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CLERK SUPREME COURT

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IN THE COURT OF APPEALS OF IOWA

WILLIAM H. DOBBS d/b/a BILL DOBBS CONSTRUCTION and DOBBS MASONRY,

Plaintiff-Appellant,

vs.

KNUDSON, INC., a Corporation, et al.

Defendant-Appellees.

0-442
2-64546

BOURKE LUMBER COMPANY, a Corporation, et al.,

Plaintiffs,

vs.

IOWA DEPARTMENT OF SOCIAL SERVICES, et al.,

Defendants.

Filed June 30, 1981

Appeal from Mills District Court. Leo F. Connolly, Judge.

Plaintiff-subcontractor appeals from judgment for defendant-general contractor in an action for breach of contract. AFFIRMED IN PART; REVERSED IN PART

Leland C. White, Harlan, Ia., and Malcolm D. Young, Omaha, Neb., for plaintiff-appellant.

Douglas S. Lash, Council Bluffs, Ia., for defendants-appellees.

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

Plaintiff-subcontractor, William Dobbs, appeals from judgment for defendant-general contractor, Knudson, Inc., in an action for breach of contract. We affirm in part and reverse in part.

In August, 1976, defendant was awarded the contract for construction of residential housing in Glenwood, Iowa. Plaintiff agreed with defendant to do the masonry work on the project and commenced the job in October, 1976. In December, 1976, plaintiff and defendant signed a written agreement for plaintiff's work. This written agreement states that $95,000 is the contract price, but below this figure is written in: "[a]bove contract price is not a firm price final contract price to be adjusted at later date." Plaintiff worked on the job until Septembe4 30, 1977, when defendant terminated his service, giving as a reason therefor that plaintiff had failed to comply with the terms of his contract in certain stated particulars.[1] Six regular progress payments were made to plaintiff totalling $77,485.44 for work done through April 20, 1977. Defendant refused to pay plaintiff's seventh progress request submitted in late June or early July of 1977 for work done through June 20. Defendant made no payment to plaintiff thereafter under the contract. Defendant did, however, pay claims of plaintiff's suppliers on the project, amounting to $18,582.51, which plaintiff concedes were his obligations. Defendant also paid $9,850 to another masonry contractor to complete the remaining 4% of the work not completed at the time of plaintiff's termination.

Plaintiff brought this action against defendant seeking to recovery additional payment for work performed under the contract. The trial court denied recovery to plaintiff and awarded defendant damages on its counterclaim. This appeal followed. The action having been tried in equity in the court below, our review is **de novo.** Iowa R. App. P. 4.

I. Plaintiff asserts the trial court erred in concluding that plaintiff had breached the agreement and therefore was precluded from making claim against defendant based on the contract. It is plaintiff's contention in this regard that it was defendant who

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[1]The letter terminating plaintiff's services alleged that this was done because plaintiff had failed to properly man the project, failed to provide necessary records as to progress being made on the project, failed to pay his suppliers on the job, failed to have material on the job site in a timely manner, and failed to complete his work so as not to cause delay. With respect to the final allegation, the letter of termination, dated September 27, 1977, was preceded by a letter of August 25, 1977, to plaintiff, advising him that his lack of progress was seriously jeopardizing the completion date for the general contractor under the agreement.

initially breached the agreement by failing to make the seventh progress payment. On our **de novo** review of the record, we conclude that based on section 9.3.1 of Article IX of the general conditions of the contract, the defendant was justified in withholding additional progress payments to plaintiff beyond the sixth progress payment because of plaintiff's failure to submit the itemized data substantiating its right to further payment which was called for by the contract document. In addition, shortly after the request for the seventh progress payment was made by plaintiff, defendant became aware of the fact that certain of plaintiff's suppliers on the project had not been paid. As we interpret the contract document, satisfactory evidence that such claims had been satisfied was a requisite for further progress payments.

The itemized data in support of further payment was never furnished by plaintiff prior to the bringing of this action. With respect to the unpaid suppliers, defendant was ultimately forced to pay $18,582.51 of plaintiff's material bills. Based on these circumstances, we find no breach of the agreement by reason of defendant's failure to make the seventh progress payment requested by plaintiff.

In spite of the foregoing circumstances, we are inclined to accept plaintiff's contention that if the evidence he produced at the trial established that the compensation which was called for in the agreement for work he completed exceeds that which has been paid to him or on his behalf, he is entitled to judgment for the difference. Plaintiff's failure to produce the documentation called for in the agreement prior to commencing suit should not prevent an award of damages actually proved to the satisfaction of the court. Unpaid material bills should only serve as a setoff against sums otherwise owed to plaintiff and should not serve as a complete bar to recovery. But conceding that plaintiff is correct as to these contentions, our review of the evidence convinces us (as it did the trial court) that plaintiff's evidence is insufficient to establish that he is entitled to additional payment from defendant.

Even if it is assumed that the plaintiff subcontractor's breach of contract does not preclude recovery for work completed under his contract with defendant, he nonetheless bears the burden of establishing that the amount called for under the contract exceeds the amount which has already been paid to him or on his behalf. Independently from the issue of whether plaintiff's breach of contract precludes recovery, the trial court found that plaintiff's evidence was insufficient to show that under the contract he was entitled to more than the substantial sums already paid by defendant either directly to plaintiff or in satisfaction of plaintiff's obligations to suppliers on the project.

We agree with these findings. On the matter of plaintiff's compensation, the record reveals that the written contract provided that the work would be completed by plaintiff for the sum of $95,000. Discussions took place between the parties as to how firm this figure should be. As a result of these discussions, the language "above contract price is not a firm price final contract price to be adjusted at later date" was inserted in the agreement below the $95,000 figure. Defendant's project manager, Richard Rogers, initialed this contract amendment on defendant's behalf. At the trial, Rogers testified that this amendment was inserted pursuant to negotiations with plaintiff wherein the witness, acting for defendant, had advised plaintiff that he would only go up to $100,000 as a maximum contract payment. Plaintiff, in his trial testimony, denied that any specific maximum amount was specified by Rogers incident to the contract amendment. In its findings of fact, the trial court specifically found Rogers' testimony on this point to be more credible than plaintiff's. In our de novo review we give weight to this finding. Iowa R. App. P. 14(f)(7). We deem it significant that plaintiff in his brief and argument does not argue that his testimony on this issue is more credible than Rogers'. His only argument is that Rogers' testimony is impermissible to vary the terms of a written agreement. Such argument is without merit. This transaction reflects an unintegrated agreement for purposes of allowing parol testimony to show the true agreement of the parties. Tamm, Inc. v. Pildis, 249 N.W.2d 823, 831 (Iowa 1976). Rogers' testimony is relevant and credible and the trial court's findings based on such testimony that plaintiff knew or should have known the contract maximum was $100,000 should not be disturbed on this appeal. Given this circumstance, it appears without dispute that plaintiff was paid in full. The sum of $77,485.44 was paid directly to plaintiff by the defendant. In addition, defendant was forced to pay unpaid material bills of plaintiff's suppliers amounting to $18,582.51. Defendant was also required to pay $9,850 to another contractor to complete work called for in plaintiff's contract. We do not read plaintiff's argument on appeal to claim that he is entitled to be paid for the portion of the contract which he did not complete. Clearly, he is not. Without determining whether defendant is entitled to a credit for the $9,850 payment to finish the job, it is apparent that in any event defendant is relieved from any obligation to pay plaintiff for the four percent of the job which, by plaintiff's own testimony, was not completed. Four percent of $100,000 is $4,000. This reduces the contract obligation to $96,000, a sum exceeded by prior payments to plaintiff or on his behalf.

There is yet another reason, also based on trial court's findings, why the judgment should be affirmed. Even if we ignore the trial court's findings that there was a $100,000 maximum price established for plaintiff's work under the contract, it is encumbent upon plaintiff to prove that he is entitled to more than those sums already paid to him or on his behalf by defendant. The trial court concluded that even if there were no contractual limit on the amount of payments to be made to plaintiff, that his right to compensation must be based upon the reasonable value of the services and materials and not upon the actual cost to the contractor. We agree that this measure of recovery is the correct one if there were no maximum contract price specified. See Olberding Construction Co. v. Ruden, 243 N.W.2d 872, 878 (Iowa 1976); McDonald v. Welch, 176 N.W.2d 846, 847 (Iowa 1970); Knudson v. Bland, 253 Iowa 614, 619, 113 N.W.2d 242, 245 (1962). The trial court found that assuming there were no contract maximum, plaintiff's proof failed to establish that the reasonable value of the services and materials which he performed exceeded those sums already paid to him or on his behalf. The trial court's findings in this regard are two-pronged: first, that there was "inadequate proof as to the fair and reasonable value of the items of his claim," and second, that the proof that plaintiff did offer (which went not to reasonable value but to actual costs of labor, materials, equipment, and overhead) was confused, inconsistent, incomplete and unbelievable. Again we give weight to these findings of the trial court based in part upon witness credibility. A reading of the record leaves the firm conclusion that there is no reasonable basis for fixing additional compensation due plaintiff after giving credit for the substantial sums already received by him. Amounts paid to defendant as general contractor by the state for the work performed by plaintiff as a subcontractor form no basis for measuring the value of plaintiff's services. The sums so paid to defendant represent a fixed bid price paid in installments as the work was completed. There is no way to interpolate the reasonable value of plaintiff's services from the payments made to defendant.

II. We separately consider plaintiff's claim that he is entitled to recover for damages to a forklift owned by plaintiff and used on the project at defendant's direction after plaintiff ceased to work on the job. The trial court denied recovery for such damage for two reasons: first, because it concluded this claim did not fall within the class of claims presented by plaintiff's pleadings, and second, because it determined proof of damages was fatally deficient. We agree with the trial court on both grounds.

III. Finally, we consider plaintiff's claim that the trial court erred in dismissing law action no. 19220 as part of its decision following trial of this equity action. Defendant urges that this action by the trial court was proper because the two actions had been consolidated for trial. We note in this regard that plaintiff has demanded a jury trial in the law action. Because such demand has never been withdrawn, we do not interpret the trial to the court as including the issues presented in the law action. This conclusion is strengthened by the fact that the order of the trial assignment only referred to the number of the equity case.

The trial court based its dismissal of the law action on the doctrine of collateral estoppel. Without determining in any way the availability of that doctrine as a defense to the pending law action following trial of the equity case, we hold it was error for the trial court to sua sponte deal with the law action as part of the equity proceeding. The law action is reinstated for such further proceedings as may be appropriate. The judgment in the equity action is affirmed; the judgment in the law action is reversed. Costs on appeal are taxed 80% to plaintiff, 20% to defendant.

AFFIRMED IN PART; REVERSED IN PART.