IN THE COURT OF APPEALS OF IOWA

No. 7-650 / 96-1257

JOHN BANES d\b\a BANES CONSTRUCTION,

Appellee,

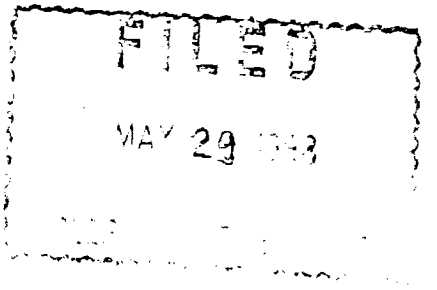
vs.

JACK SWANSON,

Appellant,

IOWA LUBE INCORPORATED d\b\a JIFFY LUBE, and TOYOTA OF IOWA CITY,

Defendants.



Appeal from the Iowa District Court for Johnson County, Patrick R. Grady, Judge.

Appellants appeal from the foreclosure of a mechanic's lien. **AFFIRMED.**

John L. Kuehnle of Sebesta & Kuehnle, Mechanicsville, and Tricia Spratt Fairfield of Norton & Norton, Lowden, for appellants.

Donald L. Carr II of Sullivan & Ward, P.C., Des Moines, for appellee.

Considered by Cady, C.J., and Huitink, and Mahan, JJ.

CADY, C.J.

In July 1993, Jack Swanson entered into an agreement with John Banes, doing business as Banes Construction, to have Banes construct a concrete basement. The parties agreed on a price of $11,536. Swanson planned to place a modular home on the basement. He acted as his own general contractor for the project. Swanson paid Banes as certain portions of the work were completed.

The basement was finished on August 30, 1993. After the modular home was placed on the basement, Swanson and his girlfriend, Brenda Cornelis, moved into the home. Swanson sent a final payment of $3,696 to Banes on September 10, 1993. Swanson then discovered some cracks in the basement walls which leaked water. Banes volunteered to fix the cracks, without charge and attempted to do so. Cornelis disagreed with the method Banes was using to repair the cracks and asked him to leave. On September 17, 1993, Swanson stopped payment on the check. The basement continued to leak water. Swanson, however, did not employ another individual to repair the cracks.

In November 1993, Banes filed a mechanic's lien. The lien was amended in December 1994 to change the rate of interest. In January 1995, Banes filed a petition to foreclose the mechanic's lien. Swanson filed a counterclaim, seeking damages for Banes' failure to properly perform under the contract. The lien was subsequently amended in February 1996 to correct the legal description.

The district court entered its decision on June 5, 1996. The court determined Banes substantially performed under the contract and was entitled to enforce the mechanic's lien. The court found Swanson was not entitled to any set-off for Banes' failure to completely perform the contract because he unreasonably prevented Banes from repairing the cracks in the basement. The court concluded Swanson failed to mitigate damages. The court entered judgment on the mechanic's lien. The court determined Banes was entitled to attorney's fees under Iowa Code section 572.32, in an amount to be determined at a later hearing.

Banes' attorney filed a certification of attorney fees on June 25, 1996. Swanson filed a notice of appeal on July 5, 1996. The district court entered an order on the attorney fee issue on July 25, 1996.

I. Under Iowa Code section 572.26, an action to enforce a mechanic's lien is in equity. *Service Unlimited, Inc. v. Elder,* 542 N.W.2d 855, 857 (Iowa App. 1995). On the other hand, a claim for damages arising from the construction of a building is reviewed for errors of law. *Id.*

II. In order to perfect a mechanic's lien, a party must file a verified statement of account which contains the correct description of the property to be charged with the lien. Iowa Code §572.8. The lien described the property as:

> Swanson 2nd - Lot 1, Jack Swanson 1390 James Avenue, Swisher, Johnson County, Iowa.

The property was actually in Swanson's First Subdivision, not the Second Subdivision. The district court allowed Banes to amend the petition and lien immediately before the trial in order to correct the legal description. The court found the amendment was an amendment to conform to the proof.

Swanson claims the district court erred in granting the motion to amend. A trial court has considerable discretion in ruling on a motion for leave to amend, and we will reverse only when a clear abuse of discretion is found. *Allison-Kesley Ag Center, Inc. v. Hildebrand*, 485 N.W.2d 841, 846 (Iowa 1992). Allowance of a conforming amendment is the rule and denial the exception. *Id.* An amendment to conform to the proof, however, should not be allowed if it will substantially change the issues before the court. *Tomka v. Hoechst Celanese Corp.*, 528 N.W.2d 103, 108 (Iowa 1995).

The amendment to change the legal description of the property in order to conform to the proof did not change the issues in the case. We determine the district court did not abuse its discretion.

III. Swanson contends Banes failed to substantially perform under the contract and was not entitled to enforce the mechanic's lien. Swanson asserts the construction of the basement was substandard, which resulted in a reduction in the value of the home.

In order to successfully enforce a mechanic's lien, substantial performance of the contract is required. *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293, 295

(Iowa App. 1995). The contractor has the burden of proof to show substantial performance. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 406 (Iowa App. 1994). Substantial performance allows only the omissions or deviations 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 damages to other portions of the building, and may be compensated for through deductions from the contract price. *Moore's Builder & Contractor, Inc. v. Hoffman*, 409 N.W.2d 191, 193 (Iowa App. 1987).

Banes completed the Swanson basement, but it subsequently developed cracks. There was no evidence the problems with the basement were intentional or the result of bad faith. The cracks only minimally impaired the value of the home. There was evidence the value of the home would not be impaired if the cracks were fixed and the repairs solved the water problems for a substantial period of time, perhaps ten years. Under these facts, we conclude Banes substantially performed under the contract.

IV. Swanson filed counterclaims for breach of contract and breach of warranty. He asserted Banes breached the contract by failing to build the basement in a reasonably good and workmanlike manner. He also asserted Banes breached a warranty to build a fit basement. Swanson claims he is entitled to a set-off or counterclaim for his damages.

A builder's substantial performance is not a defense against a suit for damages. *Bidwell*, 543 N.W.2d at 296. The homeowner is still entitled to seek damages for defects in construction. *Id.* As noted above, our scope of review on this issue is for correction of errors of law.

The district court did not award a set-off or counterclaim to Swanson because he failed to mitigate his damages. A party to a contract must act to mitigate damages. *Pirelli-Armstrong Tire Corp. v. Midwest-Werner & Pfleiderer, Inc.*, 540 N.W.2d 647, 649 (Iowa 1995). This doctrine applies to all types of contracts. *Id.* The district court noted Banes volunteered to fix the cracks without compensation. The court found this would have avoided Swanson's damages.

Swanson feels he did all he could to mitigate the damage to his home. Swanson presented the testimony of Lowell Cook, who has been a contractor for forty years. Cook stated the best method to repair the cracks in the basement would be to dig down the length of the cracks, clean the debris off the foundation, and cover it with tar and foundation cement. On the inside, Cook would use quick-dry cement to seal the crack. Banes had proposed to use an epoxy injection from the inside of the basement. Swanson did not allow Banes to use the epoxy method because he did not believe it was the best method of fixing the cracks. Swanson asserts he should not have been required to accept a less acceptable method of repairing the cracks in order to mitigate damages.

There is evidence to support the district court's finding that the method of fixing the cracks proposed by Banes was reasonable and would have diminished or eliminated Swanson's damages. It would not have been detrimental to Swanson to allow Banes to fix the cracks by using an epoxy injection. Swanson did not fix the cracks for many years, which resulted in an increase in the damage to his basement. We affirm the district court's finding Swanson failed to mitigate damages and was not entitled to a set-off or counterclaim.

V. Swanson claims the district court did not have jurisdiction to enter an award for attorney fees after the notice of appeal was filed. He also disputes the amount of attorney fees award.

A trial court retains jurisdiction to enter orders on collateral issues in a case following an appeal. *In re Estate of Tollefsrud*, 275 N.W.2d 412, 417 (Iowa 1979). In this case, the trial court left the issue of attorney fees open at the time the ruling on the mechanic's lien was entered to permit counsel to file a claim and affidavit. Notice of appeal was filed prior to the supplemental order for attorney fees.

We conclude the trial court retained jurisdiction of the case to determine attorney fees, and the attorney fee order, once entered, properly became a part of this appeal. Furthermore, based on the record presented on appeal, we agree with the amount of the award set by the trial court.

AFFIRMED.