those claims gave rise to separate final jdugments is not a ground for asserting that section 572.26 precludes joinder of the personal judgment claim to the claim for foreclosure of the mechanic's lien in this instance in which those claims arose out of the same cause of action. It would be unreasonable to insist that such claims be separately brought to court. See Consolidated Construction Co. v. Begunck, 233 Iowa 463, 472-73, 9 N.W.2d 390, 395 (1943).

Furthermore, plaintiff's prayer for relief was not limited to foreclosure of the lien. The prayer stated in pertinent part, "Plaintiff prays for judgment against

Defendant in the amount of $13,119.52 and that said mechanic's lien be foreclosed against the Defendant. . . ." I am convinced that the trial court correctly concluded that a personal judgment was sought and that the foreclosure of the mechanic's lien was the means sought to enforce that judgment. Consequently, I conclude that the March 16, 1979 ruling was the final judgment from which appeal should have been taken, and plaintiff's failure to file notice of appeal within thirty days after that date deprives us of appellate jurisdiction. I would dismiss this appeal.