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SEP 9 1977
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

RALPH E. STORM, Appellee, vs. GLEN STALEY and STALEY FARMS, INC., Appellants.	)	Filed September 9, 1977 171 2-57571

Appeal from Franklin District Court - C. H. Wild, Judge.

Appeal from judgment that plaintiff had substantially performed his contract and was entitled to recovery thereon.

AFFIRMED.

Raymond P. Drew and G. A. Cady, of Hobson, Cady and Drew, of Hampton, counsel for appellants.

R. Kurt Swaim and John L. Butler, of Lundy, Butler, Wilson & Hall, of Eldora, counsel for appellee.

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

DONIELSON, J.

The defendants below, Glen Staley and Staley Farms, Inc., appeal from a judgment for the plaintiff, Ralph Storm. Storm brought this equity action seeking foreclosure of a mechanic's lien for work done pursuant to a contract with Staley, which provided for the aerial application of herbicides on farmland owned by Staley Farms, Inc., a corporation of which the defendant Staley was the President and major stockholder.

Storm claimed that money was due him from Staley Farms, Inc. (hereinafter referred to as "Farms") on the contract, and also asserted that Staley owed him money for entering into this contract on behalf of the undisclosed principal, Farms. Staley answered that he was not personally liable because the contract was entered into by Staley only in his representative capacity as President of Farms. Farms responded that Storm had not performed as required by the contract, and counterclaimed for damages and breach of warranty in the application of the herbicides.

The trial court issued detailed Findings of Fact and Conclusions of Law and found that Storm had established, by a preponderance of the evidence, the substantial performance of the contract for services and herbicides, and was entitled to $11,384.55, and was further entitled to this amount because Staley had entered into this contract as an agent for an undisclosed principal. The court also found that Farms had failed to establish the allegations of its counterclaim by a preponderance of the evidence.

Ralph Storm operated a flying service and engaged in aerial spraying. On April 7, 1971, Storm approached Staley about the possibility of spraying his fields. On April 14, they met again and agreed upon the price of application. At no time during this meeting did Staley mention that he was entering this agreement on behalf of the corporation.

Storm had agreed to provide the chemicals at or near his cost and, in actuality was able to do so at less than invoice price. At the April 14 meeting, the two men drew maps of the area to be sprayed and examined printed materials outlining the rates of application recommended by the various herbicide companies.

The brands and quantities of herbicides to be applied, and cost of their application, were agreed upon at this meeting.

On April 17, Staley directed Storm to increase the rate of application of herbicides that had previously been agreed upon. Plaintiff commenced application in late April, 1971, and finished in early May. By this time, Staley had become concerned about the "green condition" of the fields which had been sprayed and brought this to Storm's attention and asked that he contact chemical company representatives and request that they inspect the fields. According to the testimony, Staley indicated that he was going to pay Storm, but wanted the chemical representatives to see the fields first.

On May 25, Storm, Staley, and chemical company representatives met at Staley's request in order to discuss the fields. One of these representatives advised Staley to cultivate as soon as possible and respray the fields in order to kill some of the remaining weeds. At this meeting, Staley again promised to pay Storm for the work done. Subsequently, Storm learned that Staley refused to pay him.

Factors which affect the efficiency of a herbicide are temperature, rainfall, high weed concentration, and wind. The effects of these various factors were contested at trial. Staley also contended that Storm had guaranteed that the fields would be free of weeds without further cultivation or spraying. Witnesses were called by both sides regarding the condition of the fields. Furthermore, the parties stipulated as to the field corn yield figures of Farms for the period from 1968 through 1973. These figures showed that both the total acreage and the per acre yields were higher in 1971, the year in which this dispute arose, than in any other year in that six year period.

I.

Substantial Performance

The defendants' first contention is that the evidence presented was insufficient to establish that Storm had substantially performed this contract. In an equity case such as this, our review is de novo. Rule 4, Rules of Appellate Procedure. We give weight to the findings of fact of the trial court, but are not bound by them. Rule 14(f)(7), R. App. P. Such deference to the trial court's

findings is especially appropriate in matters involving the credibility of witnesses. Olberding Const. Co., Inc. v. Ruden, 243 N.W.2d 872, 875-877 (Iowa 1976).

The doctrine of substantial performance is well-established in Iowa. A technical, exact and perfect performance is not necessary; substantial performance is all that is required. Farrington v. Freeman, 251 Iowa 18, 23-24, 99 N.W.2d 388 (1959); Huffman v. Hill, 245 Iowa 935, 938, 65 N.W.2d 205 (1954). We are convinced that the trial court's finding that Storm substantially performed the contract is amply supported by the record.

The testimony discloses that the herbicides were applied in accordance with recognized aerial application procedures and the specific instructions of Staley. However, much of the remaining testimony was disputed. Although Staley asserted that Storm had guaranteed that he would kill the weeds, Storm denied ever making such a promise. Other areas of dispute centered upon whether a flagman was requested by Staley, whether the herbicides were mixed properly, and whether the herbicides to be used were selected by Staley or Storm.

Staley testified that there was heavy weed infestation in the fields sprayed by Storm and that some of the land had to be resprayed. However, Storm produced five expert witnesses who stated that these herbicides had achieved at least 80 percent weed control, a good or "at least average" degree of control. One witness testified that the control would have been more acceptable if Staley had cultivated, as had been previously recommended. On the other hand, the defendants' witnesses were neighboring farmers who indicated generally that the weeds were prevalent throughout the fields.

On balance, we feel that the trial court properly found that Storm had established by a preponderance of the evidence that he was entitled to recover for substantial performance. In sifting through the 1300 pages of detailed testimony and numerous exhibits, we conclude that this case presents an instance in which a great many issues turn upon the credibility of the witnesses. We feel that the trial court adequately considered such factors in its thorough Findings of Fact and well-reasoned Conclusions of Law. We agree with the appellee that this is a particularly appropriate case in which to give weight to the findings of the trial court. Rule 14(f)(7), R. App. P.

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II.

Defendant's Counterclaim

Staley also contends that the trial court incorrectly concluded that he had failed to establish the allegations of his counterclaim regarding both an express warranty that all weeds would be killed and a breach of a contract to perform services. He argued that Storm did not follow the recommendations on the herbicide labels regarding wind velocity and the method of marking the field during spraying, and that his failure to do so constituted a breach of an implied duty to perform in a skillful and workmanlike manner. The label indicated that "wind velocity greater than 5 miles per hour will often cause application to be streaked and give less than maximum herbicidal control" and that, in general, application should not be made during periods of gusty winds above 15 m.p.h. Although the wind was within the desirable range on only one or two days, it was within the permissible range on all days (except one when the exact velocity was unknown).

The similarity of weed conditions on the various fields sprayed on different days contradicts Staley's argument that the wind velocity was a determinative factor in the degree of weed control. Furthermore, experts testified that wind shouldn't have had much effect if proper ground markings were made. Although Staley contended that spraying under these windy conditions resulted in a substantial decrease in yield, such an assertion is speculative at best and is weakened by the fact that the yield he did obtain in 1971 was the best throughout the 1968 to 1973 period.

Finally, Staley asserted that the use of paper markers instead of flagmen, as was recommended, constituted an improper application technique. The record not only indicates that the paper markers were properly and effectively employed, but also shows that Staley consented to their use. We also feel that the evidence dealing with the potential impact of other factors which may adversely affect the total effectiveness of aerial application, such as lack of activation of the chemical due to dryness, lack of timely cultivation, differences in the organic soil content, and weed propensities of the fields, justifies the result reached by the court below, even if, arguendo, some evidence of improper application does exist.

This court also believes that the trial court was correct in light of the speculative and remote nature of the damages alleged in this counterclaim. Even if the defendants had otherwise proven their cause of action, the trial court was unable to fix any definite sum to be deducted from the contract price, especially since the evidence on this point was inconclusive. Hayes v. Ramsey, 205 Iowa 167, 171, 217 N.W. 808 (1928); see also Braverman v. Eicher, 238 N.W.2d 331, 336 (Iowa 1976).

After a careful review of the record, we find that the trial court also correctly applied the law to the issues presented, and we further decide that the defendants' remaining issue regarding damages is without merit. See Martin v. Jaekel, 188 N.W.2d 331, 335-337 (Iowa 1971); Anderson v. Yearous, 249 N.W.2d 855, 864 (Iowa 1977). Therefore, the judgment of the district court is affirmed.

AFFIRMED.