FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

EVERLING & ASSOCIATES, et al.) specifically B & H CONSTRUCTION, INC., MIDWEST FLOORS, INC., DES MOINES PUBLIC HOUSING AUTHORITY,

Plaintiffs-Appellees,

vs.

STEEL SALES & LEASING, LTD.,

Defendant-Appellant.

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9-94
88-26

Appeal from the Iowa District Court for Polk County (CL 63-37080), Glenn Pille, Judge.

Appellant general contractor appeals the district court judgment granted in favor of appellees. **AFFIRMED.**

Gregory L. Kenyon of Stamatelos, Kenyon & McCandless, West Des Moines, for defendant-appellant.

Kerry Anderson of Wasker, Sullivan & Ward, Des Moines, for appellee B & H Construction.

Pamela D. Griebel of Scalise, Scism, Sandre & Uhl, Des Moines, for appellee Midwest Floors.

Dennis W. Johnson of Brick, Seckington, Bowers, Swartz & Gentry, Des Moines, for appellee DMPHA.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

This appeal arises out of claims against a general contractor, Steel Sales, by several subcontractors and suppliers pursuant to Iowa Code chapter 573. The Des Moines Public Housing Authority (DMPHA) also filed a claim for damages. The district court entered a judgment against the general contractor on most points and the general contractor has appealed. We affirm.

The general contractor challenges attorney fee awards to two of the subcontractor claimants. Appellant contends the subcontracts in question included a provision barring such an attorney fee award. The general contractor also challenges the award to DMPHA of damages for defective construction. Appellant contends the DMPHA never gave notice of the alleged defect or an opportunity to cure it, and that DMPHA failed to plead any issue concerning the alleged defect. Finally, appellant contends it should have been awarded interest on certain funds which DMPHA had yet to pay it under the original contract.

Midwest Floors, one of the subcontractor claimants, seeks attorney fees on appeal.

Steel Sales & Leasing, Inc., was the general contractor for the construction of forty-eight residential housing units for the DMPHA.

After substantial completion of the construction, several suppliers and subcontractors filed claims against

Steel Sales under Iowa Code chapter 573, alleging that Steel Sales had failed to pay its bills. In addition, the DMPHA filed claims against Steel Sales for defective construction of a detention pond and for damages caused by delays in completion. These various claims were consolidated for trial.

Following trial the district court entered an order granting relief to several of the claimants. Steel Sales has filed two separate appeals from this order.

This is an action at law. The scope of review is for correction of errors at law. Iowa R. App. P. 4.

The appellant contends the district court should not have awarded attorney fees to the two subcontractors because such fees were prohibited in the contract. The pertinent part of that contract is as follows.

> In furtherance of the preceding provision if a claim including claims for extra costs or delay, in the opinion of the Contractor, involves the Owner or a claim relating to the Prime Contract, then at the option of Contractor the claim shall be processed and resolved by a forum having jurisdiction over the Owner or which is empowered or designated to determine and settle disputes between owner and contractor, and:
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> Owner or which is empowered or designated to determine and settle disputes between Owner and Contractor, and:
>
> (1) Such shall be the sole and exclusive method for the resolution of any such claim of subcontractor concerning the subcontract, and interpretation, changes, or modifications thereof and any actions, directions or requirements of the Owner.
>
> (4) The Subcontractor shall be responsible for the preparation, documentation and active

> prosecution and presentation of such claim to the extent permitted, and the Subcontractor agrees to bear all costs and expenses incident thereto including any cost of legal services... (App. 495-496).

Appellant asks us to construe the contract provision to exclude an award of attorney fees in disputes between the subcontractor and the contractor, instead of just between the subcontractor and the owner. It appears as though the contract language excludes attorney fees only in disputes against the owner. However, even if we assume the language is ambiguous it must still be construed this way. The case of Freese v. Town of Alburnett, 255 Iowa 1264, 1268-1269, 125 N.W.2d 790, 793, sets out several principles of contract construction that are applicable here. A contract will be construed against the one who drafted it. A contract will not be construed so as to give one party an unfair, oppressive, or inequitable advantage over the other. Id. A party to a contract is not likely to agree to pay for the other's attorney fees in action against that person without specifically stating so in the contract. It would be inequitable to construe the contract in such a manner especially when it was Steel Sales that drew it up. The decision of the trial court to construe the provision to include only actions against the owner is supported by substantial evidence.

The appellant next contends if the contract provision does not exclude an award of attorney fees the trial court

abused its discretion in allowing them. An award of attorney fees is allowed in the discretion of the court by Iowa Code section 573.21. A discretionary ruling is presumed correct and can be overturned only for an abuse of discretion. Sheer Construction, Inc. v. Hodgman and Sons, Inc., 326 N.W.2d 328, 334 (Iowa 1982). Such abuse will be found only where the discretion is exercised on grounds or for reasons clearly unreasonable. Id. The appellant and the appellee both make fair arguments that one side or the other failed to settle in good faith. However, even-sided arguments do not enable the appellant to prove the trial court's actions were clearly unreasonable.

The appellant claims that the trial court erred by allowing DMPHA to amend its pleadings in order to obtain damages for the defective detention pond. The trial court has broad discretion in allowing a party to amend its pleadings. Before we will reverse such a ruling, a clear abuse of discretion must be shown. B & B Asphalt Co. v. McShane Co., 242 N.W.2d 279, 284 (Iowa 1976). There are, however, two prerequisites that must be met to amend pleadings. The amendment should conform to the proof and not substantially change the issues. After examining the record it is apparent the amendment did conform to the proof as the issue was substantially litigated. It did not substantially change the issues because whether or not there was a defect in the work done by appellant goes directly to how much of the retainage is owed.

Appellant makes a final point on the amendment issue that notice of the alleged defect must be plead as a condition precedent to recovery. Appellant cites Winter v. Honneggers & Co., 215 N.W.2d 316, 327 (Iowa 1974), in support of this contention. That case does not apply to this situation. The Winter case dealt with the sale of goods and applied Article Two of the Uniform Commercial Code. In this case the contract was for services, to which Article Two does not apply. Iowa Code § 554.2102. In addition, this case arose before the advent of notice pleading which makes the Winter case clearly distinguishable from the case at hand. There is no question that DMPHA gave actual notice of the defect to Steel Sales, and the original pleadings were sufficiently broad to put Steel Sales on notice of the claim. The trial court did not abuse its discretion by allowing DMPHA to amend its pleadings to conform to the proof.

Appellant's next contention regarding DMPHA is that the notice given to Steel Sales informing it about the problems with the detention pond was insufficient, and did not allow enough time to cure the defect. Both parties agree that notice must be received within a reasonable time after appellee discovered, or should have discovered the defect. The evidence supports the contention by appellee that the defect was not discovered until June or July of 1986. The first notice of the defect, which Steel Sales admits

receiving was on July 1, 1986. Thirty days is within a reasonable time after discovery of the defect. The letter that was sent on July 1, 1986, gave Steel Sales until July 15, 1986, to cure the defect. There is no evidence on how long it would take to cure such a defect. That is not significant, however, because appellant did not make the slightest overture to begin repair or to go to the sight and discover what the repair would entail. The authorities cited by appellant deal with cases where the notification did not occur for over three years or did not occur until trial. It was not error for the trial court to conclude that fifteen days was reasonable time to cure the defect.

Finally, appellant contends that it should have been awarded interest on the funds DMPHA had yet to pay under the original contract. The authority to award such interest is granted under a federal statute which provides, in essence, that the head of an agency must pay an interest penalty on any money that has not been paid for a completed service performed for the agency. 31 U.S.C. § 3901. The important question is whether DMPHA is an "agency" within the meaning of the act. The term "agency" is defined in 5 U.S.C. section 551(1) to mean a federal agency. In St. Michael's Convalescent Hospital v. State of California, 643 F.2d 1369, 1374 (1981), the court held that even though a state agency may receive federal funds and therefore comply with certain federal regulations, those regulations do not

convert acts of local and state governmental bodies into federal governmental acts. The DMPHA exists pursuant to the authority of Iowa Code chapter 403A. This chapter authorizes the acceptance of federal funds but does not provide for extensive supervision by any federal agency. Therefore, the federal statute granting interest does not apply to the DMPHA.

The appellee's, Midwest Floors, Inc., request that attorney fees be granted for this appeal is denied. It is correct that this court has broad discretion to award attorney fees in a dissolution action, but this is not such an action. The only other way to receive attorney fees is through Iowa Rule of Civil Procedure 80(a) sanctions for a frivolous appeal. An appeal is frivolous only when there is no possible basis for reversing the trial court's decision. Synan v. Merit Systems Protection Board, 765 F.2d 1099, 1102 (Fed. Cir. 1985). The issues in this appeal were clearly not frivolous

AFFIRMED