IN THE COURT OF APPEALS OF IOWA

FILED
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CLERK SUPREME COURT

JACK WALTERS & SONS, CORP.,
Plaintiff-Appellant,
vs.
PHILLIP DESTIVAL,
Defendant-Cross-Appellant.

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6-108
85-579

Appeal from the Iowa District Court for Bremer County (No. 21881) - J. W. Frye, Judge.

Plaintiff appeals and defendant cross-appeals a judgment in an action involving foreclosure of a mechanic's lien and legal counterclaims. **AFFIRMED.**

Sydney A. Thomas of Mosier, Thomas, Beatty, Dutton, Braun & Staack, Waterloo, for plaintiff-appellant.

Gaylen V. Hassman of Engelbrecht, Ackerman & Hassman, Waverly, for defendant-cross-appellant.

Heard by Snell, P.J., and Hayden and Sackett, JJ.

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Plaintiff appeals and defendant cross-appeals a judgment in an action involving foreclosure of a mechanic's lien and legal counterclaims. Plaintiff asserts that 1) the jury verdict was excessive and the result of passion or prejudice, and 2) certain expert testimony was improperly admitted. On cross-appeal, defendant asserts that 1) plaintiff failed to plead and prove the Wisconsin law allegedly applicable under the terms of the parties' contract, 2) plaintiff's mechanic's lien failed to comply with statutory requirements, and 3) plaintiff, a Wisconsin corporation, failed to prove it was licensed to do business in Iowa and therefore could not maintain this action. We affirm.

Plaintiff, Jack Walters & Sons, Corp., contracted with defendant, Phillip Destival, for construction of a pole frame building at a cost of $16,500.00. Destival made a down payment of $4,125.00; the balance was due following completion of the work.

Evidence indicates the building was constructed so the southeast corner was 8-10 inches below the existing terrain. Defendant refused to pay the balance owing on the contract, claiming the building was substantially below the appropriate grade level.

Plaintiff corporation subsequently filed a mechanic's lien foreclosure action seeking the unpaid balance of the contract price. Destival counterclaimed for damages on theories of breach of contract, negligence, and breach of warranty. The foreclosure action was tried to the court, while the legal action was tried to the jury.

Following a trial, the court determined that Jack Walters & Sons, Corp. was entitled to the lien it sought. The jury awarded Destival damages in the amount of $14,000.00, resulting in a net award to him of $1,750.00. Plaintiff has appealed from this result and defendant has cross-appealed.

I. 93

The plaintiff's first claim is that the award of damages was excessive. The assessment of damages is traditionally a jury function and will only be disturbed for the most compelling reasons. Nelson v. Steiner, 262 N.W.2d 579, 583 (Iowa 1978). We will reduce or set aside an award of damages only if it is 1) flagrantly excessive or inadequate; 2) so out of reason as to shock the conscience or sense of justice; 3) the result of passion, prejudice, or other ulterior motive; or 4) lacking in evidentiary support. Olson v. Drahos, 229 N.W.2d 741, 421 (Iowa 1975).

It is plaintiff's contention that the award of damages is the result of passion or prejudice and is lacking in evidentiary support. In considering this claim, we view the evidence in a light most favorable to the verdict and need only consider the evidence favorable to the defendant whether it is contradicted or not. Id. at 743.

Reviewing the evidence in light of this standard, we conclude the award of damages should not be disturbed. Two defense witnesses, an engineer and a construction grade foreman, testified that the building was improperly constructed and should have been built above existing ground level. L. William Kene, the engineer, indicated that the most practical solution would be to raise the building, which would cost approximately $18,000.00.

Based on this evidence, a jury could reasonably conclude that the damages totalled $14,000.00. Plaintiff points out that its expert witness estimated that the cost of raising the building was much less than this amount. However, the jury was certainly at liberty to reject this testimony. The mere fact that there is contradictory evidence in the record is not a sufficient basis for reversal.

II.

Plaintiff also contends that the trial court erred in admitting certain

testimony of defendant's witness, John McKee, a real estate broker.

During direct examination of McKee, the following transpired:

> Q. What was your observation regarding that shed when you were out there, Mr. McKee? A. Obviously, it'd been incorrectly constructed due to—
>
> MR. CLEMENTS: Objection, your Honor. The witness is not qualified to answer this type of question.
>
> THE COURT: Overruled.
>
> Q. (By Mr. Hassman) You may answer. A. It was obviously incorrectly sited and constructed.
>
> Q. And as a consequence, what did you observe about it? A. It's been built—if I may say, it's just been built in such a way that it's now setting in a hole, and it would carry no value.
>
> Q. If the building had not been built in a hole, Mr. McKee, if it'd been built at a higher grade so as to utilize the existing ground and turf, what value would the building have? A. It would have the value of construction at the time, which I've seen the contract and I see the construction contract was sixteen five, and I would concur with that.
>
> Q. Would any partial repair or remedy of the building such as doing additional landscaping and additional tiling and that would leave the building in the hole—would that be a reasonable and sensible solution in your judgment? A. No.
>
> MR. CLEMENTS: Objection, your Honor. There has been no foundation or no showing that the witness is qualified to testify in the area of farm building construction.
>
> THE COURT: Overruled.
>
> MR. CLEMENTS: He's testified or he's possibly qualified to testify to values of things, but not to the procedure of constructing buildings.
>
> THE COURT: Overruled.

Plaintiff argues on appeal that the final question in this colloquy required McKee to testify concerning farm building construction. It is claimed that this is outside McKee's area of expertise and his answer should not have been admitted. We disagree.

The admissibility of opinion testimony, lay or expert, results in the sound discretion of the trial court; the court's determination will not be disturbed on appeal unless manifest abuse of that discretion causes prejudice to the complaining party. State ex rel. Leas in re O'Neal, 303 N.W.2d 414, 420 (Iowa 1981).

The trial court's discretion, however, is not unlimited. "Expert testimony is not admissible unless the witness is shown to be qualified and the facts upon which he bases his opinion are sufficient to enable a witness so qualified to express an opinion which is more than mere conjecture." Ganrud v. Smith, 206 N.W.2d 311, 314 (Iowa 1973).

In the present case, we find no abuse of discretion in admitting McKee's testimony. It is undisputed that McKee is qualified to assert an opinion concerning the value of the farm building which is the subject of this action. The final question, which plaintiff objects to, certainly could have been phrased with more particularity. However, read in context, it is apparent that defendant's attorney was merely trying to determine if additional landscaping and tiling would change McKee's opinion concerning the value of the building. McKee's answer reflects that in his opinion the building would still have no value. Contrary to plaintiff's assertion, we find that this testimony was within McKee's area of expertise.

III.

In his cross-appeal, defendant alleges that the parties' contract specifically indicates that Wisconsin lien law was to apply. It is argued that plaintiff's failure to plead and prove the applicable Wisconsin statutes constitutes reversible error. We disagree.

Foreign law, both statutory and case law, must be pled and proven. If statutory, it may be judicially noted under the procedure set forth in Iowa R. Civ. P. 94. However, the failure of a party to pursue either procedure does not require reversal. In such a situation, we presume the foreign law to be the same as our own. In re Estate of Allen, 239 N.W.2d 163, 169 (Iowa 1976). Under this principle, Iowa law was properly applied in the present action, regardless of whether the contract referred to foreign law.

IV.

Defendant asserts two additional claims in his cross-appeal: 1) plaintiff's mechanic's lien did not comply with statutory requirements, and 2) plaintiff failed to prove it was licensed to do business in Iowa.

We have reviewed the record and find that error was not preserved on these issues. Defenses which admit the facts of the adverse pleading but seek to avoid their legal effect must be specially pleaded. Iowa R. Civ. P. 101. Defendant's failure to do so precludes our consideration of the issues on appeal. See Foods, Inc. v. Leffler, 240 N.W.2d 914, 920 (Iowa 1976).

Finding no error, we affirm in all respects.

AFFIRMED.