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IN THE COURT OF APPEALS OF IOWA

LAWRENCE McDONALD,)

Plaintiff-Appellee,)

Filed May 30, 1960

vs.)

ROBERT BRAL,)

0-128
2-63907

Defendant-Appellant.)

Appeal from Crawford District Court - David J. Blair, Judge.

Defendant appeals judgment for plaintiff in breach of warranty suit arising from installation of a septic tank on plaintiff's property. AFFIRMED.

Thomas E. Gustafson of Gustafson Law Firm, Denison, for defendant-appellant.

Robert Kohorst of Louis, Moore & Kohorst, Harlan, for plaintiff-appellee.

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

DONIELSON, J.

Defendant, Robert Bral, appeals judgment for plaintiff, Lawrence McDonald, in breach of warranty suit arising from installation of a septic tank on plaintiff's property. On appeal, defendant asserts: Plaintiff failed to produce substantial evidence supporting the damage award; implied warranties do not arise from contracts for services, such as this one for construction of a septic tank system; plaintiff failed to produce substantial evidence of defendant breaching such an implied warranty; and the trial court erroneously failed to set-off against the damage award his counter-claim for the balance allegedly due on the contract.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. The trial court's findings of fact are binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I.

Substantial evidence in the record supports the following trial court fact-findings. Plaintiff and defendant contracted for the construction by defendant of a septic tank system on plaintiff's property. Defendant had reason to know plaintiff was relying on the defendant's skill and judgment in selecting, furnishing, and installing the septic tank system. Shortly after installation, a large amount of water and mud entered the septic tank system during a severe rainstorm, causing the entire system to become clogged with mud and flooding plaintiff's basement, destroying both the system and property in the basement. No credible testimony of any other cause for leakage of water and mud was presented.

The trial court found plaintiff suffered the following damages: Fair and reasonable cost of repairs including replacement of items of defective system (\$1,569.50); fair and reasonable value of personal property destroyed by water and mud from defective system backing up into plaintiff's basement (\$1,959.90); and fair and reasonable value of time spent by plaintiff in removing water and mud from his basement (\$153.93). The trial court awarded these damages to plaintiff in the amount of \$3,683.33, with legal interest accruing at five percent per annum from September 1, 1977, to the date of entry of the judgment, June 28, 1979, and from then at an annual rate of seven percent. The trial also dismissed defendant's counterclaim for a balance allegedly due on the contract.

II.

Defendant asserts the trial court erred in overruling his motion for directed verdict at the close of plaintiff's evidence, based on plaintiff's failure to establish damages or defendant's breach of an implied warranty. Defendant made his motion for directed verdict at the close of plaintiff's evidence, but failed to renew it at the close of all the evidence. Hence, any error in the ruling was waived by this failure to renew the motion at the close of all the evidence. Thomas Truck and Caster Co. v. Buffalo Caster and Wheel Corp., 210 N.W.2d 532, 535 (Iowa 1973); Quad County Grain, Inc. v. Poe, 202 N.W.2d 118, 120 (Iowa 1972); Luddington v. Moore, 261 Iowa 641, 644, 155 N.W.2d 428, 430 (1968). Nevertheless, we do not believe the trial court erred in overruling defendant's motion for directed verdict, and briefly address the issues he raises.

Defendant correctly states the law when he asserts there must be a reasonable amount of certainty in the establishment of damages and they may not be based on speculation or conjecture. Conley v. Warne, 236 N.W.2d 682, 687 (Iowa 1973); Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 857 (Iowa 1973) (quoting from Patterson v. Patterson, 189 N.W.2d 601, 605 (Iowa 1971)); DeWaay v. Muhr, 160 N.W.2d 454, 460 (Iowa 1968). However, if uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount of damages could be inferred or approximated. Northrup, 204 N.W.2d at 857; Conrad v. Dorweiler, 189 N.W.2d 537, 540 (Iowa 1971); DeWaay, 160 N.W.2d at 460. Defendant does not controvert the fact plaintiff suffered damages, but rather the amount and the recoverability of them against him. Plaintiff as owner of damaged personal property is qualified and competent to testify to the value of his personal property. Beneficial Finance Co. of Black Hawk County v. Reed, 212 N.W.2d 454, 459 (Iowa 1973); Ruth v. O'Neill, 245 Iowa 1158, 1176, 66 N.W.2d 44, 54 (1954). While plaintiff's testimony and damage estimates did not prove damage with mathematical precision, they provided a reasonable measure of certainty and a reasonable basis from which the fact-finder could approximate the amount of recovery. See Northrup, 204 N.W.2d at 857; Nicholson v. City of Des Moines, 246 Iowa 318, 327, 67 N.W.2d 533, 534 (1954).

Defendant also asserts an implied warranty of fitness for a particular purpose did not exist here, and if it did exist it was not breached. In construction contracts it is implied, unless otherwise expressly agreed, that the structure will be erected in a

reasonably good and workmanlike manner and will be reasonably fit for the intended purpose. Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972); Markman v. Hoefer, 252 Iowa 118, 123, 106 N.W.2d 59, 62 (1960); see Gosha v. Woller, 288 N.W.2d 329, 331 n.3 (Iowa 1980). Even if we accept defendant's argument this contract was for goods and services and thus removed from the implied warranty of fitness for a particular purpose found in sections 554.2314 and 554.2315, The Code 1979, there still exists a similar warranty in the common law to cover this situation. There is sufficient evidence in the record to show the existence and breach of this warranty. See Busker, 203 N.W.2d at 303.

III.

Defendant asserts the trial court erred in not allowing, at least as a set-off against plaintiff's recovery, his counterclaim for the balance allegedly due on the contract. Plaintiff contends the contract price was \$1600, which he paid in full on August 6, 1977, when the installation of the system was complete. Plaintiff argues the counterclaim is based on work done by defendant after the first damaging rainstorm, not pursuant to the original bid. This dispute raises two issues: Whether the original contract price was \$1600 or, as asserted by defendant, \$2354; and whether defendant is entitled to recovery for expenses incurred in his unsuccessful remedial efforts.

The trial court found defendant failed to prove by a preponderance of the evidence his counterclaim. This fact-finding is binding on this court if supported by substantial evidence. Iowa R. App. P. 14(f)(1). Since the parties' agreement was oral, the trial court was faced with deciding who was the more credible witness. Because of its vantage point in assessing witness credibility and other substantial evidence in the record, we conclude the trial court did not err in rejecting defendant's alleged original bid figure. We note the cost of a replacement system installed by plaintiff was less than \$1600, although additional work was involved. We also hold the trial court correctly denied the defendant compensation for his attempts to remedy the defects in the system since but for his breach they would not have been incurred; as consequential damages of defendant's breach he may not recover for them.

Trial court is affirmed.

AFFIRMED.