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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

D & B AGRO SYSTEMS, LTD.,	)	
Plaintiff-Appellee,	)	Filed August 26, 1987 62
vs	)	
FROHWEIN ENTERPRISES, LTD.,	)	
Defendant-Appellant,	)	7-198
and	)	86-596
IRON HAWK BUILDERS, INC.,	)	
Defendant-Appellee.	)	

Appeal from the Iowa District Court for Story County (31184), Carl E. Peterson and Carl D. Baker, Judges.

Defendant-appellant appeals from a directed verdict against it, denial of its motions for a continuance and new trial, and imposition of discovery sanctions striking its affirmative defenses and dismissing its counterclaim. **AFFIRMED AND REMANDED.**

Jim R. Sween, Eldora, for defendant-appellant.

Jack A. Hall of Wilson, Hall & Craig, Eldora, for plaintiff-appellee D & B Agro.

J Kirk Norris of Skinner, Beattie & Wilson, Altoona, for appellee/cross-appellant Iron Hawk.

Considered by Oxberger, C.J., and Snell and Hayden, JJ.

HAYDEN, J.

Defendant-appellant, Frohwein Enterprises, Ltd. (Frohwein), appeals from a directed verdict against it, denial of its motions for a continuance and new trial, and imposition of discovery sanctions striking its affirmative defenses and dismissing its counterclaim. Defendant-appellee, Iron Hawk Builders, Inc. (Iron Hawk), cross-appeals from denial of its motion to conform its pleadings to the proof at trial. Plaintiff-appellee, D & B Agro Systems, Ltd. (D & B), requests additional relief in the form of appellate attorney's fees pursuant to its contract with Frohwein. We affirm on all claims and remand for a determination of reasonable attorney's fees on appeal to be awarded to D & B.

This case arose from the sale of a prefabricated grain bin by D & B to Frohwein. D & B initially hired Iron Hawk to erect the building. However, when Frohwein reported delays and poor work by Iron Hawk, D & B dismissed Iron Hawk before completion and hired another builder to finish the product.

Frohwein, dissatisfied with the quality of construction on the building, refused to pay the full price. D & B thereupon filed the present mechanic's lien proceeding against Frohwein. D & B also filed a claim against Iron Hawk seeking damages for defective and incomplete work. Frohwein responded to the mechanic's lien proceeding by alleging affirmative defenses and by filing a counterclaim against D & B and a third-party claim against Iron Hawk. Frohwein alleged that it was entitled to a set-off against the purchase price for defects in the building. Frohwein also alleged that delays in the construction had cost it substantial damages for alternative grain storage, transportation of grain, and losses of grain. Iron Hawk counterclaimed against D & B for breach of contract and against Frohwein for interference with a contractual relationship.

Prior to trial Frohwein and its attorneys became involved in a dispute over fees, the manner in which the case was being handled, and the personnel

being assigned to the case. Eventually, the attorneys were permitted to withdraw. Frohwein had difficulty thereafter finding another attorney to take its case. While Frohwein was without counsel, its affirmative defenses against D & B were stricken and its counterclaim against D & B was dismissed as sanction for Frohwein's failure to answer interrogatories. Also, Frohwein's two pretrial motions for continuance, seeking more time to retain or prepare new counsel, were both denied. Frohwein eventually retained another attorney six days before trial.

The case was tried to a jury. However, trial court directed a verdict in favor of D & B on its mechanic's lien claim against Frohwein and entered judgment against Frohwein for $48,076.00, including attorney's fees. The jury then returned a verdict awarding Iron Hawk $15,289.78 on its breach of contract claim against D & B. The jury denied all other claims submitted to it.

I. Discovery Sanctions. Frohwein asserts trial court abused its discretion by striking its affirmative defenses and dismissing its counterclaim as a sanction for failure to answer interrogatories.

On December 28, 1984, D & B served nine written interrogatories upon Frohwein, requesting information regarding Frohwein's affirmative defenses and counterclaim. On June 26, 1985, having received no response, D & B filed a motion to compel discovery. The trial court sustained this motion the same day and ordered Frohwein to answer the interrogatories and produce the requested documents by July 22, 1985. Through inadvertence another trial judge sustained the same motion on July 9, 1985, and ordered Frohwein to comply by July 25, 1985. On August 22, 1985, at the pretrial conference, trial court again ordered Frohwein to answer these interrogatories, this time by September 3, 1985. The court also set February 11, 1986, as the date for trial. Again Frohwein failed to respond.

Throughout the above chronology Frohwein was represented by the Whitfield law firm of Des Moines. However, Frohwein and Whitfield apparently experienced differences regarding fees and the handling of and the personnel assigned to the case. On June 13, 1985, Whitfield drafted a motion to withdraw, but on July 9, 1985, trial court was informed Whitfield would continue to represent Frohwein. The relationship nonetheless deteriorated. On October 22, 1985, Whitfield informed Frohwein of its intention to withdraw on October 31st. On November 5, 1985, Whitfield filed its application to withdraw as counsel. On November 25th trial court gave Frohwein two weeks to engage other counsel before Whitfield would be allowed to withdraw. On December 9, 1985, Whitfield was allowed to withdraw. Frohwein still had not retained new counsel and the interrogatories remained unanswered. D & B filed its motion for sanctions on December 11, 1985. On January 31, 1986, trial court struck Frohwein's affirmative defenses and dismissed its counterclaim, pursuant to Iowa Rule of Civil Procedure 134(b)(2).

Imposition of discovery sanctions by trial court is discretionary and will not be reversed unless there has been an abuse of discretion. State ex rel. Parcel v St. John, 308 N.W.2d 8, 10 (Iowa 1981). Where, however, the sanctions elected by trial court is dismissal of the action, the range of discretion is narrowed. Smiley v. Twin City Beef Co., 236 N.W.2d 356, 360 (Iowa 1975). In order to justify dismissal of the action, a party's failure to comply with a discovery order must be due to willfulness, fault, or bad faith. Id. Discovery sanction cases may be divided into two classes: (1) violation of a trial court discovery order, and (2) violation solely of a rule of civil procedure relating to discovery. Suckow v Boone State Bank & trust Co., 314 N.W.2d 421, 425 (Iowa 1982). Dismissal is a discovery sanction generally used when a party has violated a trial court's

order; when no trial court order has been disobeyed, a lesser sanction may be indicated. Id. at 426.

Frohwein does not dispute that numerous trial court discovery orders were violated, nor that the interrogatories to be answered dealt primarily with its affirmative defenses and counterclaim. Frohwein suggests, however, the failure to obey trial court's orders was the sole fault of Whitfield and it should not be held responsible for Whitfield's actions. We disagree.

In our system of representative litigation, each party is deemed bound by the acts of his lawyer-agent. Moser v. Thorp Sales Corp., 312 N.W.2d 881, 888 (Iowa 1981) (quoting Link v. Wabash Railroad Co., 370 U.S. 626, 633-34, 82 S. Ct. 1386, 1390, 8 L. Ed. 2d 734, 740, reh. denied, 37 1 U.S. 873, 83 S Ct. 115, 9 L. Ed. 2d 112 (1962)); see also Farnsworth v. Hazelett, 197 Iowa 1367, 1370, 199 N.W. 410, 411, 38 A.L.R. 814, 817 (1924) (knowledge of attorney is chargeable to the client). Thus, under appropriate circumstances, dismissal may be entered against a party as a result of counsel's actions. Denton v Mr. Swiss of Missouri, Inc., 564 F.2d 236, 240-41 (8th Cir. 1977).

We conclude the dismissal of Frohwein's counterclaim and the striking of its affirmative defenses by trial court was not an abuse of discretion. It is undisputed Whitfield had notice and knowledge of the trial court's orders and the record reflects Frohwein did also. We conclude the repeated violations of these orders are sufficient evidence of willfulness and fault to justify the sanctions imposed.

II. Motion for Continuance. Frohwein asserts trial court also abused its discretion by denying its motions for continuance filed, respectively, on January 20, 1986, and February 7, 1986. Frohwein contends a continuance should have been granted due to its inability to retain new counsel, after the withdrawal of Whitfield, until February 5, 1986, just six days before trial.

Trial courts have broad discretion in ruling on motions for continuances and this discretion is abused only when it appears to have been exercised on grounds or for reasons clearly untenable or to an extent clearly unreasonable. Hawkeye Bank & Trust Co. v. Michel, 373 N.W.2d 127, 129 (Iowa 1985). The trial court's ruling is presumptively correct and a party challenging the ruling has a heavy burden to overcome the presumption. Countryman v. McMains, 381 N.W.2d 638, 640 (Iowa 1986).

This case had been on file since February 26, 1983. Frohwein was aware of problems in its relationship with Whitfield as early as June 1985 and had knowledge by October 22, 1985, of Whitfield's intentions to withdraw. Furthermore, the December 9, 1985, order permitting Whitfield's withdrawal stated that it would not be grounds for continuance. It is also significant Frohwein did not object to Whitfield's withdrawal, although it now appears to suggest it was prejudiced thereby.

The foregoing facts evidence litigation long-delayed and provide ample grounds for denial of a motion for continuance. We conclude trial court did not abuse its broad discretion by so ruling.

III. Directed Verdict. Frohwein asserts the trial court erred on the merits by directing a verdict in favor of D & B on its mechanic's lien claim. In its primary argument against the directed verdict, Frohwein contends the trial court erred by holding that where D & B had substantially performed its construction contract (conceded by Frohwein), the only offset to the contract price available to Frohwein was the actual cost of repairs. Frohwein argues the court erred by holding on this basis that Frohwein could not recover as a setoff the difference between the contract price and the value of the allegedly defective building finally constructed. Frohwein also argues the trial court erred by excluding its proposed evidence of the difference in value.

We do not interpret trial court's ruling as narrowly as Frohwein. Trial court found there was not sufficient evidence to submit the issue of offsets to the jury since there was inadequate testimony to support a conclusion regarding the extent of the defects in the building claimed or the cost for the repair of these defects. Trial court thereupon concluded the substantial performance of D & B, in conjunction with the lack of evidence regarding defects, mandated a directed verdict.

Our review is for correction of errors at law, Iowa R. App. P. 4; and we construe the evidence adduced at trial in the light most favorable to Frohwein. Iowa R. App. P. 14(f)(2).

In determining whether to apply the "reduction in value" rather than the "cost to repair" rule, the Iowa Supreme Court has stated:

> As a general rule, the measure of damages is the cost of correcting the defects or completing the omissions, rather than the difference in value between what ought to have been done in the performance of the contract and what has been done, where the correction or completion would not involve unreasonable destruction of the work done by the contractor and the cost thereof would not be grossly disproportionate to the results to be obtained.

Busker v. Sokolowski, 203 N.W.2d 301, 304 (Iowa 1972) (quoting 13 Am. Jur.2d Building and Construction Contracts § 79 at 79).

Frohwein concedes there was a dearth of evidence offered at trial relative to the cost, if any, of repairs. Yet it nonetheless contends trial court was in error when it declined to apply, or admit evidence relevant to, the "reduction in value" rule. Under Busker, the "reduction in value" rule is not applicable unless the cost of correcting or completing the work is "grossly disproportionate to the results to be obtained." Id. This has not been shown where there was a dearth of evidence offered at trial on the issue. We conclude the trial court was correct in directing a verdict in favor of D & B.

IV. Motion for New Trial. Frohwein's final assertion on appeal is trial court abused its discretion in not granting it a new trial. Frohwein premises this assertion upon the alleged errors we have discussed above.

In ruling on a motion for a new trial, trial court has broad discretion to determine whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 14(f)(3); Marriage of Johnson, 311 N.W.2d 697, 699 (Iowa App. 1981). Only when the evidence clearly shows trial court abused its discretion will we interfere. Thomas Truck & Caster Co. v. Buffalo Caster & Wheel Corp., 210 N.W.2d 532, 536 (Iowa 1973).

As we have upheld all the trial court rulings which Frohwein asserts dictate a new trial when viewed cumulatively, we conclude trial court did not abuse its discretion in denying Frohwein's motion for a new trial.

V. Motion to Conform Pleadings to the Proof. Iron Hawk asserts on appeal trial court abused its discretion in denying its motion to conform its pleadings to the proof at trial. Iron Hawk sought thereby to have its mechanic's lien decreed first and paramount as against the real estate of Frohwein, and further requested the lien to be foreclosed. Trial court, however, ruled Iron Hawk made only a breach of contract claim against D & B, and only an intentional interference with a contractual relationship claim against Frohwein. The jury found for Iron Hawk on the former claim and against on the latter. However, trial court found no claim for foreclosure of a mechanic's lien was pleaded or proved.

Whether an amendment to the pleadings substantially changes the issues is the determining factor in whether it should be allowed. Beneficial Finance Co. v. Reed, 212 N.W.2d 454, 456 (Iowa 1973).

Upon our review of the record, we conclude trial court did not abuse its discretion in denying Iron Hawk's motion for leave to amend to conform pleadings

to the proof. Iron Hawk recovered damages for breach of contract against D & B. The jury found against Iron Hawk on its claim for intentional interference with a contractual relationship against Frohwein. Amending the pleadings to provide for foreclosure of Iron Hawk's mechanic's lien would have substantially changed the issues raised.

VI. Attorney's Fees. D & B requests appellate attorney's fees pursuant to its contract with Frohwein. The contract states: "In event of default in payment under the terms of this agreement, the purchaser-owner [Frohwein] agrees to pay service charges plus legal fees."

The right to attorney's fees is statutory. Bankers Trust Co. v. Woltz, 326 N.W.2d 274, 278 (Iowa 1982). Iowa Code section 625.22 provides in pertinent part: "When judgment is recovered upon a written contract containing an agreement to pay an attorney's fee, the court shall allow and tax as a part of the costs a reasonable attorney's fee to be determined by the court." This section also justifies awarding appellate attorney's fees where the written agreement in no way limited the provision for attorney's fees to costs in the trial court. Woltz, 326 N.W.2d at 278.

In this case Frohwein defaulted in its payment under the contract. The contractual provision for attorney's fees in no way limited them to costs in the trial court. We therefore remand to trial court for the limited purpose of an evidentiary hearing on the fixing of appellate attorney's fee of D & B, to be taxed as a part of the costs to Frohwein.

AFFIRMED AND REMANDED.