FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

BIG HAWK COMPANY,	)	
Plaintiff-Appellant,	)	Filed January 26, 1983
vs.	)	
MICHAEL GLICK,	)	2-437 2-66745
Defendant-Appellee.	)	

Appeal from Johnson District Court - L. Vern Robinson, Judge.

Plaintiff-contractor appeals from judgment for defendant on his counterclaim in an action to enforce a mechanic's lien. AFFIRMED WITH MODIFICATION.

Henry E. Nathanson, Cedar Rapids, Iowa, for plaintiff-appellant.

Philip A. Leff of Leff, Leff, Leff, Haupert & Traw, Iowa City, Iowa, for defendant-appellee.

Considered en banc.

PER CURIAM

Plaintiff-contractor, Big Hawk Company, appeals from a judgment for defendant, Michael Glick, on his counterclaim in an action to enforce a mechanic's lien. Plaintiff asserts: (1) that as a matter of law and fact defendant waived a requirement of the written contract that any changes be made in writing and that plaintiff is therefore entitled to a recovery based upon certain alleged oral changes in the written contract; (2) that plaintiff should be entitled to overhead and profits on those oral changes to which defendant agreed; (3) that plaintiff should be entitled to interest from the date of submission of a bill, rather than the date of filing the petition to enforce mechanic's lien, with regard to the amount set off against the judgment for defendant; (4) that certain items of damage not specified in the pleadings or pretrial statement should not have been awarded and that defendant's motion to amend his counterclaim either was not, or should not have been, sustained; (5) that the evidence was insufficient to establish the existence of a defect in a foundation wall; and (6) that the evidence was insufficient to establish certain costs of repair awarded by the trial court. We affirm with modification.

The parties entered into a written contract wherein plaintiff was to construct a house for defendant. Upon defendant's failure to pay all amounts plaintiff claimed to be due, plaintiff filed an action to enforce a mechanic's lien. Defendant counterclaimed for breach of contract, alleging that in certain particulars the construction was faulty and/or defective. The trial court awarded defendant a judgment of $6,826 on his counterclaim subject to a setoff of $1,529.46.

The parties' written contract provided that any changes involving extra charges were to be made in writing. Numerous changes in the contract specifications involving additional costs were made by oral agreement but the trial court allowed plaintiff to recover only the additional costs which defendant admitted that he owed.

The trial court awarded defendant judgment based on certain items of damage not specified in either the pleadings or a pretrial statement, stating that it had sustained defendant's motion to amend his counterclaim to conform to the evidence. At the time the motion was made, however, the court had stated that it was reserving ruling on the motion. No order specifically sustaining the motion was ever entered.

Defendant presented expert testimony that a foundation wall was defective while plaintiff's expert testimony was to the contrary. The trial court awarded certain damages based on the cost of repair estimated by defendant's experts even though plaintiff's experts had testified that certain substantially cheaper methods of repair existed.

I. Scope of Review. An action to enforce a mechanic's lien is in equity, Iowa Code § 572.26 (1981), and accordingly our review is **de novo.** Iowa R. App. P. 4.

> It is our responsibility to review the whole record and determine from the credible evidence rights anew on those propositions properly presented, provided issue has been raised and error, if any, preserved in the course of trial proceedings. While weight will be given to findings of the trial court, this court will not abdicate its function as triers **de novo** on appeal.

Ringland-Johnson-Crowley Co. v. First Central Service Corp., 255 N.W.2d 149, 151 (Iowa 1977).

II. Waiver of Contract Provisions. Plaintiff claims the trial court erred in holding as a matter of law that the provision in the contract requiring all building changes to be in writing could not be waived. In making its ruling on this issue the trial court stated:

> No doubt, in the vast majority of construction contracts the builder and buyer make a number of changes without reducing those changes to writing. The result of that type of practice is the kind of lawsuit we now find ourselves involved with at this time. The Court has to rely on the written document and does so. The Court will accept the Defendant's statement that he is responsible for certain

> items even though they are not listed on the written change orders. With that exception, however, the Plaintiff's claim must fail.

This recitation by the trial court reflects its consideration of the principles regarding waiver of such a contract provision espoused by the court in Hetherington Letter Co. v. O.F. Paulson Construction Co., 171 N.W.2d 264 (Iowa 1969). We find the trial court did not err as a matter of law.

Plaintiff next claims, however, that the trial court erred in not finding that the provision was waived by the parties' course of conduct. Plaintiff basically claims that because some oral modifications were upheld by the court that all such modifications should have been permitted. We believe that such a rule as proposed by plaintiff is not warranted under the instant facts.

The court in Hetherington stated:

> As stated in 13 Am. Jur. 2d, Building and Construction Contracts, section 24, page 26: "Although stipulations in building or construction contracts requiring written orders or agreements for extra work or alterations are valid and binding so long as they remain in effect, it is equally well settled that they may be avoided by the parties to the contract. The courts have adopted various theories of avoidance, which may be classified as those of independent contract, modification or rescission, waiver, and estoppel."
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> "A waiver of such stipulation by the owner is the theory on which it is most frequently avoided. Among the acts or conduct amounting to waiver are the owner's knowledge of, agreement to, or acquiescence in such extra work, a course of dealing which repeatedly disregards such stipulation, and a promise to pay for extra work, orally requested by the owner and performed in reliance thereon." See also Berg v. Kucharo Construction Co., 237 Iowa 478, 488-489, 21 N.W.2d 561, 567, 17A C.J.S. Contracts § 371(5)c, page 409; and Annos. 2 A.L.R.3d 620, 648.

Id. at 267. Similarly to the facts in Hetherington, the parties concede that some extras were furnished under an oral modification. Hetherington, however, does not stand for the proposition that once one oral modification is permitted that it is incumbent on the trial court to allow for all alleged oral modifications.

Like the court in Hetherington, we will examine the merits of plaintiff's contentions on the specific oral modifications. However, we defer this discussion to a later portion of this opinion.

III. "Reasonable Overhead and Profit." Plaintiff claims the trial court erred in refusing to award plaintiff reasonable overhead and profit on all change orders. In denying such damages, the trial court stated: "Any claim for overhead and profit was not part of the written contract and clearly an item which cannot be compensated for by the Court."

The change orders signed by defendant contain a provision stating "We agree to furnish labor and materials—complete in accordance with the above specifications at above stated prices." Plaintiff urges that the proper measure of damages is the reasonable value to the owner of the services rendered and material furnished, as distinguished from the actual cost to the contractor. Olberding Construction Co., Inc. v. Ruden, 243 N.W.2d 872, 875-78 (Iowa 1976). There is no indication that the prices quoted by plaintiff to defendant, in fact, represent only plaintiff's costs. There is no evidence in the record to indicate that the amount for which the parties contracted was in fact anything but the reasonable value of plaintiff's materials and labor. Accordingly, we find the trial court did not err in denying plaintiff's recovery for these claims.

IV. Amendment to Counterclaim. Plaintiff also asserts as error trial court's award to defendant for breach of contract damages which were not pled. The record shows that defendant moved to amend his counterclaim to conform to the evidence. The record does not reflect a specific ruling by the trial court. However, in its Findings and Conclusions, trial court stated "and said motion was sustained by the Court." "Allowance of such an amendment is the rule and denial the exception. Nevertheless, a trial court has considerable discretion in ruling on a motion for leave to amend, and we will reverse only when a clear abuse of discretion is shown." B & B Asphalt Co. v. T. S. McShane Co., 242 N.W.2d 279,

284 (Iowa 1976). "Failure to request time to prepare for trial of the 'new' issues--a remedy it says it desperately needed--weighs against [the resisting party's] argument on this appeal." See Ackerman v. Lauver, 242 N.W.2d 342, 345 (Iowa 1976). Plaintiff objected to defendant's evidence of damage at the time of its introduction. Consistent with the principles of equity, plaintiff's objections were not ruled on by the court at the time of the objection, but rather taken under consideration by the trial court. At the time defendant made his motion to amend, plaintiff failed to request additional time to prepare while asserting surprise and prejudice to the trial court as reasons for not granting the amendment. We hold the trial court did not abuse its discretion in allowing the late amendment.

V. Specific Items of Damage. Under our **de novo** review, we will examine plaintiff's contentions regarding specific items of damage and their valuation. We note at the outset that we will not scrutinize the indebtedness to plaintiff for which defendant has admitted liability.

The first item of damage to be examined is the basement wall. Our review of the evidence discloses that the parties arranged for the walk-out basement prior to signing the contract. The weight of the credible evidence in the record convinces us that no change order was necessary as the basement wall was part of the construction contemplated by the original contract. Accordingly, we find no error on the part of the trial court in not awarding this amount to plaintiff.

The next item we examine is plaintiff's claim for damages resulting from an oral painting contract with a third person. There is evidence in the record that defendant authorized plaintiff to hire someone to do the painting. We find plaintiff should receive some damages on this element. Evidence as to the value of the painting ranges from $500 to $1,700. We conclude, however, that defendant agreed to painting services in the amount of $500.

The next point of contention is the driveway. There was testimony that plaintiff believed the indebtedness for the driveway was to be paid by the land developer, not him. The record reveals, however, that defendant authorized and approved the construction of the driveway by plaintiff. On the basis of the record before us, we find plaintiff is entitled to $1,144, the value of the driveway.

The defendant contracted for $220 worth of light fixtures in his original contract with plaintiff. The actual value of the fixtures installed was $338.06. The trial court did not include either amount in its determination of defendant's obligation. However, despite the fact the fixtures selected by defendant cost $338.06, we believe the evidence clearly establishes that plaintiff specifically told defendant the light fixtures would be covered by the original allowance in the contract. Further, we do not accept plaintiff's argument that trial court gave defendant a $220 credit for the fixtures. From our calculation of the $65,818.60 accounting credit awarded to defendant, we conclude that the allowance for light fixtures was not included.

The plaintiff also claims defendant owes for a larger heater which was installed in lieu of a smaller one stated in the original contract. We find that defendant did not authorize the installation of this unit and, accordingly, find the trial court did not err on this issue.

We find trial court committed no error by awarding defendant accounting credits of $65,818.06. On the basis of the foregoing analysis, we conclude plaintiff was entitled to the amount of $68,991.52. We then deduct the credit allowances of $65,818.06 to defendant and find that plaintiff is entitled to $3,173.46.

VI. Plaintiff's Challenges to Defendant's Counterclaim.

A. Foundation Wall. Plaintiff contends that the trial court erred in finding a foundation wall was defective in the absence of competent evidence of injury and damage. Defendant produced two expert witnesses. These witnesses testified essentially that if the construction of the wall had been proper structural

failure of the wall would not have occurred. Plaintiff's attacks on defendant's experts qualifications go to the credibility of the witnesses and does not render their testimony incompetent. Our review of the record convinces us that the trial court did not err in finding the foundation wall to be defective.

B. Unreasonable Measure of Damages. Plaintiff claims trial court erred in finding $2,900 to be the reasonable cost of repair of the foundation and garage slab problems where there was evidence of a less costly alternative. Plaintiff also challenges the value of $2,445 set by the trial court as the cost of repair of alleged water problems.

Plaintiff alleges that the court should have accepted the testimony of its witnesses that the cost to repair the garage slab to be $250-$300 and the cost to repair the water damage to be $1,000. One of defendant's experts testified that the garage slab and foundation repair costs would be $3,200 and the other testified to a value of $2,900. We believe the evidence shows that the mere re-capping of the garage slab, as urged by plaintiff, would not properly repair the damage. We find the trial court did not err in assessing $2,900 as the reasonable value to repair the foundation and garage slab.

Plaintiff next alleges that the trial court should have accepted the $1,000 value for the repair of water damage rather than the amount of $2,455. We find the valuation made by the trial court was within the permissible range as shown by the evidence. Accordingly, we find no error on this issue.

We conclude defendant is entitled to the amount of $6,826 for damages from plaintiff's failure to construct the home in a reasonable and workmanlike manner. We offset against this amount plaintiff's entitlement to $3,173.46. This would result in judgment for defendant in the amount of $3,652.54.

We therefore order that defendant have judgment against plaintiff in the amount of $3,652.54. We accordingly affirm the trial court's judgment with modification.

AFFIRMED WITH MODIFICATION.