

FILED

JAN 31 1978

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

PAUL UNDERWOOD d/b/a
UNDERWOOD EXCAVATING,

Appellee,

vs.

BURLINGTON NORTHERN, INC., d/b/a
BURLINGTON NORTHERN RAILROAD,
INC., and BOB MADGET, INC.,

Appellants.

Filed January 31, 1978

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2-59933

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Appeal from Polk District Court - Maynard Hayden, Judge.

Appeal from judgment allowing plaintiff to recover for substantial performance
of a contract to demolish a building. **AFFIRMED.**

Thomas M. Zurek, of Neiman, Neiman, Stone & Spellman, of Des Moines, counsel
for appellant.

William J. Trout, of Coppola, Trout, Taha & Gazzo, of Des Moines, counsel for
appellee.

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

DONIELSON, J.

Defendant, Bob Madget, Inc. appeals from a judgment allowing plaintiff, Paul Underwood, d/b/a Underwood Excavating, to recover \$8,000 for substantial performance of a contract to demolish a building for defendant, Burlington Northern, Inc., d/b/a Burlington Northern Railroad, Inc. On or about December 15, 1975, Burlington Northern, Inc. (hereinafter referred to as "Burlington") entered into a contract with Bob Madget, Inc. (hereinafter referred to as "Madget") for the demolition of a building in Des Moines owned by Burlington. According to the terms of the contract, Burlington was to pay Madget \$12,140 upon completion of the project.

On February 27, 1976, Madget entered into a contract with Paul Underwood which provided that Underwood would demolish the Burlington building for \$8,000. The contract between Madget and Underwood contained most of the same terms as the one between Burlington and Madget. The Madget-Underwood contract contained specific provisions regarding terms of insurance, public liability and property damage insurance, limits of liability, approval of policies by Madget, and bond. Furthermore, paragraph nine of the contract provided that Madget could, at its option, cancel the contract if Underwood failed to perform any agreement contained therein.

Although the Burlington-Madget contract also called for insurance and bond, conflicting testimony was presented regarding whether Madget had required Underwood to secure a bond. Underwood did obtain an insurance policy for a term of 35 days, but in lesser amounts of coverage than those specified in the contract with Madget. Despite requests by Madget for information regarding the extent of Underwood's insurance, Underwood did not supply Madget with a certificate of insurance as required by the contract. In an attempt to explain this omission, Underwood presented evidence that its insurance company was at fault because it had failed to mail the certificate of insurance to Underwood and Madget on time. However, sometime after March 19, the insurer orally notified Madget of the existence and extent of Underwood's insurance coverage.

On March 22, a Madget official inspected the job site and accompanied Underwood to the city building department to obtain a building permit. That same day, Underwood began the demolition, after having previously informed Madget that he was going to begin the job. After Underwood had begun the work, the Madget official physically took

Underwood's copy of the contract and advised him that Madget was taking over the job since the insurance certificate had not been received. There is also some evidence in the record implying that Madget's sudden attempt to cancel the contract was somehow related to the fact that Madget had previously learned that Underwood had made a sale of the salvage on the premises. Notwithstanding Madget's protestations and other efforts to prevent Underwood from completing the work, Underwood subsequently finished the demolition to the complete satisfaction of Burlington.

Underwood commenced the instant equitable action to recover the \$8,000 contract price, establish and foreclose his mechanic's lien, and obtain whatever other equitable relief the court deemed just and proper. The district court found that Underwood had substantially performed all of the material terms and conditions of the contract and that Underwood's failure to obtain adequate insurance coverage and provide the insurance certificate were not of such materiality as to be fatal to the contract. The court further found that there was no clear showing that Madget had actually required a bond and that any contract provisions in that regard had been waived by the conduct of the parties. Consequently, the court concluded that Underwood was entitled to recover the \$8,000 contract price from Madget. We agree with the trial court in all respects.

Essentially, Madget argues on appeal that the trial court erred in refusing to grant it a rescission of the contract as a matter of law since (1) Underwood's failure to obtain sufficient insurance and supply the certificate of insurance constituted a material breach of the contract and (2) Underwood failed to substantially perform under the terms of the contract.¹

¹ At one point in its brief, Madget alludes to an argument that it was entitled to rescind the contract under the terms thereof. We note, as did the trial court, that Madget did not, at any time, raise or argue what effect, if any, paragraph nine of the contract had on the instant action. We further note that Madget did not plead paragraph nine as a defense or in any other context. See rules 72, 101, and 103, Rules of Civil Procedure. Since Madget elected to assert one type of defense in the trial court, he may not now attempt to inject a new and different issue of law into the case at the appellate stage, *Elkader Production Credit Association v. Eulberg*, 251 N.W.2d 234, 237 (Iowa 1977), even when the action is brought in equity. *Olberding Construction Co., Inc. v. Ruden*, 243 N.W.2d 872, 879 (Iowa 1976); *Schnabel v. Display Sign Service, Inc.*, 219 N.W.2d 546, 548 (Iowa 1974); *Cole v. City of Osceola*, 179 N.W.2d 524, 527 (Iowa 1970). See generally *Foods, Inc. v. Leffler*, 240 N.W.2d 914 (Iowa 1976); *Graham v. Kuker*, 246 N.W.2d 290 (Iowa 1976).

Although the resolution of the issue presented by paragraph nine could conceivably make consideration of other issues unnecessary, *Republic Coal Co. v. Block Co.*, 195 Iowa 321, 329, 190 N.W. 530 (1923); 17 Am. Jur.2d *Contracts* § 495 (1964); 17A C.J.S. *Contracts* §§ 396 and 399 (1963), we need not decide it since it was not properly raised in the trial court and therefore did not constitute an aspect of Madget's defense.

Our review in this matter is *de novo*. Rule 4, Rules of Appellate Procedure. Although we give weight to the findings of fact of the trial court, we are not bound by them. Rule 14(f)(7), R. App. P. The law is settled that rescission of a contract will not be granted as a matter of law for mere breach not so substantial as to defeat the object of the parties in making the contract. *The Maytag Co. v. Alward*, 253 Iowa 455, 465-466, 112 N.W.2d 654 (1962); *Nora Springs Co-Op Co. v. Brandau*, 247 N.W.2d 744, 749 (Iowa 1976); 17 Am. Jur.2d Contracts § 504 (1964). Furthermore, one who seeks recovery on a contract has the burden to plead and prove the existence of the contract and his performance. *Roland A. Wilson and Associates v. Forty-O-Four Grand Corp.*, 246 N.W.2d 922, 925 (Iowa 1976). The courts have uniformly allowed recovery where the terms of the contract "are performed with such an approximation or complete performance that the owner obtains substantially what is called for by the contract." 17 Am. Jur.2d Contracts § 378, at p. 822; *Stratmeyer v. Hoyt*, 189 Iowa 85, 90-91, 174 N.W. 243 (1919); *Farrington v. Freeman*, 251 Iowa 18, 24, 99 N.W.2d 338 (1959). The supreme court has recognized this principle and has often applied it in cases involving foreclosures of mechanic's liens based upon express written contracts for construction work. *Farrington v. Freeman*, *supra*, at 23-24; *Kaltoft v. Nielsen*, 252 Iowa 249, 253-260, 106 N.W.2d 597 (1960); *S. Hanson Lumber Co. v. DeMoss*, 253 Iowa 204, 207-208, 111 N.W.2d 681 (1961). See also *Roland A. Wilson and Associates v. Forty-O-Four Grand Corp.*, *supra*, at 925-926.

Apparently, Madget believes that Underwood's non-compliance with the specific provisions of the contract dealing with insurance coverage and the certificate constituted just such a substantial breach, and that, notwithstanding this breach, Underwood failed to substantially perform under the terms of the contract. Upon a review of the record, we conclude, as did the trial court, that Underwood's breach did not defeat the objects of the parties in making this contract. *The Maytag Co. v. Alward*, *supra*; see Restatement (Second) of Contracts §§ 255 and 262 (Tent. Draft No. 8, 1973). We further hold that Underwood substantially performed all of the material terms and conditions of the contract.

In *Cota Plastering Co. v. Moore*, 247 Iowa 972, 978, 77 N.W.2d 475 (1956), the court stated:

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"Generally equity is somewhat less strict than law in requiring performance by one who seeks to enforce a contract." Equity looks to the substance rather than the form and seeks to prevent injustice. The rule of substantial performance is especially applicable to building construction or improvement contracts of this sort, because the builder's material and labor cannot be returned to him. The courts are forced to weigh, on the one hand, the harm to be done to the owner if he is forced to accept and pay for a job that is not the job he contracted for; on the other hand, the injustice to the builder and the unjust enrichment of the owner if trivial deviations from the contract are to deny the former any pay whatever and to permit the latter to keep the fruits of the builder's efforts and material without compensation. The contention that "It is so nominated in the bond" will not avail the owner whose property has been constructed or improved unless the deviation from the "bond" has been a material and substantial one.

Accord, *Lautenbach v. Meredith*, 240 Iowa 166, 172-173, 35 N.W.2d 870 (1949). We share the views expressed by the supreme court in *Cota Plastering*. A reversal of the district court judgment would effectively result in Madget being unjustly enriched by \$8,000 for work which it did not perform. This court will not permit such a result inasmuch as Underwood substantially performed the terms and conditions of the contract. Since we conclude that Madget's other contentions are without merit, we affirm the district court.

AFFIRMED.