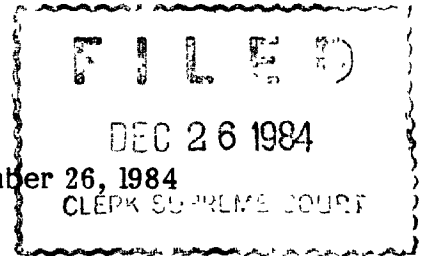


IN THE COURT OF APPEALS OF IOWA



HOMES BY BURR, INC.,)

Plaintiff-Appellant.Cross-Appellee,)

Filed December 26, 1984

CLERK SUPREME COURT

vs.)

AL ANDERSON,)

4-404
83-1031

380

Defendant-Appellee/Cross-Appellant.)

Appeal from the Iowa District Court for Polk County - Luther T. Glanton,
Judge.

Plaintiff has appealed and defendant has cross-appealed from a district
court decision in a suit arising from a contract to build a house. AFFIRMED IN
PART; REVERSED IN PART; AND REMANDED.

Michael M. Sellers, Des Moines, Iowa, for plaintiff-appellant/cross-appellee.

Edwin N. McIntosh and Leo L. Finkelstein of Davis, Hockenberg, Wine,
Brown & Koehn, Des Moines, Iowa, for defendant-appellee/cross-appellant.

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

HAYDEN, J.

Plaintiff has appealed and defendant has cross-appealed from a district court decision in a suit arising from a contract to build a house.

Plaintiff is a corporation whose president and sole shareholder is Frederick Burr. On October 12, 1979, plaintiff entered into a contract with defendant, Al Anderson, to build a house for defendant in Cumming, Iowa. The contract provided that the cost of the house was to be \$341,214 plus any agreed upon changes. Plaintiff was to be paid twelve percent of the changes as an additional fee.

After completion of the construction plaintiff brought suit for defendant's failure to pay the last installment of the purchase price. Defendant counterclaimed seeking damages for alleged poor workmanship. The case was tried to the court.

The trial court found that the agreed upon changes to the house totaled \$59,849 above the contract price. The court added to that amount \$7,182 representing twelve percent of the changes and \$1,400 additional expenses incurred due to defendant's failure to pay some of the subcontractors on time, making the total cost of the house \$409,645. Both parties agreed that defendant had paid \$400,865. The trial court found plaintiff was due \$8,780 on the house. The court also awarded plaintiff \$3,000 in damages for various delays defendant caused in the construction schedule. The court offset the amount to which plaintiff was entitled by \$12,007 which represented defendant's damages for breach of an implied warranty of good workmanship. The court entered judgment for defendant for \$227.

On appeal plaintiff alleges that (1) the evidence shows that the changes in the house added substantially more to the contract price than found by the trial court; and (2) the amount awarded defendant for improper workmanship should be reduced resulting in a net award of \$29,004 to plaintiff. In his cross-appeal,

defendant claims: (1) the award of damages for improper workmanship was too low; (2) the \$3,000 award to plaintiff for delays in construction should be reversed; and (3) the trial court made a computation error in totaling the amount of damages to defendant for improper workmanship so that the net award to defendant should be increased by \$100.

Our review of this action at law is on assigned error. Iowa R. App. P. 4. The findings of fact of the trial court have the effect of a special verdict. Id. These findings are binding upon this court if they are supported by substantial evidence. Iowa R. App. P. 14(f)(1).

I. Change Orders. Plaintiff contends that the trial court erred in relying upon defendant's exhibit E to determine the increase in the cost of the house due to changes rather than upon plaintiff's exhibit 4. Plaintiff's exhibit 4 consists of two parts. The first part (pages 1-7) is a list of notes and changes, some of which have been marked "OK" by defendant. This section of the exhibit is hard to read and is somewhat cryptic in its brevity. The second part of the exhibit (pages 8-36) is composed primarily of change order forms. The problem of compiling a complete list of changes is compounded by the fact that some of the jotted notes in the first part of the exhibit are duplicated by official change orders in the second part. Defendant's exhibit E purports to be a summary of all approved changes in exhibit 4. After comparing the two exhibits we find that the trial court's total reliance on exhibit E was misplaced.

Defendant's exhibit E indicates there are \$990 in changes in pages 3-7 of plaintiff's exhibit 4 not reflected in other change orders. We find that the overwhelming weight of the evidence shows this figure must be increased. On page 3 of exhibit 4 it indicates that "electric utilities was an owner cost." Defendant marked "OK" beside this item. Although the amount is not given there, it is clear from plaintiff's exhibit 15, a spread sheet with a list of change orders broken down by contract categories, that the amount of electric utilities under

contract category 2-200 was \$1,253. Similarly, exhibit 4 contains an item under category 2-500 for landscaping which was an owner expense under the contract. This entry on the exhibit was also approved by defendant. Although part of the entry is illegible, plaintiff's exhibit 15 shows the amount of this category to be \$854.

On page 6 of plaintiff's exhibit 4 there is an entry regarding changes in light fixtures which indicates a \$7,200 increase in the cost of the house. This amount is confirmed by plaintiff's exhibit 15. There is no indication of defendant's approval of this item on exhibit 4. However, there was extensive testimony at trial on this subject. Defendant admitted that he personally selected the fixtures and had them billed to plaintiff. He also admitted that this was one of the contract categories in which increased costs had been anticipated at the time the contract was executed. We hold that defendant, by selecting the fixtures at an increased cost, implicitly agreed to the increase and is, therefore, obligated to reimburse plaintiff for the cost. Testimony at trial showed that the actual cost of the lighting selected by defendant exceeded the contract estimate by \$7,168.

Except for these items defendant's exhibit E appears to accurately summarize plaintiff's exhibit 4. Other entries on pages 3-7 of exhibit 4 not included on exhibit E are, as far as we can tell, either duplicated by later official change orders which are included on exhibit E, are not increases due to changes but are explanations of what was being done, or were apparently not agreed to by defendant. Therefore, we find that the trial court's findings regarding the change orders based on exhibit E are supported by substantial evidence with the modifications we make after also considering plaintiff's exhibits 4 and 15.

Adding together the cost increases of the electric utilities (\$1,253), the landscaping (\$854), and the lighting (\$7,168), we find that the total of \$9,275 exceeds the \$990 amount on defendant's exhibit E by \$8,285. This amount should have been included by the trial court among the approved changes in the cost of

the house, making the total changes \$68,134. Calculating plaintiff's additional fee of twelve percent of the changes based on the new figure yields \$8,176.

Substituting the new figures into the formula used by the trial court, we find the cost of the house was \$341,214 plus extras of \$68,134, plus twelve percent of these extras or \$8,176, plus the \$1,400 additional amount charged by subcontractors due to defendant's delays in payment making a total of \$418,924. This exceeds the amount paid by defendant (\$400,865) by \$18,059, which is the amount due plaintiff under the contract.

II. Damages for Delay. Evidence showed that at the time the contract was entered into the parties contemplated that the house would be completed in ten to twelve months. The construction of the house actually took almost two years. Plaintiff attributed the construction delays to changes made by defendant and alleged that he lost money due to the delays. The trial court found that plaintiff had made less than \$5,000 each of the three years prior to the construction of defendant's house and made similar amounts since that time. The trial court also noted that a home show house built by plaintiff in 1981 while the defendant's home was still under construction was sold at a loss of more than \$30,000. Nevertheless, the trial court awarded plaintiff \$3,000 damages for these delays. We reverse this award since there is no evidence in the record supporting it.

III. Defective Workmanship. Defendant testified that he was unsatisfied with some of the workmanship on the house. In addition, an expert witness testified concerning some problems in construction and finishing which he had observed. The trial court found the following items to be a breach of the implied warranty of construction in a good and workmanlike manner, see Busker v. Sokolowski, 203 N.W.2d 301, 303 (Iowa 1972), and made the following determinations of the reasonable cost of repair: (1) find grading of the yard - \$250; (2) exterior repainting - \$500; (3) rust stain on roof - \$50; (4) damaged

copper gutter - \$100; (5) removal of paint over gutters - \$100; (6) garage door - \$60; (7) cracks in plastering - \$450; (8) interior staining and painting - \$1,500; (9) refastening carpet where it meets tile - \$100; (10) adjustment of sliding doors - \$100; (11) replacement of rail on redwood deck and staining patio screen doors - \$120; (12) replacement of warped walnut door - \$254; (13) replacement of jacuzzi tile - \$1,000; (14) deficiencies in heating and cooling system - \$7,523.

We conclude there was evidence to support each of these awards except for the last one concerning the heating and cooling system. The trial court characterized this expense as the cost of "repairs" to the system. The evidence showed, however, that these were not costs for repairs but for new equipment needed because of unanticipated water quality problems.

Defendant's house was to be furnished with a water source heating and cooling system utilizing an artesian well over 600 feet deep. After defendant moved into the house it was discovered that the system was not functioning properly because of the high mineral content in the well water. A filtration system was later installed. The uncontradicted evidence was that no one knew the quality of the water at the time the estimate of the cost of the system was made. Defendant testified that he would have paid for the filters if they had been included in the bid. Moreover, there was testimony that the installation of the filters cost no more at the later time than it would have if it had been done earlier. The installer of the system testified he had been involved with ten to twelve such systems and only defendant's needed the filtration. Defendant also testified that he was receiving the benefits of the system now.

We conclude that the need for the water filters was not reasonably foreseeable by plaintiff. There is no reason defendant should receive this benefit at plaintiff's expense. Therefore, the award of \$7,523 for deficiencies in the heating and cooling system is reversed. The total of the other damages awarded to defendant is \$4,584. Subtracting this amount from the \$18,059 due plaintiff leaves a net award to plaintiff of \$13,475.

We remand the case to the trial court for an award of \$13,475 to plaintiff.

The costs of the trial and appeal of this action shall be borne by defendant.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.