

FILED

JAN 26 1982

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

ROGER F. HANSELMANN,)

Plaintiff-Appellee,)

vs.)

MARTIN C. WESTERFIELD,)

Defendant-Appellant.)

Filed January 26, 1982

24

1-365
2-65813

Appeal from Dubuque District Court - T. H. Nelson, Judge.

Defendant appeals from the trial court's judgment awarding plaintiff, a heating and air conditioning contractor, \$1200.00 for labor and materials for partial installation of heating and air conditioning equipment in defendant's home. Defendant also appeals the denial of his counterclaim, seeking recovery of the difference between the contract price and the actual cost to complete the work.

AFFIRMED.

William A. Conzett of Conzett, Norman, Lindahl, O'Brien & Bauer, Dubuque, for defendant-appellant.

Arthur F. Gilloon of Curnan, Fitzsimmons & Schilling, Dubuque, for plaintiff-appellee.

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

Defendant appeals from the trial court's judgment awarding plaintiff, a heating and air conditioning contractor, \$1200.00 for labor and materials for partial installation of heating and air conditioning equipment in defendant's home. Defendant asserts there was insufficient evidence to support the \$1200.00 award to plaintiff. Defendant also appeals the denial of his counterclaim, seeking recovery of the difference between the contract price and the actual cost to complete the work.

Our scope of review is limited to correction of errors at law. Iowa R. App. P. 4. We affirm.

I.

On September 23, 1976, the parties entered into a written contract providing that plaintiff would install a central air conditioning and heating system in defendant's home, then under construction. In November 1976, the contract was orally modified to authorize plaintiff to run the basement supply and return ducts underground at an additional cost of \$400. On December 26, 1976, defendant terminated the contract prior to completion of the job, allegedly due to plaintiff's poor workmanship and lack of progress. Prior to his termination, plaintiff had installed considerable heating and air conditioning equipment, and defendant had paid him \$2182.14 for the equipment but not for any labor. Defendant had to hire another contractor to finish the job.

On June 26, 1979, plaintiff filed a petition seeking recovery of an additional \$3596.25 allegedly due and owing on the contract. Plaintiff sought recovery on alternative theories of breach of contract, quantum meruit, and unjust enrichment. On July 9, 1979, defendant answered and counterclaimed for \$2019.88, which represented the difference between the contract price with plaintiff and the total cost of the job, including the monies paid to plaintiff and the cost of hiring another contractor to complete the job.

The matter was tried on September 11, 1980. Both parties presented testimony and evidence regarding the labor and materials expended by plaintiff and by the contractor hired to finish the job. Defendant presented bills from the finishing contractor. The parties disputed the amount and kind of work done to finish the job.

On September 22, 1980, trial court filed its findings, conclusions and decree. The court found: (1) that plaintiff's failure to timely complete the work was unjustified; (2) that prior to termination plaintiff installed certain equipment and expended \$800 worth of labor in doing so; and (3) that plaintiff installed the underground duct work. The court therefore awarded plaintiff \$800 for that labor and \$400 for the underground duct work, in addition to the \$2182.14 already paid. The court denied defendant's counterclaim on grounds that defendant "... has failed to establish by the preponderance of the evidence the reasonable value of the difference between the contract price and cost of finishing the work in as much as there was no showing that the amounts charged defendant by the subsequent contractor were for the same work." Defendant then instituted this appeal.

II.

Defendant asserts that the trial court erred in finding that defendant failed to establish the reasonable value of the difference between the contract price and the cost of finishing the work when there was no showing that the amounts charged defendant by the subsequent contractor were for the same work. The defendant must prove that damages were sustained. In Northrup v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850 (Iowa 1973), the effect of such a failure was discussed and distinguished from the failure to prove the amount of damages with certainty.

Courts have recognized a distinction between proof of the fact that damages have been sustained and proof of the amount of those

damages. If it is speculative and uncertain whether damages have been sustained, recovery is denied. If the uncertainty lies only in the amount of damages, recovery may be had if there is proof of a reasonable basis from which the amount can be inferred or approximated. Id. at 857.

Defendant would sustain damages when the cost to complete and the amount already paid to plaintiff exceeded the contract price. In this case, the absence of design prints or written specifications made it impossible to determine whether the subsequent contractor actually performed the same work which plaintiff had contracted to perform. When this is combined with the conflicting evidence in the record as to the amount of work remaining when plaintiff was dismissed, it is apparent that the trial court was correct to find in essence that defendant failed to prove the fact of damages. We, therefore, affirm.

III.

Defendant also asserts that there was insufficient evidence to support the trial court's award of \$1200.00 for the reasonable value of the work actually installed. We disagree and affirm. The record shows \$1000.00 of the original contract price was allocated to labor costs and approximately 80% of that work was completed as well as \$400.00 worth of the work under the oral modification.

The party who has failed to perform his contract in full is entitled to compensation for the part performed less damages caused to the non-breaching party by his failure. Aetna Iron and Steel Works v. Kossuth Co., 79 Iowa 40, 44 N.W. 215 (1890). Since defendant failed to prove his damages, the plaintiff's recovery in this case was justified.

AFFIRMED.