

IN THE COURT OF APPEALS OF IOWA

FILED

JUL 26 1989

CLERK SUPREME COURT

EVERLING & ASSOCIATES, INC.,)
et al.,)

Plaintiffs-Appellees,)

vs.)

STEEL SALES & LEASING, LTD.,)

Defendants-Appellants.)

9-96
88-150

158

Appeal from the Iowa District Court for Polk County (CL 63-37080), Glenn Pille, Judge.

Appellant general contractor appeals the district court judgment granted in favor of appellees. **AFFIRMED.**

James R. Cook, Des Moines, for defendants-appellants.

Dick L. Jensen of Dreher, Wilson, Simpson, Jensen, Sellers, Butters, Adams & Kaiser, Des Moines, for appellee Dixon.

Richard L. Alexander, Des Moines, pro se.

Heard by Donielson, P.J., and Schlegel and Hayden, JJ.

SCHLEGEL, J.

This appeal arises out of claims against a general contractor, Steel Sales, by several subcontractors and suppliers pursuant to Iowa Code chapter 573.

The general contractor contends the district court erred by finding that a certain paving subcontractor, Dixon Concrete, Inc., had not breached its subcontracts. In addition, the general contractor contends the district court erred by requiring it to pay another subcontractor's claim for damages caused by a third subcontractor. We affirm.

Steel Sales & Leasing, Inc., was the general contractor for the construction of forty-eight residential housing units for the Des Moines Public Housing Authority (DMPHA). During construction the DMPHA expressed dissatisfaction with the manner in which Dixon was doing its paving. This disagreement resulted in substantial delays and eventually led to an oral agreement between Steel Sales and Dixon, allowing Steel Sales to perform some of the paving itself. In addition, problems arose with the painting subcontractor's work, allegedly caused by the bricklayer. This resulted in an oral agreement between Steel Sales and the subcontractor, Alexander Painting and Decorating, Inc., to redo the painting that was damaged.

This is an action at law and therefore this court reviews for the correction of errors at law. Iowa R. App. P. 4.

The claims in this case deal with two different subcontractors, but they both involve the question of whether an oral modification of the subcontract was made, and if so, the scope of that modification.

I. Steel Sales Claims Regarding Dixon. Appellant contends that Dixon failed to complete the concrete work under the original contract and therefore should be liable for the appellant's costs of completion. Steel Sales acknowledges that it agreed to perform the concrete work for Dixon at one site at the scheduled values set out in the original contract. The question is whether Steel Sales agreed that whatever concrete work it performed in the future would be done at the scheduled values.

There is no question that parties to a contract may modify it orally. DeWaay v. Muhr, 160 N.W.2d 454 (Iowa 1968). The oral modification in this instance extended to at least one site and the trial court was correct in holding that it extended to as many sites as Steel Sales worked on. A letter sent to Dixon by Steel Sales stated that it would perform the work at one site at the scheduled rates and that it would inform Dixon of any further sites it would finish. The ambiguous portion of this letter is whether Steel Sales must inform Dixon of further sites and at what price they will be done. Steel Sales informed Dixon by working on the other sites. The only price ever discussed in either the original contract or the oral

modification were the scheduled rates, which must be the price agreed upon. To hold the price to be other than the scheduled rates would construe the contract to give an unfair advantage to one party over the other. Freese v. Town of Alburnett, 255 Iowa 1264, 1268-1269, 125 N.W.2d 790, 793 (1964). The unfair advantage arises because Steel Sales could in effect set its own price. When one party has clearly breached the contract the other may sue for any damages it might incur. In this case there was an oral agreement. Dixon was not placed on notice that it would have to pay damages in excess of the scheduled amounts for every site completed by Steel Sales. Finally, Steel Sales wrote the letter modifying the contract and therefore it should be construed against it. Id.

Appellant makes the additional claim that if an oral modification occurred, then Dixon still failed to perform the contract on time as to one site. The contention is that Dixon began work at this site and therefore was responsible for completing it on time. The trial court correctly found that the delays in the completion of this site were not the fault of Dixon and therefore Steel Sales was not entitled to damages above the scheduled rates.

II. Steel Sales Claims Regarding Alexander. The appellant next challenges an award of \$2,400.00 to the painting subcontractor, Alexander. These costs were incurred when Alexander repaired damages caused by another

subcontractor. The original contract specifically states that if a subcontractor sustains any loss or damage because of another subcontractor, the subcontractor cannot proceed against the contractor. The trial court found that Steel Sales orally modified the original contract with Alexander. Alexander in effect agreed to do extra work in repairing the damage. The trial court found that Alexander did this repainting at the request of Steel Sales. Alexander had completed its portion of the contract before the other subcontractor caused the damage. Perhaps Steel Sales could have proceeded against Alexander for the damage, but instead it chose to modify the contract by agreeing to pay Alexander for the extra work of fixing the damage. The trial court was correct in finding an oral modification to the contract between Steel Sales and Alexander.

AFFIRMED.