IN THE COURT OF APPEALS OF IOWA

FILED
JAN 30 1981
CLERK SUPREME COURT

VAN BUSKIRK CONSTRUCTION COMPANY,

Plaintiff-Appellant,

vs.

BOARD OF PARK COMMISSIONERS OF BETTENDORF, IOWA and McCLEARY EXCAVATING COMPANY,

Defendants-Appellees.

McCLEARY EXCAVATING COMPANY,

Counterclaimant,

vs.

VAN BUSKIRK CONSTRUCTION COMPANY,

Defendant to Counterclaim.

McCLEARY EXCAVATING COMPANY,

Cross-Petitioner,

BOARD OF PARK COMMISSIONERS OF BETTENDORF, IOWA,

Defendant to Cross-Petition,

ELMER L. MOUNGEY,

Intervenor,

vs.

VAN BUSKIRK CONSTRUCTION COMPANY, BOARD OF PARK COMMISSIONERS OF BETTENDORF, IOWA, and McCLEARY EXCAVATING COMPANY,

Defendants.

Filed January 30, 1981

0-342
2-62171

Appeal from Scott District Court - Lowell D. Phelps, Judge.

Plaintiff construction company appeals from judgment entered against it on a counterclaim filed by defendant Board in this action for breach of contract for the construction of a golf course. AFFIRMED.

David Dutton and James R. Hellman of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, Iowa, for plaintiff-appellant.

Robert H. Gallagher of Wells, Brubaker, deSilva, Gallagher & Flynn, Davenport, Iowa, for defendant.

Charles T. Traw of Rehling, Lindburg & Gosma, Davenport, Iowa, for intervenor-Moungey.

Allan R. Havercamp of Havercamp, Havercamp & Murray, Davenport, Iowa, for intervenor-McCleary Excavating Company.

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

PER CURIAM

Plaintiff construction company appeals from judgment entered against it on a counterclaim filed by defendant Board in this action for breach of contract for the construction of a golf course. Plaintiff's primary objection is that there is insufficient evidence to support the findings of the trial court relating to contractual liability and damages. We affirm the judgment.

On February 5, 1973, plaintiff entered into a written contract to construct a public golf course for the City of Bettendorf, Iowa at a price of $315,409.50. The contract specified that work was to commence May 1, 1973, and that plaintiff was "to diligently prosecute the work in such sequence and manner as to complete the work in all detail by October 1, 1973." The contract contained the following forfeiture provision:

> In case the Contractor [plaintiff] shall fail to complete the work or any part thereof according to the terms of this contract, then, and in such case, the Owner reserves the right and is hereby authorized to declare this contract forfeited and to relet the unfinished portion thereof in the manner provided by law, and such person or persons to whom such work shall have been relet shall be and are hereby authorized to complete said portion of the work without hindrance from the Contractor. The Contractor shall be liable, in case of non-performance of this Contract, or any part thereof, and hereby agrees to pay said owner, as damages, all the costs, charges and expenses attending such reletting, and also such sums or amounts as it shall cost to complete the said contract over and above the amounts hereby agreed for the various items thereof.

The contract also required plaintiff to execute a performance and payment bond. Defendant was permitted to "order extra work or make changes in the work, the contract sum being adjusted accordingly" without invalidating the contract.

The contract gave defendant the right to serve written notice on plaintiff regarding the exercise of the various contractual remedies (including forfeiture) if plaintiff "fail[s] to prosecute his work with due diligence and carry the work forward in accordance with his work schedule . . . or if he should fail to substantially perform one or more of the provisions of the Contract Documents to be performed by him."

It is undisputed that plaintiff did not provide the required bond. Work began before May 1, 1973 but was not completed that year. Plaintiff claims the delay was caused by excessive amounts of rainfall which often hindered or halted construction as well as a large number of Board-requested change orders. Defendant admits that the weather caused some problems which is why the original contractual completion date of October 1, 1973 was waived. But it is defendant's contention that in spite of these

problems, plaintiff should have finished nine holes of the course by May 15, 1974 had sufficient equipment and workers been utilized. On July 30, 1974, defendant notified plaintiff in writing of the latter's discharge from further responsibility under the contract.

Plaintiff filed its petition on August 5, 1974, claiming that it had substantially completed its performance under the contract and that $75,000 was due and owing to plaintiff for work and materials supplied as of the time of the discharge. Defendant's answer and counterclaim was filed on August 23, 1974, alleging that plaintiff failed to perform its part of the contract with due diligence or in a workmanlike manner. In its counterclaim, defendant demanded $85,000 from plaintiff in compensation for the costs incurred to complete the contract. Plaintiff's subcontractors were also made parties to this action; however, their claims are not at issue on this appeal.[1]

Trial was held in January, 1977. On March 23, 1978, the trial court issued its findings, conclusions and judgment. It found that the parties agreed to modify the projected completion date so that nine holes would be finished by May 15, 1974, and that plaintiff did not meet that new deadline. The contract was found to have been terminated on the basis of plaintiff's "lack of due diligence" in pursuing the job both in 1973 and 1974. Defendant was awarded $81,096 on its counterclaim, representing the difference between $104,500 (the amount of the replacement contract to complete the golf course after plaintiff's contract was terminated in July, 1974) and $23,404 (the amount remaining due to plaintiff on its contract had it completed the job). After various post-trial motions were denied, plaintiff perfected this appeal.

I. Plaintiff's first complaint is that there is insufficient evidence to support the findings and conclusions whereby the trial court determined that plaintiff was in default under the agreement. That court's findings of fact are binding upon us if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1). "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." City of Davenport v. Public Employment Relations Board, 264 N.W.2d 307, 311 (Iowa 1978).

Initially, we agree with plaintiff that there is no substantial evidence to support the trial court's finding that the parties agreed to a new completion deadline of May 15,

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[1] Subsequent to the filing of appellant's brief, counterclaimant McCleary Excavating Company and intervenor Elmer L. Moungey, filed separate motions to dismiss the appeal and affirm as to each of them. The basis for both motions was that plaintiff failed to state any issue applicable to either McCleary or Moungey. By supreme court order, Moungey's motion was granted on July 11, 1980. McCleary's motion was granted by order of this court on January 13, 1981.

1974. While the Board indicated to plaintiff its desire that nine holes be completed by May 15, we find nothing to support the conclusion that a binding contract as to this completion date was ever formed. An erroneous finding of fact, however, does not necessarily require reversal of a judgment. Iowa R. Civ. P. 179(b) provides that a party on appeal may challenge "the sufficiency of the evidence to sustain any finding." But the mere fact that a finding by the court is not supported by the evidence will not justify a reversal when the judgment is in accord with other findings which do have support in the record. Concannon v. Blackman, 232 Iowa 722, 726-27, 6 N.W.2d 116, 118 (1942).

Applying these principles to the present case, we conclude that even though the trial court erred in making the finding regarding a firm deadline for completion of the project, we nevertheless should affirm the judgment. This result is based on our conclusion that there is substantial evidence in the record to support the trial court's separate findings that plaintiff was in default for other reasons.

Regardless of whether there was a fixed completion date, plaintiff was, in any event, required by the agreement to pursue the work with due diligence. In this regard, the trial court found:

> In the spring of 1974 there was again more than normal rainfall, but the Court finds from the evidence that there was ample time when Plaintiff could work and could with proper use of equipment and sufficient competent manpower and proper organization of work have completed at least a nine-hole course, including seeding, by May 15, 1974, but failed to do so. The Court further finds from the evidence that the lack of progress was such that unless Plaintiff's method of operation was decidedly improved the entire project could well not have been completed in time for the September 15, 1974 seeding deadline, August 15th to September 15th of each year being the other seeding time acceptable for grass seed.

We conclude that this latter finding is supported by substantial evidence.

Although the rainy weather unquestionably contributed to the construction delay, there was also evidence that plaintiff did not take full advantage of the favorable and dry conditions that did occur. This supports the trial court's findings that plaintiff failed to exercise due diligence in completing the project. Ed Sheck, the city superintendent of parks and recreation, testified that plaintiff used only two full-time employees on the job and that the contractor which completed the contract was able to improve upon performance by using faster methods of construction. David Matson, a surveyor who examined the course in July, 1974 at defendant's request testified that he found significant variations from the original contract plans and specifications. Stanley Hergert, a superintendent of golf course construction who was hired by the replacement

contractor to finish the course after plaintiff's discharge, testified that he had to replace much of the work done by plaintiff. James Spear, the architect for the project, testified that he observed that plaintiff was not making satisfactory progress in part because plaintiff was not using a sufficient amount of equipment of manpower. Although there is contrary evidence supporting plaintiff's version of the progress of the construction, we find that the trial court's findings regarding the reasons for the delays are supported by substantial evidence and justify the Board's termination of plaintiff's contract.

Our conclusion that the trial court was correct in finding that plaintiff was in default is further supported by the uncontested fact that plaintiff failed to provide the performance and payment bonds required by the contract. Plaintiff argues that this failure was merely a technical breach and cannot of itself be a ground for termination. We disagree. The contract expressly required plaintiff to execute and deliver such a bond. We believe this to be a matter of no small importance. Nor do we believe that plaintiff has established a waiver of this requirement by the Board. Section 573.3, The Code, prohibits such waiver.

In view of the requirements of sections 573.2 and 573.3, The Code, failure to provide the necessary bond, alone, would appear to constitute sufficient evidence of default to warrant termination of the contract. But we need not place our decision on this basis alone. We conclude that clearly the cumulative effect of plaintiff's failure to deliver the bond, failure to make maximum use of time, and resulting delays provide grounds sufficient to justify the action taken by the Board to terminate plaintiff's services.

II. We next consider plaintiff's challenges to the trial court's findings on damages. With respect to the damages plaintiff has sought to recover in this action, it is contended that plaintiff was owed $75,000 as a result of work and materials supplied but not paid for at the time of the discharge. Inherent in the trial court's findings is a determination that plaintiff was paid in full for work and materials supplied by it prior to discharge except for $10,000 plus a retainage of $32,637.95. These amounts, totalling $42,637.95, were applied against claims of subcontractors and costs incident thereto.

On appeal the only evidence relied upon by plaintiff to support the $75,000 amount claimed is an estimate prepared by plaintiff on or about July 24, 1974 and submitted to the architect on the project. At trial, the architect in his testimony rejected the amounts contained in plaintiff's estimate and substantially confirmed the figures found by the trial court. The trial court was not bound to accept plaintiff's figures as a

verity. We conclude that its findings have sufficient support in the evidence. We further note, in regard to plaintiff's claims for sums unpaid under the agreement, that in all likelihood, if such sums are increased, this will work a corresponding increase in the damages to be determined on the defendant's counterclaim under the measure of damages employed by the trial court.

Plaintiff also urges that the trial court's findings are erroneous with respect to the damages awarded on defendant's counterclaim. Defendant was awarded $81,096.00—the difference between the cost of completing the project with another contractor and the amount called for in plaintiff's contract for the unfinished work. Plaintiff does not object to the formula under which these damages were computed, but contends that the dollar amounts used by the trial court lack evidentiary support.

In this regard it is urged that in determining the amount of the contract price remaining to be paid under the original contract, the trial court was bound to accept the determination of the architect as to this issue. We disagree. Kaltoft v. Nielson, 252 Iowa 249, 252-53, 106 N.W.2d 597, 602 (1960), relied on by plaintiff, does not compel such a result. In the cited case, the evidence made out an account stated. In the present case, the trial court found with considerable support in the evidence that the particular determination of the architect relied upon by plaintiff was tentative.

The most significant deficiency in plaintiff's contention as a basis for granting further relief to plaintiff, is that the trial court found a larger unpaid balance on the original contract than that contained in the certificate of the architect upon which plaintiff relies. This finding has the effect of decreasing the ultimate amount of damages awarded against plaintiff rather than increasing said amounts.

Plaintiff also contends that the total amount paid to the second contractor involved payments for additional work not contemplated by plaintiff's contract with the board. In support of this contention, plaintiff points to certain items performed by the second contractor which were not required by the original contract. These were extra mulching and placement of straw on the slopes and tees, extra work on certain greens, and the building of certain water diversions. We find from the record that while these items were not included in plaintiff's contract, they also were not included in the bid specifications which formed the basis for the contract with the replacement contractor, Wadsworth Company. These bid specifications were identical to the work called for in plaintiff's contract but not completed. The contract price to Wadsworth Company was $104,500 for completing plaintiff's contract without reference to these extra items.

This was the figure used by the trial court in computing defendant's damages. Plaintiff has failed to show that the use of this figure was erroneous.

Finally, on the issue of damages, plaintiff contends that the substantial difference between the amount remaining unpaid under its contract with the Board and the amount required to complete the project with another contractor establishes that the latter figure is too high. This argument fails to take into account the expectancy measure of damages whereby the Board was entitled to the benefit of the bargain, if any, that inhered in its contract with plaintiff. The unfinished portion of the contract was relet in accordance with the general conditions of the original contract. The fact that the cost of securing a replacement contractor was higher than the amount for which plaintiff agreed to finish the project is what precipitated defendant's counterclaim. Such circumstance serves as no basis for granting relief to the plaintiff from the trial court's judgment.

III. Lastly, we consider plaintiff's claim that the Board failed to comply with the procedure for termination outlined in the agreement between the parties. According to section 32 of the contract, the owner could terminate the services of the contractor by serving upon the contractor a notice that the architect had determined that the contract should be terminated and an itemization of the reasons for the recommendation. The records show that by letter dated July 11, 1974, plaintiff was advised that such a recommendation to terminate his contract had been made by the architects. In addition, plaintiff was provided at this time a copy of the letter from the architect dated July 3, 1974, summarizing the reasons for this recommendation. Such reasons included the failure of the plaintiff to prosecute his work with due diligence and in accordance with his work schedule, and the failure to provide the required bond. Under the terms of the general conditions, the plaintiff was given ten days to remedy the problems thus listed as reason for termination. The record clearly shows that little if anything was done during the ten day period. We believe that the evidence is sufficient to show substantial compliance by the Board with the contract conditions for termination.

Plaintiff asks us to find that the Board acted in bad faith in not acting to terminate the contract at an earlier time. It is urged that this was done to secure additional performance from plaintiff with no additional payment. We do not find that the record supports this contention. We have considered all issues and arguments presented and find no basis to alter the trial court's determination. We therefore affirm the judgment.

AFFIRMED.