FILED
MAY 31 1979
CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

HILLEBRAND & SON, INC.,

Plaintiff-Appellant,

vs.

HENNING IMPLEMENT CO., and EDNA A. HENNING, RAYMOND W. HENNING and GARY R. HENNING,

Defendants-Appellees.

Filed May 31, 1979

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2-61480

Appeal from Scott District Court - L. D. Carstensen, Judge.

Plaintiff construction company appeals from judgment against it, and for defendants on their counterclaim, in a suit to foreclose a mechanic's lien for construction of a metal building. AFFIRMED AS MODIFIED.

Thomas R. Schirman, Jr. of Jungmann Law Offices, Eldridge, Iowa, for appellant.

Harold J. DeLange, II, of Wehr & DeLange, Davenport, Iowa, for appellees.

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

PER CURIAM

Plaintiff construction company appeals from judgment against it, and for defendants on their counterclaim, in a suit to foreclose a mechanic's lien for construction of a metal building.

I. Plaintiff contends on this appeal that the evidence sufficiently establishes its claim so as to entitle it, upon de novo review, to a judgment confirming its mechanic's lien in the sum of $5,992.25. The matter below was heard and considered in equity so our review is de novo. Iowa R. App. P. 4.

The evidence shows that the written agreement between the parties calls for completion by plaintiff, in a workmanlike manner of a 50' x 100' steel building for an agreed price of $36,284.00. It is also undisputed that some extra work was orally contracted for to be performed by plaintiff on a cost plus basis. The evidence shows plaintiff has been paid the sum of $38,000.00 for work performed under these agreements. It is incumbent on plaintiff to show the extent to which the value of the extra work performed exceeds that for which he has already been paid. In this regard the trial court found: "plaintiff has brought the court a bare allegation and unexplained bills to prove the account." We do not find that this statement of the trial court to be a fair characterization of the evidence presented. The president of the plaintiff corporation testified that with respect to the extra work defendants agreed to pay for material costs and labor charges at a fixed rate plus ten percent. He further testified that he was familiar with the materials and labor furnished for said extra work and that applying the agreed method of compensation to these quantities produces a balance of $45,078.75 ($36,284.00 under the original contract and $8,794.75 for extra work). The president of the corporation also testified that defendants were entitled to a credit of $1,678.75 for materials purchased by plaintiff but not used, thus reducing the total sum to $43,400.00. When the payments of $38,000.00 already received by plaintiff are applied to this total, the unpaid balance is $5,400.00.

While the trial court might have had some basis to disbelieve this testimony, it assigns no reason for so doing. It simply disregards this testimony and suggests, inaccurately, that plaintiff's claim is founded only upon "a bare allegation and unexplained bills." The testimony of plaintiff's president creates a prima facie case. It is not seriously contradicted by other evidence and defendants, on appeal, have provided us with no valid reason why this evidence should be disbelieved.

We credit the evidence of plaintiff which we have discussed and conclude that, as a result thereof, plaintiff is entitled under Iowa R. Civ. P. 225 to a set off of $5,400.00 against the amounts awarded defendants on their counterclaim. Because this adjudication results in a set off, we need not consider whether plaintiff's claim is barred by limitations. See section 614.12, The Code 1977.

II. We next consider that portion of plaintiff's appeal which pertains to the judgment awarded defendants on their counterclaim. Plaintiff contends that the trial court improperly allowed recovery under a theory of implied warranty not applicable to construction contracts. We disagree. The trial court's theory of recovery is proper under the holding of Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972), as well as the expressed provisions of the written agreement that the building be erected in a workmanlike manner. We also find on our de novo review of the evidence, that the trial court correctly concluded that defendants' measure of recovery on their counterclaim was the reasonable cost of repair to correct a roof leakage problem. Busker, 203 N.W.2d at 304. The evidence also sustains the trial court's finding that such costs would be $7,650.00.

Lastly, we reject plaintiff's claim that defendants refused to permit plaintiff to correct the deficiencies which serve as the basis for defendants' recovery on their counterclaim. The evidence reflects that any such refusal on defendants' part pertained to repetition of methods of repair which had previously, over a substantial period of time, proven inadequate.

As a result of the set off found to exist under Division I of this opinion, the amount of the judgment on defendants' counterclaim is reduced to $2,250.00, with interest at the legal rate from January 6, 1977. As so modified, the judgment of the trial court is affirmed. The costs on appeal shall be taxed one-fourth to the plaintiff and three-fourths to the defendants.

AFFIRMED AS MODIFIED.