

FILED

APR 29 1980

IN THE COURT OF APPEALS OF IOWA

CLERK SUPREME COURT

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ROBERT E. LOBBINS,
d/b/a CUSTOM BUILDERS,

Plaintiff,

vs.

ARTHUR SCHOOLEY and CARMEN
SCHOOLEY,

Defendants.

Filed April 29, 1980

0-15
2-63568

Appeal from Davis District Court - James D. Jenkins, Judge.

Defendants appeal trial court's decree in favor of plaintiff building contractor in an action to foreclose a mechanic's lien asserting trial court erred in 1) finding no express or oral contract existed between the parties, 2) not construing ambiguities and unresolved issues against plaintiff, 3) finding plaintiff was entitled to a lien, and 4) determining the amount due plaintiff. **AFFIRMED WITH MODIFICATION.**

Sidney E. Drake of the Drake Law Office, Centerville, Iowa, for appellants.

Donald W. Harris of Bloomfield, Iowa, for appellees.

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

PER CURIAM

Defendants, Arthur and Carmen Schooley, appeal from trial court's decree foreclosing plaintiff building contractor, Robert Lobbins', mechanic's lien against their property. They assert trial court erred in 1) finding no express oral contract existed between the parties, 2) not construing ambiguities and unresolved issues against plaintiff, 3) finding plaintiff was entitled to a lien, and 4) determining the amount due plaintiff. We affirm with modification.

In early 1977, defendants, long-time operators of two sale barns, decided to build a new home on a rural tract of land they owned. Having no previous experience in building, they contacted plaintiff, a general contractor for more than 20 years, to determine if he could build a home for them. From a floor plan sketch by defendants, plaintiff drafted a working blueprint for a home with an estimated construction cost of \$70,000. Defendants indicated, however, this was more than they desired to spend and asked if plaintiff could reduce the cost. After reworking the plans, plaintiff submitted blueprints to defendants providing for a \$58,000 pre-cut house which would be completely finished inside and out, except for seeding the lawn. Defendants liked the plans, decided they were willing to spend \$58,000 for the house, and directed plaintiff to begin construction. No written contract was entered. No detailed plans or specific materials list were compiled, although plaintiff's original package price contained allowances for such items as cabinets, carpet, and light fixtures.

Construction commenced in May 1977. One or both of the defendants checked their home's progress almost every day. Virtually from the beginning, defendants requested modifications involving both structure and materials. Due in part to many of these changes, progress on the house was delayed. Defendants were not able to move into the house until December 1977, rather than September, as expected.

Plaintiff submitted his final bill in the amount of \$94,685.23 to defendants in late January 1978. Defendants had made payments to plaintiff in July and September 1977 for \$32,000 and \$18,474.59, respectively, resulting in a balance of \$44,210.64 allegedly due plaintiff.

When defendants refused to pay the balance, plaintiff terminated further work on the house, leaving the following unfinished: grading; some exterior painting; setting the compressor for the central air-conditioner; installation of an outdoor intercom speaker; pouring sidewalks; and installation of a light fixture.

The plaintiff filed a mechanic's lien on June 6, 1978, for \$44,210.64. Due to the impasse, plaintiff instituted this action to foreclose the lien. Defendants answered, claiming existence of an oral contract between the parties, plaintiff's failure to complete the terms of the contract, and plaintiff's negligent construction of the house. The matter came on for trial April 10, 1979.

Trial court found plaintiff and defendant had not entered into an express oral contract, but rather, merely an agreement to build a house at an estimated cost of \$58,000. Trial court further found plaintiff had performed the work requested and defendant was obligated to pay reasonable compensation for services rendered and materials furnished. Trial court determined, however, defendants were entitled to the following set-offs, totalling \$10,620.34: reparation of leaks in the basement, \$3,400; replacement of water-damaged carpet due to plaintiff's abandonment of work, \$2,300; repair of discolored bricks in upstairs fireplace, \$1,125; staining of exterior of house, \$1,600; fixing steel plate on top of fireplace chimney, \$68; pouring cement for sidewalks and steps, \$1,220; installation of air-conditioning compressor, \$907.34. Trial court consequently granted plaintiff's mechanic's lien against defendants for \$33,590.30, with interest at 7% per annum from March 28, 1978, until April 26, 1979, a total of \$36,128.38. Judgment of \$36,128.38 was to bear interest at 7% per annum after April 26, 1979.

I. Scope of Review. An action to foreclose a mechanic's lien is in equity and our review is *de novo*. Keith Young & Sons Co. v. Victor Senior Citizens Housing, Inc., 262 N.W.2d 554, 555 (Iowa 1978). Although we give weight to trial court's findings of fact, we are not bound by them. Iowa R. App. P. 14(f)(7).

II. Existence of Contract. Defendants allege trial court erred in determining no express oral contract existed between the parties. We find defendants' contention unpersuasive.

A contract is an agreement between two or more persons or parties to do or not to do something. Compiano v. Kuntz, 226 N.W.2d 245, 249 (Iowa 1975). We will determine whether a contract exists based on the parties' intentions as shown by the facts. Severson v. Elberon Elevator, Inc., 250 N.W.2d 417, 421 (Iowa 1977). For a contract to exist, there must be a mutual manifestation of assent to the same terms. Service Employees International, Local No. 55 v. Cedar Rapids Community School District, 222 N.W.2d 403, 408 (Iowa 1974); McCarter v. Uban, 166 N.W.2d 910, 913 (Iowa 1969); Bates v. First Trust and Savings Bank, 222 Iowa 407, 410, 269 N.W. 437, 438 (1935).

Applying these principles to the facts before us, we conclude trial court properly determined no contract to build a house for \$58,000 existed between the parties, but rather, merely an agreement to furnish labor and materials for the house to be built pursuant to the original plans and as modified by material changes authorized by defendants.¹ When the parties originally talked, plaintiff stated he could build a "nice" house for defendants according to the plans for approximately \$58,000. No further discussions on the specific aspects of the house took place, however. It is now clear this was unfortunate since plaintiff's views of a "nice" house were obviously not the same as defendants. The house built for defendants was not at all the same house plaintiff planned to build. As trial court sagely noted, "[d]efendants in effect ordered a stripped down Chevy. When it arrived and they saw what it looked like, they did not like its looks and added more and more. The cost was tremendous."² Where plaintiff did not have a firm bid or offer as to compensation to be paid for building the house in accordance with defendants' requirements and figures plaintiff gave defendants were significantly altered at defendants' direction, there was no binding offer to build for a maximum total price the type of house finally agreed on by the parties. Denniston & Partridge Co. v. Mingus, 179 N.W.2d 748, 752 (Iowa 1970).

III. Contract Ambiguities. Defendants also urge trial court erred in not construing all ambiguities in the contract against plaintiff as the party most able to anticipate the possible areas of conflict. Defendants cite North Dakota case law to support their proposition this doctrine should be applied to oral contracts arising in Iowa. We will not address the merits of defendants' argument, however, as it is not relevant in light of our determination no express contract existed between the parties.

IV. Substantial Performance. Defendants also assert trial court erred in granting plaintiff's mechanic's lien because he substantially failed to perform his contract. To support their argument, defendants point to the facts the basement leaked and plaintiff's termination of construction after he was refused payment.

Neither of these facts, however, is sufficient to bar plaintiff's recovery on a theory of implied contract. It is well settled a party to a contract, who has not performed it fully, may recover on a quantum meruit so much of the contract price as

¹ Defendant's Exhibit No. 6.

² App. p. 309.

remains after deducting what it will cost to make and complete the contract as agreed. McClay v. Hedge, 18 Iowa 66, 68-69 (1864). See also Johnson Construction, Inc. v. Vaudt, 158 N.W.2d 664, 666-67 (Iowa 1968). Similarly, plaintiff, notwithstanding failure of performance without justification, may recover on quantum meruit. Goeben v. Des Moines Asphalt Paving Co., 208 Iowa 1113, 1117, 224 N.W. 785, 788 (1929). Since plaintiff seeks recovery for labor performed and materials furnished, rather than pursuant to an express contract, and we have determined no contract in fact existed between the parties, we find defendants' contentions without merit.

V. Determination of Amount Due. As a final assignment of error, defendants complain trial court erred in determining the amount due plaintiff. Where, as here, there is no agreement as to the amount of compensation to be paid plaintiff, the proper measure for recovery is the reasonable value of the services rendered and materials furnished. Olberding Co. v. Ruden, 243 N.W.2d 872, 875 (Iowa 1976). Although the estimate of \$58,000 given defendants is of some relevance in ascertaining the fair and reasonable value plaintiff is to be compensated, the estimate is not conclusive. Id. Recovery is based on the reasonable value of the services and materials to defendant, not the actual cost to plaintiff. Id. at 878. Plaintiff's profit may be included as part of the reasonable value of the work performed where supported by evidence. Id.

Applying these standards to the evidence presented, we conclude trial court properly determined the amount due plaintiff for services rendered and materials furnished. While plaintiff's original estimates were nearly \$20,000 less than his established costs and the modifications defendants made in the house resulted in additional overruns of \$16,880, careful examination of plaintiff's materials and labor expenditures disclose all items were meticulously accounted for in computing the total bill.³ The evidence is without dispute plaintiff is an experienced contractor and well aware of the reasonable cost of materials and services. The only evidence presented by defendants to the contrary are their own general statements and a contractor's testimony charges of \$680 for labor in applying exterior stain seems high. Without more direct proof, we must accept as reasonable plaintiff's evidence of the compensation due.

³ Plaintiff's Exhibits Nos. 2 and 3.

Trial court also properly determined the amount of set-off due defendants for plaintiff's defective workmanship in constructing the basement, the fireplace, and sewer system, and the cost to defendants for hiring another contractor to complete the unfinished work. Defendants presented substantial evidence of the cost they have and will incur to make the various reparations. Plaintiff failed to challenge these estimates in any respect.

VL. Calculation of Interest. Defendants challenge to trial court's award of interest at 7 percent per annum from March 28, 1978, until April 26, 1979, has merit. Section 535.2(1), The Code 1977, which governs this action, provides the rate of interest on money after it becomes due is 5 percent per annum. Trial court's judgment should be modified to give plaintiff judgment for \$33,590.30 with interest at 5 percent per annum from March 28, 1978, to May 11, 1979, the date of trial court's decree, and 7 percent per annum thereafter. Olberding, 243 N.W.2d at 872.

Costs of this appeal are assessed against defendants.

AFFIRMED WITH MODIFICATION.