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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

JEWETT LUMBER COMPANY,)

Plaintiff-Appellee,) Filed April 30, 1985

vs.)

McMURRAY CONSTRUCTION CO., et al.,) 4-498 / 2-69087

Defendants-Appellants.)

Appeal from the Iowa District Court for Polk County - Theodore H. Miller, Judge.

Defendants appeal the adverse judgments entered in ten related actions. AFFIRMED.

Charles A. Coppola of Coppola, Coppola, Clark & Karnes, Des Moines, Iowa, for defendants-appellants.

James L. Spellman of Neiman, Neiman, Stone & Spellman, Des Moines, Iowa, and Lorna Williams, Des Moines, Iowa, for plaintiff-appellee.

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

SCHLEGEL, J.

Defendants, Mike McMurray and McMurray Construction Company, appeal the adverse judgments entered in ten related actions. We affirm.

Plaintiff, Jewett Lumber Company, originally filed ten actions against McMurray Construction. The petitions prayed for foreclosure of mechanics liens and for judgment against McMurray Construction. Jewett later amended all the petitions to add Mike McMurray as a defendant.

Mike McMurray then filed a motion for summary judgment, requesting that the claims against him be dismissed. The motion asserted that no action to foreclose a mechanic's lien could lie against him because he was not an owner of any property subject to liens. The motion also asserted that Iowa Code section 572.26 (1981) prohibited joinder of the claims for personal judgment with the actions to foreclose the mechanic's liens. The trial court denied the motion for summary judgment.

All ten actions were consolidated for trial. In reported proceedings that occurred before any testimony was presented, the district court indicated that the trial would include evidence pertaining to all ten actions for lien foreclosure, and in addition, evidence pertaining to an action at law on an account. After the court stated its intentions, counsel for defendants moved to have Mike McMurray dismissed "as to the portions of these cases that apply to the mechanic's liens only," on the grounds that Mike McMurray never had an ownership interest in the property. Counsel further stated, "I understand that would not relieve liability on the account." The motion to dismiss was refused because Jewett claimed there was a fact issue whether Mike McMurray owned the property subject to lien.

The parties agreed at trial that Jewett had furnished material for improvements as alleged in the petitions. The only issues in dispute were: (1) whether Jewett's account was with Mike McMurray personally or with the corporation McMurray Construction, (2) whether Jewett had violated a contract —allegedly made pursuant to a telephone conversation—by overcharging for mat-

erials listed in the alleged contract, and (3) whether Jewett had applied the payments made by defendants as defendants directed. The trial court ruled in favor of Jewett on all three issues. Defendants appeal those rulings.

I. Personal Judgment Against Mike McMurray. The trial court found as a matter of fact that Jewett had its account with Mike McMurray and sold the relevant lumber and materials to Mike McMurray in his individual capacity. Accordingly, judgment was entered against Mike McMurray individually. He argues, in this appeal, that entry of personal judgment in these actions to foreclose mechanic's liens is barred by Iowa Code section 572.26, which provides in part, "An action to enforce a mechanic's lien shall be by equitable proceedings and no other cause of action shall be joined therewith."

Capitol City Drywall v. C. G. Smith Construction Co., 270 N.W.2d 608 (Iowa 1978), resolves McMurray's argument. In that case, the supreme court stated:

> Therefore a plaintiff in a mechanic's lien foreclosure action is prohibited initially from suing in one count in equity to foreclose his lien and in a separate count at law to obtain a personal judgment on his claim.

Id. at 610-11. While that statement appears to favor McMurray's argument, the court went on to say that misjoinder is not jurisdictional. Id. at 611. A defendant can waive his rights under section 572.26. Id.

In this case it is clear that Mike McMurray waived those rights. The record shows that he consented, at the outset of the trial, to have the court hear Jewett's action at law on the account. The court did hear evidence pertaining to that claim, and found that Mike McMurray was individually liable to Jewett. The claim was one tried at law, so we cannot disturb that factfinding, which was supported by substantial evidence. See Iowa R. App. P. 14(f)(1). The personal judgment against Mike McMurray is affirmed.

II. Contract Made Pursuant to Telephone Call. As an affirmative defense to Jewett's suit, defendants claimed that Jewett overcharged for certain materials delivered. Specifically, defendants claimed that Jewett disregarded

prices set in a contract that allegedly arose out of a telephone conversation which occurred on July 28, 1980.

The trial court did not reach the merits of the defense. Instead, it ruled that Mike McMurray was estopped from asserting the defense because of his subsequent actions, and that McMurray Construction was barred from asserting the defense by the statute of frauds. Defendants argue these rulings were erroneous. We agree.

In order to constitute equitable estoppel, or estoppel in pais, four elements must be shown: 1) false representation or concealment of material facts must exist; 2) the party to whom it was made must have been without knowledge of the real facts; 3) that representations or concealment must have been made with the intention that it should be acted upon; and 4) the party to whom it was made must have relied thereon to his prejudice and injury. There can be no estoppel in any event if any of these elements are lacking. Khabbaz v. Swartz, 319 N.W.2d 279, 286 (Iowa 1982). Because there is absolutely no evidence in the record of any false representations or concealment of facts by Mike McMurray the estoppel ruling must fall.

The ruling on the statute of frauds issue must also be overturned. Defendants introduced into evidence a bid list that was prepared and signed by Rick Thompson, an employee of Jewett, and used by him during the telephone conversation on July 28, 1980. We believe that writing was sufficient to satisfy the statute of frauds. A writing is not insufficient simply because all the agreed upon terms are not included. Iowa Code § 554.2201 (1981).

The errors of the district court, however, are harmless. Reaching the merits, we find that defendants have failed to prove the alleged contract. While the evidence is undisputed that Jewett, through Rick Thompson, did give price estimates over the telephone on July 28, 1980, there is no evidence that the parties ever agreed to be bound by that estimate.

Defendants solicited the estimate so that they could submit a bid for a construction project. They did not intend to be bound to any agreement with

Jewett unless they were awarded the construction contract upon which they were bidding. Jewett had a similar understanding. The form on which the estimate was made specifically states that Jewett would not be bound to honor the quoted prices after fourteen days.

Defendants were awarded the construction contract for which they had solicited the Jewett estimate. Unfortunately, defendants did not sufficiently notify Jewett of their intent to hold Jewett to the July estimate. This was due in part to a turnover in personnel at Jewett. Ben Marshall had previously handled all sales to defendants by Jewett. It was his practice to contact defendants to find out whether defendants had been awarded contracts and would hold Jewett to estimates he had given. Rick Thompson, who replaced Ben Marshall, did not continue that practice. Thus, he never inquired whether defendants were going to rely on the July estimates.

Defendants contend that Jewett received sufficient notice of their intent when plans for the project were submitted to Jewett for use in compiling a materials list. We do not find that to be sufficient. The record shows that Rick Thompson did not know what project defendants had in mind when they solicited the July estimate. Therefore, viewing plans to that project would not give notice of defendant's intent regarding the July estimate. We therefore affirm the trial court's decision that defendants cannot claim an overcharge.

III. Application of Payments. The trial court found against defendants' defense of misapplication of payments. Although this issue pertains to the mechanic's liens and our scope of review is de novo, we decline to overturn the trial court's finding of fact. The evidence on this issue was hotly disputed at trial. We defer to the trial court's implicit determination that plaintiff's witnesses were more credible than defendant's witnesses. See Iowa R. App. P. 14(f)(7).

AFFIRMED.