

IN THE COURT OF APPEALS OF IOWA

FILED

SEP 21 1982

CLERK SUPREME COURT

INDUSTRIAL JANITOR SERVICE, INC.,)

Plaintiff-Appellee,)

vs.)

BURK BROTHERS CONSTRUCTION, INC.,)

Defendant-Appellant,)

**BRISTOL PRODUCTS, INC., and E-Z HEAT
WIRECRAFT,**)

Defendants.)

Filed September 21, 1982

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$\frac{2-75}{2-66084}$

Appeal from Adams District Court - Maynard Hayden, Judge.

Defendant appeals from trial court's judgment foreclosing a mechanic's lien in favor of plaintiff and dismissing a counterclaim against plaintiff for damages resulting from plaintiff's allegedly improper performance of work on a construction project. **AFFIRMED.**

Jeffrey B Millhollin of Mullin and Millhollin, Corning, Iowa, for defendant-appellant.

Rex Darrah, Des Moines, Iowa, for plaintiff-appellee.

Considered en banc.

PER CURIAM

Defendant-contractor, Burk Brothers Construction, Inc., appeals from trial court's judgment foreclosing a mechanic's lien in favor of plaintiff, Industrial Janitor Service, Inc., and dismissing a counterclaim against plaintiff for damages resulting from plaintiff's allegedly improper performance of work on a construction project. Defendant claims that plaintiff failed to prove proper performance of its work. Defendant also claims that trial court erred in overruling defendant's counterclaim asserting it was clearly established by the evidence. We affirm.

Plaintiff is a Des Moines corporation engaged in the sale and application of cleaning supplies, seals, machines and degreasing materials, as well as the preparation of floors for surfacing with the sealers. In January, 1979, defendant contacted plaintiff to prepare a floor in a building under construction for which defendant was the general contractor. The general contract specified that a material from the Tennant Corporation would be utilized.

According to the terms of the agreement reached by the parties, plaintiff was to send a crew to scrub the floors of the building, to supply the equipment for scrubbing, and to apply surface sealers to the floor. Materials for applying the sealer were to be supplied by defendant at the building site. The agreement also included a provision that plaintiff would not be responsible for overseeing the work done. In fact, the parties agreed that a representative of the Tennant Corporation would be at the site and instruct the plaintiff's crew on the proper application of the products.

Pursuant to the agreement plaintiff sent a truckload of cleaning equipment and three men experienced in applying floor coating to the job site. Plaintiff's employees scrubbed the floor, allowed it to dry, and then applied the Tennant sealer under the direction of a Tennant Company representative. The following day bubbles appeared on the surface of the floor in a large room where the sealer had been applied. The owner of the building, E-Z Heat Wirecraft, and defendant

did not accept or approve the finished floor. Defendant, therefore, contacted plaintiff about the problem. Plaintiff suggested that defendant sand the floor to remove the material. Plaintiff also sent a second crew to the site and worked with defendant in reapplying the Tennant material. The second application was satisfactory.

Plaintiff filed its petition in equity to foreclose a mechanic's lien against defendants on September 5, 1979. On December 28, 1979, defendant filed its answer and counterclaim seeking \$4,629.58 as a result of plaintiff's alleged nonperformance. Trial court's decision resulted in judgment for plaintiff and dismissal of defendant's counterclaim. This appeal followed.

I. Standard of Review. Since this petition was filed in equity, our review is *de novo*. Iowa R. App. P. 4.

II. Evidence of Contract and Substantial Compliance. Defendant claims trial court erred in finding that plaintiff performed the job it was hired to do. We disagree.

The burden in a mechanic's lien foreclosure action is upon the claimant to prove not only a contract for the work but also to prove by a preponderance of the evidence that plaintiff complied with the contract or that compliance was excused or waived by defendant. See, e.g., Kaltoft v. Nielson, 252 Iowa 249, 253, 106 N.W.2d 597, 599 (1960). "To constitute 'substantial performance' omissions or deviations from the contract must be inadvertent or unintentional." Lautenbach v. Meredith, 240 Iowa 166, 172, 35 N.W.2d 870, 874 (1949).

With these principles in mind:

[I]t is our responsibility to review the whole record and determine from the credible evidence rights anew on those propositions properly presented, provided the issue has been raised in error, if any, preserved in the course of trial proceedings. While weight will be given to findings of the trial court, this court will not abdicate its function as triers *de novo* on appeal.

See Ringland-Johnson-Crowly v. First Central Service, Corp., 255 N.W.2d 149, 151 (Iowa 1977).

The evidence introduced at trial shows the following agreement: 1) that plaintiff would send a crew and equipment to scrub the floor and apply the surfacing for a price of \$1,000; 2) that defendant would supply the surfacing material; 3) that the material was to be manufactured by the Tennant Corporation of Minneapolis as per building specification; and 4) that plaintiff would prepare and surface the floor according to instructions of a representative from the Tennant Corporation. The parties dispute whether plaintiff was hired because of its experience in surfacing floors or because of its experience in surfacing floors with the Tennant material. In any event, plaintiff did send a crew to the building site who scrubbed and surfaced the floor pursuant to the directions of a Tennant Corporation representative. The following day the floor began drying in such a fashion as to leave bubbles on the surface. This result was not satisfactory to the parties constructing the building. There is evidence in the record that the bubbling effect was caused either: 1) by defective Tennant materials supplied by defendant; or 2) by air fans which were turned on by defendant and which caused a drop in the temperature in the room, thereby affecting the bond on the sealer. The record also shows that the material applied by plaintiff in two smaller rooms which were protected from the air currents by walls did not bubble.

Defendant contacted plaintiff about how to remedy the flooring defects and was told by plaintiff it should rent machinery and sand off the sealer down to the concrete floor. Defendant then requested further assistance from plaintiff in applying the Tennant material. Employees of both plaintiff and defendant helped in applying the second application. The results of the second application were satisfactory to all.

After considering all the evidence, we are satisfied that there was an agreement between the parties for plaintiff to apply a Tennant surfacing to the

floor, that the unacceptable results of the first application were not due to plaintiff's negligent performance, and that plaintiff substantially complied with the agreement.

III. Dismissal of Defendant's Burk Brothers Counterclaim. Defendant also asserts that the court erred in failing to rule favorably on its counterclaim after it was established by clear and convincing evidence. In its brief, defendant states that "the issue of defendant's right to prevail upon their claim revolves basically around the question of who the responsible party was for the initial wrongful application."

We have already determined that plaintiff substantially complied with the contract. Where substantial performance has been proven by the claimant, the claimant is entitled to the contract price less deduction for the value of any defects in performance. See Farrington v. Freeman, 251 Iowa 18, 23, 99 N.W.2d 388, 391 (1959). There is no dispute that the floor was, in fact, surfaced with the Tennant material and that the plaintiff did so. Plaintiff agreed to do the original surfacing job for the amount of \$1,019 of which a \$100 advancement was made by defendant. We also find sufficient evidence in the record from which to conclude that defendant contracted for a second application at a cost of \$791.72. This results in a total balance of \$1,726.66. Therefore, we find that trial court properly dismissed defendant's counterclaim.

We affirm the trial court's ruling on all points.

AFFIRMED.