IN THE COURT OF APPEALS OF IOWA

No. 5-347 / 94-1343

MAX SMITH d/b/a MAX SMITH CONSTRUCTION,

Plaintiff-Appellee,

vs.

CITY OF HAVERHILL, IOWA,

Defendant-Appellant.

FILED
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CLERK SUPREME COURT

Appeal from the Iowa District Court for Marshall County, Carl E. Peterson, Judge.

The defendant city appeals from the district court judgment awarding the plaintiff contractor the net retainage under the parties' contract for the construction of a sewer system. **AFFIRMED IN PART; REVERSED IN PART AND REMANDED.**

Patrick W. Brooks of Brooks & Ward, Marshalltown, for appellant.

James R. Cook, West Des Moines, for appellee.

Considered by Hayden, P.J., and Sackett and Habhab, JJ.

HABHAB, J.

The defendant, Max Smith, entered into a contract with the cities of Haverhill, Ferguson, and Laurel for sewer system construction. The present action only involves Smith and the city of Haverhill.

As part of the project, Smith was required to restore constructed areas, including proper ground preparation, seeding, and watering. Smith made several attempts to reseed the constructed area. On May 4, 1993, the city notified Smith that the reseeding was improper and directed that certain areas be reseeded. After the notice, Smith completed a third seeding. The city was dissatisfied with the third attempt and hired an independent landscaper to perform the seeding.

On August 10, 1993, the parties signed a final change order changing the project completion date to October 1, 1992, from a November 1991 date. The cost of the independent landscaper's work was $3699.12. On the basis of Smith's failure to complete the seeding, Haverhill invoked the contract retainage provision permitting Haverhill to retain a portion of the money to be paid Smith under the contract.

On August 25, 1993, Smith filed a petition seeking to recover the money retained by Haverhill and an amount for additional work performed. Haverhill filed an answer asserting it properly retained a portion of the amount Smith was due under the contract and brought a counterclaim seeking liquidated damages and additional damages for Smith's delay in completion of the contract work.

The case proceeded to trial. At the time of trial, the disputed retainage was $12,462.89. The city claims it produced evidence it properly notified Smith of the defective seeding for invoking the retainage provisions and the seeding performed by the independent landscaper was limited to the areas affected by Smith's construction.

On June 15, 1994, the district court entered a judgment awarding Smith the net retainage held by the city. Although the court determined Smith was not entitled to amounts for additional work performed not covered by the contract, it concluded Smith was entitled to the contractual amounts retained by Haverhill.

Haverhill appeals.

The essential character of a cause of action and the relief it seeks, as shown by the complaint, determine whether an action is at law or equity. *Moseback v. Blythe*, 282 N.W.2d 755, 758 (Iowa App. 1979). Where the primary right of the plaintiff arises from nonperformance of a contract, where the remedy is money, and where the damages are full and certain, remedies are usually provided at law. *Id.* The present action was tried at law. Our scope of review is on assigned error only. Iowa R. App. P. 4.

Findings of facts in a law action are binding on us if supported by substantial evidence. Iowa R. App. P. 14(f)(1). We construe the district court's findings broadly and liberally. *Grinnell Mut. Reins. Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988). The district court's findings of fact have the effect of a jury verdict and are binding upon us if supported by substantial evidence. *Id.* In case of doubt or ambiguity we

construe the findings to uphold, rather than defeat, the district court's judgment. *Id.* We are prohibited from weighing the evidence or the credibility of the witnesses. *Id.*

> A finding of fact is supported by substantial evidence if the finding may be reasonably inferred from the evidence. In evaluating sufficiency of the evidence, we view it in its light most favorable to sustaining the court's judgment. We need only consider evidence favorable to the judgment, whether or not it was contradicted.

Briggs Transp. Co. v. Starr Sales Co., 262 N.W.2d 805, 808 (Iowa 1978).

"Evidence is substantial or sufficient when a reasonable mind could accept it as adequate to reach the same findings." *Waukon Auto Supply v. Farmers & Merchants Sav. Bank*, 440 N.W.2d 844, 846 (Iowa 1989) (citation omitted). Evidence is not insubstantial merely because it could support contrary inferences. *Grinnell Mut. Reins. Co.*, 431 N.W.2d at 785.

With these principles in mind, we turn to the issue raised on appeal.

On appeal, Haverhill contends the district court erred in finding Haverhill could not charge Smith for the seeding done by the landscaper, Weitzell. The district court found this claim must fail for the following four reasons:

1. The conduct of the parties and their written representations in the final estimate reflect approval of the surface restoration, both as to work and amount.
2. The job was determined to be complete on October 1, 1992.
3. There appears no evidence the City rejected the reseeding and dirt work done by the Contractor at the direction of their Engineer in May 1993.
4. There is insufficient showing that the work performed by the independent landscaper was only on defective areas for which the Contractor might have been responsible.

Regrettably we are working without the benefit of an appellee's brief. This places us in the extremely difficult and time consuming position of having to search the entire record to determine whether the trial court's findings of fact are supported by substantial evidence.

We have done so and reach the following conclusions:

1. There is substantial evidence to support the trial court's findings that the plaintiff is not entitled to his claim for "extra work" in the amount of $16,692.00. Thus, we affirm the trial court on this issue.

2. There is substantial evidence in the record to support the trial court's findings that the City of Haverhill is not entitled to its claim of $300 per day for delay in completion of the contract and for its claim for additional engineering expenses. The trial court is affirmed on this issue.

3. The plaintiff claims he is entitled to the whole of the agreed to retainage claim of $12,462.92. The City argues rather persuasively that it is entitled to offset the amount of the retainer percentages payable to the plaintiff by the amount it had to pay the independent landscaper to correct the improper seeding. We agree with the City on this issue. Once a contractor has met its burden to show substantial performance, the City has the burden to show any defects or incompletions which may be deducted from the contract price. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 406 (Iowa App. 1994). The City here carried its burden to produce a

finding that it is entitled to an offset from the $12,462.92 retainage of $3,699.12. Thus, we reverse the trial court's ruling by reducing the plaintiff's judgment to $8,763.82.

In conclusion, we affirm the decision of the district court in all respects except for the costs incurred by the City for the reseeding done by Weitzell. That part of the district court's ruling is reversed. The district court is to enter judgment in favor of the plaintiff and against the defendant in the amount of $8,763.82. The plaintiff is entitled to interest as determined by the district court.

AFFIRMED IN PART; REVERSED IN PART AND REMANDED.