

IN THE COURT OF APPEALS OF IOWA

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No. 3-024 / 92-456

PELLA BUILDING SYSTEMS, INC.,
Appellee,

vs.

RANDALL G. MILLER and CAROL MILLER,
Appellants.

Appeal from the Iowa District Court for Appanoose
County, James D. Jenkins, Judge.

Defendants appeal from a district court judgment in
favor of plaintiff on its action to enforce a mechanics'
lien arising out of a home construction contract. **AFFIRMED
AS MODIFIED.**

Louis R. Hockenberg and Dennis L. Packett of Sullivan &
Ward, P.C., Des Moines, for appellants.

Richard K. Updegraff of Brown, Winick, Graves,
Donnelly, Baskerville & Schoenebaum, Des Moines, for
appellee.

Considered by Oxberger, C.J., and Schlegel and Habhab,
JJ.

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OXBERGER, C.J.

On February 22, 1990, Pella Building Systems (PBS) entered into a written contract with Randy and Carol Miller to build an "A" frame lake home for \$31,500. Although PBS had been in business for many years, this was to be the first "A" frame house constructed by the company. PBS agreed to build the house for a reduced price because it wanted to use the house as a model for other potential buyers.

The house was to be constructed according to plans which were attached to the contract. The Millers agreed to provide electrical fixtures and appliances. They were also to perform the painting, finishing grade of the yard, and planking of the deck. All the other work and materials was to be provided by PBS. The contract included an allowance of \$10 per square yard for floor covering.

The house was to be constructed on a lot near Lake Rathbun. The Millers had not yet purchased the lot when the contract with PBS was entered into. However, the parties agreed to begin construction of the house. The parties soon discovered the house encroached upon a neighboring lot.

On March 15, 1990, the Millers, Keith Goodyke, the president of PBS, and Paul Vande Noord, a carpenter, met to discuss the problem. The Millers agreed to buy the neighboring lot. The parties also agreed to make some changes to the original plans--one of the bedrooms was

moved to the upper floor and a bathroom, walkway, and second deck were added to the upper floor. After some discussion, the parties agreed these changes would be made for an additional price of \$2,500, making the total contract price \$34,000.

While the house was under construction the Millers requested several changes and additions. After the house was completed, PBS's costs to complete the house were \$51,663, and it sought payment for an additional \$22,163 from the Millers. The Millers refused to pay, and PBS filed a mechanic's lien. On March 28, 1991, PBS filed a petition to foreclose the mechanic's lien. The Millers filed a counterclaim seeking an offset for \$5,100 which they had paid directly to suppliers and subcontractors.

The district court entered its decision on February 17, 1992. The court found the parties abrogated the original contract. The court concluded the Millers should pay PBS's cost to build the house plus 15% for overhead and profit, for a total of \$51,663. The Millers had already paid \$30,500. Also, the Millers were allowed an offset of \$1,928 for carpeting and additional paint. The court therefore entered judgment against the Millers for \$19,235. The Millers were also ordered to pay \$2,500 for PBS's attorney fees. The Millers appealed.

I. An action to foreclose a mechanic's lien is an equitable proceeding, and our scope of review is de novo. Moore's Builder & Contractor v. Hoffman, 409 N.W.2d 191,

193 (Iowa App. 1987). While we give weight to the findings of the trial court, especially where credibility of witnesses is involved, we are not bound by them. Id.

II. The Millers contend the district court should not have found the parties abandoned their written contract. The court found the written contract was abrogated and superseded due to the many changes requested by the Millers.

The parties to an executory contract may mutually consent to its abandonment, Siebring Manufacturing Co. v. Carlson Hybrid Corn Co., 246 Iowa 923, 928, 70 N.W.2d 149, 152 (1955), or they may consent to a modification of the contract. Davenport Osteopathic Hospital Association v. Hospital Service, Inc., 261 Iowa 247, 253, 154 N.W.2d 153, 157 (1967). Agreements made after a written contract which modify it or add to it or are collateral to it are valid and enforceable. S. Hanson Lumber Co. v. DeMoss, 253 Iowa 204, 208, 111 N.W.2d 681, 684 (1961).

We determine PBS is bound by its agreement to build the house for \$34,000. There is no evidence to show the parties intended to abandon the contract. Instead, the evidence shows they agreed to modify the existing contract. The house was constructed according to the original plan, as modified on March 15, 1990. Also, both parties rely upon parts of the written contract in their arguments before this court. We conclude there was no abandonment of the written contract.

III. The Millers also contend the award of damages to PBS was not supported by the evidence. The district court did not base the judgment upon the contract, but awarded PBS all of its costs to construct the house. The Millers state that PBS agreed to build the "A" frame house for a total of \$34,000. The Millers believe they should only be responsible for any changes and additions not included in the written contract, as modified on March 15, 1990.

Under Iowa Code section 572.16 (1991), an owner's liability is limited to the amount provided in the owner's contract with the principal contractor. A builder may recover for extra work only if it was performed with the knowledge or consent of the adverse party. Central Iowa Grading, Inc. v. UDE Corp., 392 N.W.2d 857, 860 (Iowa App. 1986).

If an owner makes changes and additions to a project as the construction is in progress, an implied contract arises permitting the builder to recover the reasonable value of its services to perform the changes. S. Hanson, 253 Iowa at 210, 111 N.W.2d at 686; Peterman v. Hardenbergh, 250 Iowa 931, 933, 97 N.W.2d 152, 154 (1959); Sulzberger Excavating, Inc. v. Glass, 351 N.W.2d 188, 194 (Iowa App. 1984). A builder has the burden to show items which were a change made subsequent to the original agreement. Peterman, 250 Iowa at 936, 97 N.W.2d at 155. The builder also has the burden to establish the reasonable value of its services. Denniston & Partridge Co. v. Mingus, 197 N.W.2d 748, 753 (Iowa 1970).

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Thus, PBS had the burden to show which items were changed after the original agreements and the reasonable value of performing such changes. We conclude that many of the items which PBS claims were extras should actually be included in the sales price of \$34,000.

Doug Thornburg, the electrician on the project, charged PBS \$1,066.73 for additional labor and materials above his original bid of \$1,750. However, he testified his bid did not include any costs for installing telephone outlets, cable jacks, ceiling fans, or appliances, and these items were therefore extras.

We conclude these items should have been part of the original contract. The contract provided PBS would perform the electrical work on the building and that the Millers would provide their own appliances and electric fixtures. Thus, the parties anticipated appliances would be installed in the house, and PBS would be responsible for installing them. The ceiling fans came in a unit which included lights, and were installed in place of light fixtures. We find it hard to believe Thornburg did not know the Millers expected to have a telephone. Therefore we believe the installation of telephone outlets should be part of the contract. Furthermore, Thornburg testified he installed the cable jacks in the same outlets as were used for the telephone.

We determine the allowable extras should be limited to electrical fixtures purchased by Thornburg and additional

wiring necessitated by the change of some appliances from gas to electric. The amount of these allowable extras are \$433.51.

Don Nilius, Jr., the plumber on the project, charged PBS a total of \$1,250 for his labor. About \$500 of this was for alleged extra work. Nilius testified he charged extra for the second bathroom, the furnace flue, and an outdoor faucet.

We conclude none of these items should be considered an extra because they were all included in the original contract, as modified on March 15, 1990. The second bathroom was included in the March 15, 1990, modifications PBS agreed to make for \$2,500. The position of the furnace flue was changed when the Millers purchased a higher efficiency furnace. However, there was no evidence to show there was any additional cost for placing the flue in a location other than that originally planned. Furthermore, the contract specifically provided PBS would provide an outdoor faucet.

Paul Vande Noord, the carpenter on the project, charged PBS a total of \$13,750 for his labor, which included \$1,750 for extras. Vande Noord testified he changed the height of the bar, added a counter in the laundry room, changed the shape of the vanity top in a bathroom, and added an extra closet among other things. We conclude the amount of \$1,750 should be charged to the Millers for these extras.

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Keith Goodyke, representing PBS, the general contractor, testified the Millers chose more expensive cabinets than that provided for in the contract. However, he presented no evidence to show what additional cost was due to the cabinets, although he testified this information was available to him. We find he has not met his burden to prove any additional cost due to the cabinets.

Goodyke testified the cost of lumber for the additional closet was about \$550. Extra lumber for the downstairs deck cost about \$1,136. The labor for completing the downstairs deck has been attributed to Vande Noord. A patio door and window were added upstairs, for a total cost of about \$870. The Millers chose a more efficient furnace, which cost an additional \$646, a larger water heater, which cost an additional \$62, and different bathroom fixtures, which cost an additional \$450. The cost of the upstairs deck was included in the March 15, 1990, modification.

We conclude the amount of the extras to be charged to the Millers is \$5,897.51. The Millers should be charged for this amount in addition to the contract price of \$34,000.

IV. The Millers claim PBS should not be entitled to recover for its overhead and profit. The district court awarded PBS \$7,749.52 for overhead and profit, which represented 15% of its alleged additional costs.

When a contractor has a definite contract for a stipulated sum and is allowed payment for extras on the

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basis of quantum meruit, the sum claimed and allowed is the reasonable value of the services and materials furnished and presumably includes a fair return to the builder. S. Hanson, 253 Iowa at 210, 111 N.W.2d at 686. A profit may be included as part of the reasonable value of material furnished and labor performed if there is evidence to support such a claim. McDonald v. Welch, 176 N.W.2d 846, 849 (Iowa 1970).

Thus, a profit to the builder may be included in a calculation of the reasonable value of extra services and materials furnished. An additional amount of profit should not be included for items covered by the contract, because the contract presumably includes a fair return to the builder. Goodyke testified PBS's overhead was about 12% to 13%. We determine PBS is entitled to an award of 15% of the allowed cost of extras to represent overhead and profit. This amounts to \$884.63.

V. The Millers contend the district court erred in failing to grant them all of the credits to which they are entitled. The Millers state that they paid \$5,100 for items which were the responsibility of PBS. The district court allowed the Millers an offset of \$1,928.38 for carpeting and paint.

The Millers seek to be reimbursed for the cost of bringing water and electric service to their property, installing drainage tile and lightning rods, and providing some deck lumber. These items were the responsibility of

the Millers under the contract. Therefore, they are not entitled to an offset for these expenditures.

The Millers also ask to be awarded an offset for work which was not completed, such as the installation of fireplace flooring and a dryer outlet. The Millers did not present any evidence to show the reasonable cost of completing these items. We conclude this lack of evidence precludes them from receiving an offset for these items.

We agree with the district court that the Millers are entitled to an offset for the cost of carpeting and paint. However, our calculations show the amount of this offset should be \$1,937.

VI. Finally, the Millers claim the district court should not have awarded PBS \$2,500 for trial attorney fees.

Section 572.32 provides for an award of attorney fees to a successful plaintiff in an action to enforce a mechanic's lien. We have determined PBS was only partially successful in its action. We therefore reduce the award of attorney fees to \$1,000.

VII. In summary, we have determined the Millers are responsible to pay the contract price of \$34,000. They are also responsible to pay \$5,897.51 for labor and materials due to changes and additions made to the contract and \$884.63 for PBS's overhead and profit for the changes and additions. This amounts to a total of \$40,782.14. The Millers have already paid PBS \$30,500 and are entitled to an offset of \$1,937. PBS is entitled to a judgment of

\$8,345.14 against the Millers, plus interest. In addition, the Millers must pay \$1,000 for PBS's trial attorney fees. We modify the district court decision to make these changes. Costs of this appeal are assessed one-half to each party.

AFFIRMED AS MODIFIED.