FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

No. 5-375 / 94-0857

ROBERT F. CORKIN d/b/a CORKIN CONSTRUCTION,

Appellee,

vs.

JAMES N. WEST and KATHLEEN HARTIG WEST, Husband and Wife,

Appellants.

Appeal from the Iowa District Court for Linn County, Thomas M. Horan, Judge.

Wests appeal a district court judgment entered upon Corkin's petition to enforce a mechanic's lien and the Wests' counterclaims. **AFFIRMED AS MODIFIED.**

Peter C. Riley of Tom Riley Law Firm, P.C., Cedar Rapids, for appellants.

John W. Hayek of Hayek, Hayek & Brown, Iowa City, for appellee.

Considered by Donielson, C.J., and Cady and Huitink, JJ.

HUITINK, J.

Defendants James and Kathleen Hartig West appeal a district court judgment entered upon plaintiff Corkin's petition to enforce a mechanic's lien and the Wests' counterclaims. The Wests contend the district court erred in (1) finding Corkin substantially performed under a contract for the construction of their home and (2) in calculating damages and credits allowed each party. We affirm as modified.

On January 27, 1993, Robert F. Corkin d/b/a Corkin Construction (Corkin) filed a petition in equity for foreclosure of a mechanic's lien on a home construction project. Corkin named as defendants the homeowners, James and Kathleen Hartig West, a subcontractor, Ronald R. Steiner d/b/a Steiner Construction Co., and Mount Vernon Bank & Trust Co., the mortgagee. The Wests answered, offered affirmative defenses, and raised counterclaims alleging, among other things, Corkin's breach of contract, breach of implied warranty, and fraud. The Wests sought compensatory and punitive damages on their counterclaims. The Wests settled with Steiner, who had cross-claimed, prior to trial, and Corkin allowed a credit of $5516 for the Steiner settlement. The case ultimately went to a bench trial in equity on all claims with Corkin as plaintiff and Wests as defendants.

At trial, the district court found the parties entered into a written contract on April 1, 1992, for Corkin to construct a house for the Wests in Mount Vernon for a

stated price of $143,000. The contract did not contain a completion date, but the court found the parties orally agreed the house would be finished in the fall of 1992.

The court further found construction was ninety percent complete when Corkin was discharged in October 1992, and the construction met prevailing standards for the Mount Vernon/Linn County area. The court found the delay in construction was due, in large part, to abundant changes requested by the Wests and some delays in receiving materials.

The court also determined the Wests failed to establish most of their counterclaims and any entitlement to punitive damages. In assessing both parties' claims the trial court determined that the Wests owed Corkin $14,882.54 in unpaid labor and materials costs, and awarded a mechanic's lien in that amount.

An action to enforce a mechanic's lien is in equity. Thus, our review is de novo. Iowa R. App. P. 4. In mechanic's lien cases, involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs. *McDonald v. Welch*, 176 N.W.2d 486, 849 (Iowa 1970). Thus, we occasionally have reviewed counterclaims in mechanic's lien issues on error of law rather than de novo. *See Moore's Builder & Contractor, Inc. v. Hoffman*, 409 N.W.2d 191, 194 (Iowa App. 1987). In cases where counterclaims and the mechanic's lien action are tried together before the court, we review the action de novo. *Nepstad*

Custom Homes Co. v. Krull, 527 N.W.2d 402, 405 (Iowa App. 1994). Here, all claims were tried by the court in equity, thus our review is de novo. Iowa R. App. P 4. We keep in mind, however, that although we are not bound by the trial court's findings of fact, we give them great weight, especially when considering the credibility of witnesses. Iowa R. App. P (7)(f).

The Wests first assert the trial court erred in finding Corkin substantially performed the construction contract. When a contractor has substantially complied with his or her contract, the contractor is entitled to recover the contract price with deductions for any defects or incompletions. *Moore's Builder*, 409 N.W.2d at 194. The burden of proof regarding performance of the contract is on the contractor while the homeowner has the burden of showing defects and imperfections. *Id.* If there is an uncured material breach or if the omissions or deviations are intentional, a contractor may not rely on substantial performance. *Nepstad*, 527 N.W.2d at 406. The Wests point to twenty-one instances where Corkin allegedly failed to conform to specifications or performed his work in an unsatisfactory manner. They claim these deviations and defects are substantial and also allege they were intentional or resulted from Corkin's bad faith failure to perform.

While we agree with the Wests that Corkin did not fully and completely perform the contract, we disagree that the alleged deviations preclude a finding of substantial performance. Corkin's claim the West's home was eighty-five to ninety

percent complete in October of 1992 is supported by expert testimony. There is nothing in the record to support Wests' allegation that any omissions or deviations from the contract were intentional or resulted from Corkin's bad faith.

The Wests also dispute the amount of the lien awarded. Specifically, they assert the district court erred in allowing Corkin credit for plumbing upgrades and in failing to sufficiently credit them for Corkin's deficient performance.

A builder may recover the costs of extras ordered or agreed upon which were not covered by the contract. *Id.* at 407 An owner may be allowed offsets for defects in workmanship and the contractor's failure to supply items included in the contact. *Id.*

The fact that there were plumbing upgrades is undisputed. The plumbing supplies included in the contract were no longer available, and those West selected as replacements were more expensive than originally agreed. The record includes a conversation between Kathleen Hartig West and Corkin in which Corkin expressly agrees to waive the additional costs of the plumbing upgrade. We are unable to reconcile the district court's contrary conclusions with this conversation and accordingly find it necessary to reduce the amount of the lien awarded by $2227.

The record reveals a number of deficiencies that were corrected by the Wests at their expense. The district court credited Wests with the amount of the costs of needed repairs and the costs of completion. We are unable to find other repairs or deficiencies necessitating additional credits or offsets.

Finally, Corkin seeks attorney's fees on appeal pursuant to Iowa Code section 572.32. He does not appeal the trial court's ruling on the issue of trial attorney's fees and seeks compensation only for the costs of the appeal. Section 572.32 permits an award of attorney's fees to a plaintiff who successfully enforces a mechanic's lien. Corkin is awarded attorney's fees in the amount of $500 plus the costs of appeal.

We modify the district court's decree by reducing the amount of the mechanic's lien to $12,655.54. The remainder of the judgment is affirmed in its entirety.

AFFIRMED AS MODIFIED.