

IN THE COURT OF APPEALS OF IOWA

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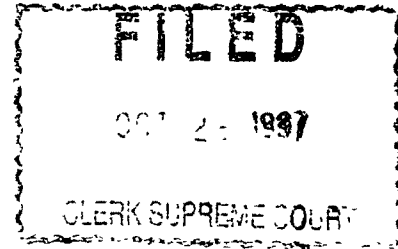
No. 7-058 / 95-2050

Filed 10/29/97

MOLLY TEDESCO,
Plaintiff-Appellee,

vs.

HAROLD OBER d/b/a OBER CONSTRUCTION CO.,
Defendant-Appellant.



Appeal from the Iowa District Court for Polk County, Richard G. Blane, II,
Judge.

A construction company appeals from an adverse district court judgment in a
breach of contract action concerning a home remodeling project. **AFFIRMED IN
PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS.**

Kenneth W. Rittgers, Des Moines, for appellant.

Joseph A. Renzo of Babich, McConnell & Renzo, P.C., Des Moines, for
appellee.

Heard by Huitink, P.J., and Streit, J., and Habhab, S.J.*

*Senior judge assigned by order pursuant to Iowa Code § 602.9206 (1997).

HUITINK, P. J.

This appeal concerns a dispute between a homeowner, Tedesco, and a contractor, Ober, over the amount owed on a home improvement project. The district court found in favor of Tedesco on her breach of contract claim and entered a judgment against Ober for \$8345.44. Ober was also ordered to pay \$2976 of subcontractor claims secured by mechanic's liens on Tedesco's home. Because we disagree with the district court's conclusion that the parties' contract was a fixed-priced contract, this case is affirmed in part, reversed in part, and remanded for a new trial, limited to Tedesco's damages.

I. Background Facts and Proceedings.

The record indicates Tedesco first met with Ober in August 1988 to discuss the planning and costs of Tedesco's home improvement project. As a result of these and subsequent discussions, Ober submitted a written proposal for Tedesco's acceptance.

The proposal included the following terms:

We [Ober Construction Co.] hereby propose to furnish all the materials and perform all the labor necessary for the completion of addition and remodel per plans and specifications and as directed by owner. All work to be performed at net cost to builder plus flat fee of \$4300.

The proposal also provided:

All material is guaranteed to be as specified, and the above work to be performed in accordance with drawings and specifications submitted in a substantial workman-like manner for the sum of . . . dollars (\$) with payments to be made as follows: to keep all bills paid on current basis. Any alteration on deviation from above specifications involving

extra costs, will be executed only upon written orders and will become an extra charge over and above the estimate. . . .

Ober prepared and attached an itemized estimate of material and labor costs to the proposal based on estimates made from the architect's sketch showing only basic room layout and dimensions. This document provides:

Following is a cost estimate to build addition and remodel as directed Molly Tedesco residence, 5348 N.W. 60th Avenue, Johnston, Iowa. Estimates based on information at hand 10-6-88.

Permit	\$ 200.00
Footings and Foundation	\$ 2,500.00
Garage Door	\$ 350.00
Carp. Labor	\$ 4,284.00
Lumber, etc.	\$ 8,474.00
Drywall	\$ 1,600.00
Insulation	\$ 500.00
Heat and A/C	\$ 3,500.00
Sptg.	\$ 300.00
Paint and Varnish	\$ 1,100.00
Cleanup	\$ 300.00
Floor Coverings	\$ 1,100.00
Fireplace	\$ 1,500.00
Misc.	\$ 500.00
Cabinets and Tops	\$ 3,200.00
Elec. Work	\$ 800.00
Plumbing	\$ 400.00
Contr. Fee	<u>\$ 4,300.00</u>
	\$34,908.00

Tedesco financed this project with a \$35,000 home equity loan from American Federal Bank. Ober's subcontractors commenced work in November 1988.

In March 1989, Tedesco expressed concerns that the project was approaching her loan limits although it was far from complete. She asked Ober for a firm estimate

of the remaining costs. Ober estimated cost of completion was \$17,500. He maintains the estimate included extra expenses for floor coverings, electrical work, and a dishwasher which were not part of the original estimate. Without these extras, he estimated the total cost at \$37,271, based on costs as of March 1989.

Tedesco contends that in March 1989 she had only \$3800 remaining from her \$35,000 home equity loan, while Ober insists Tedesco had only expended \$25,300. Ober contends Tedesco refused to pay the suppliers or subcontractors "another cent." Tedesco testified she was current on the bills Ober had submitted to her by March 1989, with the exception of a lumber bill and an electrical bill. Ober treated her alleged refusal to pay as breach of their contract and abandoned the project in June 1989. Tedesco hired other workers to finish the project and to repair various defects in the project.

In 1993, Tedesco sued Ober for breach of contract. In his answer, Ober claimed Tedesco's refusal to pay subcontractors prevented his performance of the contract and he was justified in abandoning the project. Ober also counter-claimed for \$6300 citing Tedesco's failure to pay \$6300 due under the contract.

Following a bench trial, the district court determined the parties' contract was a fixed-price contract requiring Ober to complete the project for \$35,000. The court made the following findings concerning Ober's performance:

Ober breached the contract by failing to complete the work, abandoning the work, not overseeing the work of subcontractors which was substandard, use of wrong materials and cost overruns. Ober, as the

contractor, failed to provide substantial performance of the construction contract.

The court awarded Tedesco \$2535.75 for the cost of correcting defective work, \$2470.50 for the cost of completion of the project, and \$3339.19 for other miscellaneous costs. The court further determined Tedesco should be indemnified by Ober to the extent of any amounts owed to SKT Construction and Deniston & Partridge Lumber Company, two subcontractors of Ober holding a total of \$2956 in mechanic's liens against Tedesco's property.

On appeal, Ober asserts the court erred in failing to find Tedesco breached the contract by refusing to pay according to the terms of the agreement. Ober argues her breach excused it from completing performance. Ober also argues the court erroneously determined the contract was a fixed-price contract rather than a cost-plus contract.

II. Standard of Review.

This case was tried to the court at law so our review is for correction of errors. Iowa R. App. P. 4. The findings of fact in jury-waived cases have the effect of a special verdict. Iowa R. App. P. 4. They are binding on appeal if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We are not bound by the trial court's application of legal principles or conclusions of law. *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 862 (Iowa 1991); Iowa R. App. P. 14(f)(14).

III. Fixed-Price Contract v. Cost-Plus Contract.

We apply the law governing the construction and interpretation of contracts to Ober's written proposal and related documents to determine the meaning of its terms and legal effect. Interpretation involves ascertaining the meaning of the contract words; construction refers to determining their legal effect. *Fashion Fabric of Iowa, Inc. v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978)(citation omitted). In construing written contracts, the cardinal principle is the parties' intent must control; and except in cases of ambiguity, this is determined by what the contract itself says. Iowa R. App. P. 14(f)(14). An ambiguity exists when, after application of the pertinent rules of interpretation to the contract language, a genuine uncertainty exists as to which of two reasonable constructions is proper. *Berryhill v. Holt*, 428 N.W.2d 647, 654 (Iowa 1988). An ambiguity does not exist simply because the parties disagree on the meaning of a phrase. *Farm Bureau Mut. Ins. Co. v. Sandbulte*, 302 N.W.2d 104, 108 (Iowa 1981). If a contract is not ambiguous, it will be enforced as written. *Spilman v. Board of Directors*, 254 N.W.2d 593, 596 (Iowa 1977).

Interpretation is reviewed as a legal issue unless it is dependent at the trial level on extrinsic evidence. Construction is always reviewed as a legal issue. *Fashion Fabrics of Iowa*, 266 N.W.2d at 25.

Implicit in the district court's reference to extrinsic evidence of the parties' intent is its determination that the contract between Ober and Tedesco was ambiguous. We are unable to reconcile this conclusion with the express terms of the

documents comprising the parties' contract. The plain and unambiguous language of Ober's written proposal states that all work will be performed "at net cost to the builder plus a flat fee of \$4300." The estimate sheets attached to the proposal also clearly state that estimated costs were based on prices as of the date of the estimate. The parties' agreement was a cost-plus contract and it was error for the district court to conclude otherwise.

IV. Breach of Contract Claims.

A. Tedesco's claim against Ober.

Our determination that this contract was a cost-plus contract does not preclude consideration of the parties' respective breach of contract claims. Reference to the terms of the contract indicate that Ober agreed to perform its work "in accordance with drawings and specifications submitted in a substantial workman like manner." This contractual obligation was consistent with Ober's implied common-law contractual duty. *See Kirk v. Ridgeway*, 373 N.W.2d 491, 493 (Iowa 1985) (In a construction contract it is implied that the building will be erected in a reasonably good and workman like manner and it will be reasonably fit for the purpose intended). In defective construction cases, damages may include diminution in value, and cost of construction and completion in accordance with the contract terms. *R.E.T. Corp v. Frank Paxton Co.*, 329 N.W.2d 416, 421 (Iowa 1983).

The district court determined Ober breached the contract by failing to complete the project, abandoning the project, failing to oversee the work of subcontractors,

which was substandard, and the use of the wrong materials. We are bound by these factual findings if they are supported by substantial evidence. *See* Iowa R. App. P. 14(f). There is abundant evidence of poor workmanship and resulting damages. The district court's determination that Ober breached his duty to complete the project in a good and workman-like manner is supported by substantial evidence and we accordingly affirm on this issue.

We are however, upon consideration of the appropriate measure of damages, unable to determine which of the damages awarded for cost of completion resulted from Ober's breach of contract. Because the amount of damages awarded for cost of completion could influence the total amount of Tedesco's damages, we find it necessary to remand this case for a new trial, limited to the amount of Tedesco's damages.

B. Ober's counterclaim.

Ober claims he is entitled to payment because he substantially performed his contractual obligations. The doctrine of substantial performance permits a contractor to recover partial compensation for a substantially completed construction contract. *Moore Building and Contractor, Inc. V. Hoffman*, 409 N.W.2d 191, 193 (Iowa App. 1987) (citations omitted). Substantial performance allows only omissions from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damage to the other portions of the building and may be compensated by reduction in the contract price.

Id. Ober had the burden of proving substantial performance at trial. *Id.* The district court's conclusion that Ober failed to meet this burden is supported by substantial evidence. The record discloses that the omissions in Ober's performance at the time he abandoned the project could not be remediated as contemplated by this rule. Tedesco's additional expenses incurred for costs of repair and completion could not be compensated by reduction in the contract price. We accordingly affirm on this issue.

V. Summary.

The judgment of the district court is affirmed in part and reversed in part. This case is remanded for a new trial on damages.

AFFIRMED IN PART, REVERSED IN PART, REMANDED WITH INSTRUCTIONS.