FILED
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CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

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ROBERT WALTER and **ROGER WALTER,**)

Plaintiffs-Appellees/ Cross-Appellants,)

vs.)

KENNETH R. SCAFE, Individually, and **KENNETH R. SCAFE** doing business as **A & S CONSTRUCTION, TERRA DOME INC.,**)

Defendants-Appellants/ Cross-Appellees.)

Filed April 23, 1986

6-02
84-1214

Appeal from the Iowa District Court for Adams County (No. 10831) - James W. Brown, Judge.

Defendant appeals and plaintiffs cross-appeal from judgment in an action for breach of contract. **AFFIRMED.**

Robert A. Rolfe of Phipps & Rolfe, Lamoni, for defendant/appellant.

Richard L. Wilson and Ronald D. Bonnett of Wilson, Bonnett & Christensen, Lenox, for plaintiffs/cross-appellants.

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

DONIELSON, P.J.

Defendant, Kenneth R. Scafe, doing business as A & S Construction, appeals and plaintiffs, Robert and Roger Walter, cross-appeal from judgment in an action for breach of contract. Defendant asserts that judgment should not have been entered against him individually and that the evidence was sufficient to establish as a matter of law plaintiffs' failure to mitigate damages. Plaintiffs assert, inter alia, that judgment should also have been entered against defendant construction company, that punitive damages should have been awarded, and that the evidence was sufficient to establish their entitlement to damages for rental of other living quarters.

In 1981, plaintiffs contacted Scafe and Bill Ayers in Creston, Iowa, regarding construction of an energy-efficient earthen home. The plaintiffs contracted with Scafe. Ayers was affiliated with A & S Construction and was responsible for inspection of the homes. Scafe signed the contract as follows: Kenneth R. Scafe, A & S Constr. Disputes over the work developed both before and after construction was completed and plaintiffs ultimately moved out when attempts at repair did not remedy their complaints. Scafe made offers to try to remedy the problems, which were not accepted by the plaintiffs.

Plaintiffs' breach of contract action, filed on July 2, 1982, was tried to the court, which awarded plaintiffs damages of $30,120 against Scafe individually based upon a finding that corporate status had not been disclosed to plaintiffs. The court awarded neither punitive damages nor the cost of renting other living quarters after plaintiffs moved out of the home.

I.

Scafe's first claim is that he should not be held personally liable because Walters entered into the contract at issue on August 1, 1981 with A & S Construction Co., Inc. to build an earth home. The trial court found neither the signature

on the contract, nor any discussions between the parties would have disclosed to Walters that "A & S Constr." was an incorporated business. See 19 C.J.S. Corporations § 840 at 264-65 (1940) ("Directors or officers may, of course, so control as to create personal obligation on their part, where they do so they cannot excuse their failure to perform by setting up acts of the corporation, especially where they control every act of the corporation through stock ownership and membership in the board of directors. Directors and officers are personally liable on written instruments signed by them which are not so worded as to bind the company. So, where directors or officers contract personally with one who is ignorant of the existence of the corporation and to whom no disclosure thereof is made, they are personally liable."). Scafe is forced to concede that the Walters did not know A & S Construction was anything other than an unincorporated business operated by Scafe when the contract was entered into. The business's advertisements do not even suggest a corporate status. Scafe submits, however, that the mechanic's lien filed on April 9, 1982, served as notice to the Walters that A & S Construction was a corporate entity. We find this version of the facts unpersuasive because on January 1, 1982, the State of Iowa cancelled A & S Construction's corporate status. Even if the Walters could have been charged with having knowledge that A & S Construction was incorporated as of April 9, 1982, A & S Construction ceased being a corporation almost four months prior to such date. Thus, A & S Construction ceased being a corporate entity before the time Scafe claims the Walters should have known of its corporate status. We agree with the trial court that Scafe should be personally liable for this contract. See Miller v. Hartford Fire Insurance Co., 251 Iowa 665, 674, 102 N.W.2d 368, 373 (1960).

Scafe also seeks to reverse the trial court's determination that he failed to prove the Walters failed to mitigate damages. We find no merit in Scafe's

position. The Walters' decision not to allow Scafe to make offered repairs, particularly when Scafe's prior practices would lead the Walters to conclude Scafe would not provide suitable repairs, did not amount to a failure to mitigate damages. Further, Scafe seems to confuse mitigation of damages with settlement of a suit. It was only after the Walters filed suit that Scafe made overtures to reach a compromise. The Walters were well within their rights in rejecting Scafe's offers after damages arose and did not fail to mitigate damages by taking this posture.

II.

The Walters' initial cross-appeal issue involves whether the trial court erroneously deemed recovery against A & S Construction as a separate defendant. Having already decided A & S Construction did not have corporate status which results in A & S Construction being legally the same entity as Scafe, and having held Scafe personally liable, a judgment against A & S Construction would only result in a judgment against the same party. Thus, we find no merit in this issue raised by the Walters.

As to liability against A & S Construction which would hold Ayers personally liable, we decline to make such a determination. Ayers was not a party to the contract and was properly not deemed a party to this suit. Furthermore, liability was imposed against Scafe individually, which did not result in A & S Construction being liable.

The Walters further claim the trial court erred by not awarding punitive damages. We find no error in this ruling. While punitive damages cannot be recovered for breach of contract, punitive damages may be awarded in exceptional cases involving willful torts or intentional wrongs if committed with malice, Pogge v. Fullerton Lumber Co., 277 N.W.2d 916, 920 (Iowa 1979). No doubt the Walters suffered mental anguish and distress of this situation, however, focusing

upon Scafe's conduct, not the Walters' anguish, leads us to conclude the trial court's decision is appropriate. We do not believe Scafe's conduct rose to the necessary level to justify awarding punitive damages.

Finally, the Walters seek $3,525 in damages for costs incurred when the house was uninhabitable due to Scafe's breach of contract. This damage amount represents: $1,000 for four month's rent, $1,092 for utilities, and $17 for additional insurance costs. Such damages are characterized as consequential damages. See generally Dugguery Brothers v. Lewis Roofing Co., 139 Iowa 432, 436, 116 N.W. 711, 712-13 (1908).

Scafe does not contest the fact such damages may be awarded, but does claim the Walters did not establish their claim by a preponderance of the evidence.

Had the Walters introduced evidence as to the rental cost of the house they stayed in while the earth home was uninhabitable, the trial court seems to have been willing to grant such damages. The trial court, however, found no evidence was introduced as to the amount of rent and no evidence was offered as to the length or time such rent was paid. Because the Walters did not introduce evidence as to the amount of rent and how long such rent was paid, we will not disturb the trial court's ruling.

Because the claim for damages as to rental property was decided, we find no merit in the Walters' claimed damages for additional utilities and insurance paid because the house was uninhabitable.

For these reasons, the trial court's decision is affirmed.

AFFIRMED.