IN THE COURT OF APPEALS OF IOWA

No. 1-545 / 10-1278
Filed October 5, 2011

FLYNN BUILDERS, L.C.,
Plaintiff-Appellee,

vs.

MATTHEW P. LANDE and
CHRIS LANDE,
Defendants-Appellants.

Appeal from the Iowa District Court for Boone County, William C. Ostlund, Judge.

Homeowners appeal from an adverse judgment in an action to enforce a mechanic's lien. **AFFIRMED.**

Duane M. Huffer and Robert L. Huffer of Huffer Law, P.L.C., Story City, for appellants.

Meredith C. Mahoney Nerem and John D. Jordan of Jordan & Mahoney Law Firm, P.C., Boone, for appellee.

Heard by Sackett, C.J., and Vaitheswaran and Tabor, JJ.

SACKETT, C.J.

Matthew and Chris Lande appeal from the district court judgment enforcing Flynn Builders, L.C.'s ("Flynn") mechanic's lien for construction work performed by Flynn on property Landes owned in Boone County, Iowa. Landes raise eleven issues for our review. We affirm.

I. Background Facts and Proceedings.

Landes own property near Boone, Iowa, where they wanted to build a home. In early 2009 they met with Greg Flynn, owner of Flynn Builders. Greg had house plans drafted, and he gathered cost estimates from subcontractors and submitted to Landes a written itemization of his determination of the cost to build the home they wanted. The "cost to build" document included the subcontractors' costs, a "materials package," a "contracting fee," the cost of the plans, and various allowances for fixtures. Landes agreed Flynn would build their house, used the cost to build Flynn prepared to obtain financing for the project, and told Flynn to proceed.

Construction began in May of 2009. Landes paid Flynn a first draw of $27,951.39 for the first portion of the materials package and $8,207.50 for the first half of the framing fee. Before the money for the second portion of the materials package would be released by the lender, the lender requested a lien waiver from the supplier. A faxed waiver in the amount of $17,951.39 was received. About this time Landes realized there was a $10,000 mark-up on the first portion of the materials package and another in excess of $10,500 on the second portion of the materials package, and a dispute arose with Flynn.

Additional faxed lien waivers were received, apparently from the materials supplier, but in the amount of $27,951.39 and $17,951.39.[1] Landes refused to pay the additional mark-up, the second draw for labor, and the contractor fee. Flynn left the job and on July 6, 2009, went to the Boone County Courthouse, and filed a mechanic's lien for $28,307.50.[2] On July 10, 2009, Landes sent for service on Flynn a demand to enforce its mechanic lien, as provided for under Iowa Code section 572.28 (2009).[3]

On August 26, 2009, Flynn filed a petition to enforce its mechanic's lien. Landes answered, asking the action be dismissed with prejudice and that Flynn pay the costs of the action and all attorney fees.

The matter came on for trial on May 12, 2010, and on July 8, 2010, the district court filed a ruling. The court found the parties entered into an agreement for Flynn to build Landes' home, based on the cost-to-build document prepared by Flynn. The court concluded "the essentials of a contract" existed and the parties proceeded based on that contract. Although Mr. Lande was involved at the construction for as much time as his job as a railroad conductor allowed and he contacted several subcontractors and obtained most of the lien waivers, Flynn "did indeed act in large part as the general contractor." Because a portion of the

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[1] At trial, Gregg Flynn admitted sending lien waivers as if they were from Menards in an attempt to conceal the markup on materials. However the amount billed was not in excess of the amount shown on "the cost to build"

[2] By the time of trial the amount was reduced to $24,233.31 after Landes made an additional payment.

[3] Iowa Code section 572.28 provides in part:

> 1. Upon the written demand of the owner served on the lienholder requiring the lienholder to commence action to enforce the lien, such action shall be commenced within thirty days thereafter, or the lien and all benefits derived therefrom shall be forfeited.

general contracting duties either were delegated or fell to Landes when Flynn stopped construction, the court reduced the contractor's fee by fifty percent. The court determined the work was eighty percent complete when Flynn stopped work, and the court reduced its recovery for work by twenty percent.[4] The court concluded "the mechanic's lien as filed complies with the requirement of section 572.8 and gave notice as to the amount requested." The court expressly noted, "As is always the case, and in this case in particular, the credibility of the parties was given substantial weight in reaching the ultimate conclusion." In addition to ordering partial recovery on the mechanic's lien, the court awarded Flynn $1000 in attorney fees.

II. Scope and Standards of Review.

Actions to enforce mechanic's liens are tried in equity. *See* Iowa Code § 572.26); *Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d 363, 366 (Iowa 2000).[5] Therefore, they are reviewed de novo. *Griess & Ginder Drywall, Inc. v. Moran*, 561 N.W.2d 815, 816 (Iowa 1997). In mechanic's lien cases, involving as they do numerous charges and counter charges that depend entirely on the credibility of the parties, we have held the trial court is in a more advantageous position than we are to put credence where it belongs. *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 405 (Iowa Ct. App. 1994); *see also*

[4] The court determined the siding was ninety percent complete, so reduced the amount claimed by ten percent.

[5] Although these are equitable proceedings under the statute, the record is mixed. The action was filed in equity and decided by the court. The court ruled on evidentiary objections, the "hallmark of a law trial," instead of receiving the evidence subject to the objection. *See In re Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 129 (Iowa 1988). The court's decision was captioned "findings of fact, conclusions of law, and ruling" instead of "decree" as in equitable actions.

Iowa R. App. P. 6.904(3)(*g*). "[A] mechanic's lien is purely statutory in nature and is liberally construed to promote restitution, [to prevent] unjust enrichment, and to assist parties in obtaining justice." *A & W Elec. Contractors, Inc. v. Petry*, 576 N.W.2d 112, 114 (Iowa 1998).

III. Merits.

Landes raise eleven claims on appeal.

1. Mechanic's Lien. Landes claim the court erred in not applying the law regarding a mechanic's lien.

Contract. Iowa Code section 572.2(1) provides every person who furnishes materials for or performs labor on any building or land "by virtue of any contract with the owner, contractor, or subcontractor" shall have a lien on the building or land to secure payment. The contract may be express or implied. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 65 (Iowa 2003). Landes "disagree about the contract and what was contained in the contract" but assume for the sake of analysis that a contract existed. The district court found the existence of a contract: offer, acceptance, and consideration or performance. We agree.

Substantial Performance. In order to enforce a mechanic's lien, a contractor must show substantial performance of the contract. *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293, 295 (Iowa Ct. App. 1995). Substantial performance allows omissions or deviations from the contract that are inadvertent or unintentional, that are not the result of bad faith, and that do not

impair the structure as a whole. *Moore's Builder & Contractor, Inc. v. Hoffman*, 409 N.W.2d 191, 193 (Iowa Ct. App. 1987).

The evidence was the home was seventy to ninety-five percent complete when Flynn stopped working. There was no evidence of bad faith or that the portion remaining to be completed impaired the structure as a whole. The district court found the home was eighty percent completed and reduced Flynn's recovery accordingly. *See id.* at 195. (noting the contractor cannot fully recover, "but his recovery is decreased by the cost of remedying those defects for which he is responsible"). Landes assert "the home is not substantially complete when there is no insulation, drywall, electrical, plumbing, cabinets, interior doors, trim, and flooring." The evidence shows the home was framed, enclosed, roofed, sided (with a minor exception), and the electrical and plumbing was roughed-in, leaving finishing work to be done by subcontractors. We agree with the district court's determination Flynn substantially performed the contract.

Perfection. Landes contend the builder is not entitled to recover because it did not properly perfect its mechanic's lien. *See* Iowa Code § 572.8[6] Flynn filed a mechanic's lien form that contained a verified statement of the amount owing. *See id.* § 572.8(1). It set forth the first date labor or materials were

[6] Iowa Code section 572.8 provides:

> 1. A person shall perfect a mechanic's lien by filing with the clerk of the district court of the county in which the building, land, or improvement to be charged with the lien is situated a verified statement of account of the demand due the person, after allowing all credits, setting forth:
> a. The date when such material was first furnished or labor first performed, and the date on which the last of the material was furnished or the last of the labor was performed.
> b. The legal description of the property to be charged with the lien.
> c. The name and last known mailing address of the owner of the property.

furnished, but left blank the last date labor or materials were furnished. *See id.* § 572.8(1)(a). It contained a legal description of the property. *See id.* § 572.8(1)(b). The form also listed the name and last known mailing address of the property owners. *See id.* § 572.8(1)(c). The district court denied Landes' arguments there were deficiencies in the mechanic's lien as "without merit," and it found the filing complied with the requirements of section 572.8.

The lien form showed items claimed were furnished beginning May 11, 2009, but the form does not state the last day material was furnished or the last labor was performed. We do not view this omission as fatal to the lien. The lien form, as filed, gave Landes the necessary notice, and they knew when Flynn stopped work. We agree with the district court that the claims of deficiencies in perfecting the lien are without merit.

Original Contractor. Landes contend the court erred in allowing recovery to the builder in violation of section 572.13 concerning liability of the owner to the "original contractor." This issue was not addressed in the court's ruling, and no motion to amend or enlarge was filed. It is not preserved for appellate review. *See Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) (noting "that issues must be presented to and passed upon by the district court before they can be raised and decided on appeal.").

We believe the claim would have failed, had the court addressed it, because the supreme court addressed a similar claim that failure to provide notice as set forth in section 572.13 precluded recovery by the general contractor. *See Frontier Props. Corp. v. Swanberg*, 488 N.W.2d 146, 148-49

(Iowa 1992). The court determined failure to provide notice concerning subcontractors "only precludes the contractor from asserting a mechanic's lien *for amounts charged by subcontractors and suppliers.*" *Id.* at 149 (emphasis added). The court further determined a contractor "who fails to provide notice under this section is not entitled to the lien and remedy provided by this chapter *as they pertain to any labor performed or material furnished by a subcontractor* not included in the notice." *Id.* (emphasis added). The claim in this appeal is not for amounts charged by subcontractors, but rather for the services of the general contractor.

2. Type of Contract. Landes contend any agreement with Flynn was a time-and-materials contract because they considered themselves the general contractor and Flynn did not act as a general contractor.

The written documentation of the cost to build included a contractor's fee of $5000 for Flynn, and Flynn obtained costs from a variety of subcontractors and included those costs as well as his own costs. Flynn testified he was at the site daily and he arranged for subcontractors, though the parties had agreed earlier Landes had friends they wanted to use for some of the subcontracting work.

The cost to build proposal did not contain any indication it was a time-and-materials contract. Gregg Flynn testified the cost to build was the total cost to build, subject to changes made by Landes, and it was based on the subcontractors' quotes. Gregg Flynn also testified, "And I explained to them that no matter what, as long as you go off your allowances, your house will not cost more than this, and he was okay with that."

In contrast, Mr. Lande, when asked if he considered the cost to build to be the contract price for the builder, testified,

> No. Not at all. Not at all. It was very well understood from the get-go that a bunch of this work I was doing myself. Like I said, I was throwing him a bone, and some of his subcontractors a bone, but it was understood from the get-go I was paying all the materials and paying all the subs.

He acknowledged he did not pay Flynn based on time spent, and paid for the cost of framing of the house without reference to the amount of time Flynn put into it.

Mr. Lande did hire and pay some subcontractors, and obtained lien waivers. The dates on the lien waivers show most were obtained after Flynn left the project. The district court recognized this in concluding "a portion of the general contracting duties were either delegated or became the responsibility of the Defendants. Therefore the general contracting fee is reduced by fifty-percent."

As the parties disagree on the contract and the role they played in the construction, the district court's credibility assessment becomes more of a factor in our view of the testimony. It is clear the court gave more credence to Flynn's witnesses than to Landes'. We conclude, as did the district court, that the evidence showed Flynn acted as a general contractor. We affirm on this issue.

3. Breach of Contract. Landes contend the court erred in finding the contract was for Flynn to construct their home and be general contractor, yet allowing the builder to collect after its own breach of the contract. They cite to *Iowa-Illinois Gas & Electric Co. v. Black & Veatch*, 497 N.W.2d 821, 825 (Iowa 1993), for a list of elements a party must prove to recover on a contract.

Flynn provided services and materials under a contract, which entitled Flynn to a mechanic's lien. Iowa Code § 572.2(1). Flynn was not suing for breach of contract, but rather to enforce the mechanic's lien. Although the statute does not directly address breach of the contract, courts have interpreted the statutory language as requiring substantial performance by a contractor in order to enforce a mechanic's lien. *See Bidwell*, 543 N.W.2d at 295. There was substantial performance. We affirm on this issue.

4.–6. Admission of Exhibits. Landes raise three claims of error in the court's admission of exhibits. In equity, to the extent the parties challenge the court's rulings on the admissibility of evidence, we review for the correction of errors at law. *Garland v. Branstad*, 648 N.W.2d 65, 69 (Iowa 2002). On our de novo review, we may decline to address the issue of admissibility when we can arrive at the same result with or without the evidence. *See In re Marriage of Anliker*, 694 N.W.2d 535, 540 (Iowa 2005). Because this is an equitable action, the district court need not rule on objections, but should hear all evidence subject to objections. *Wilker v. Wilker*, 630 N.W.2d 590, 597 (Iowa 2001). The purpose is to preserve a complete record of the evidence for our de novo review, leaving to us the rejection of inadmissible testimony in deciding the issues. *See O'Dell v. O'Dell*, 238 Iowa 434, 465-66, 26 N.W.2d 401, 417 (1947). With a complete record before us, if we find the district court has erred, we may decide the case on the record made without a remand. *See id.*

A. Admitting Documents Not Provided in Discovery. (Issue 4). Landes contend the court erred in admitting exhibits that were not produced during

discovery. As to two of the exhibits, the only objection was that they were copies printed on a different date than the original date.[7] A public record from the county assessor's website was admitted subject to the objection. A list of amounts claimed that Flynn prepared just a few days before trial was not produced in discovery, but the exhibit was merely a compilation of amounts from documents already produced. The district court concluded there was no prejudice. We agree.

B. Public Records Exception to Hearsay (Issue 5). Landes objected to the admission of a printout of the county assessor's record of Landes' home, including photographs. The objection was "Hearsay. Not provided during discovery. Relevance." The court ruled, "Well, the assessor's record is a public document. I am going to receive it subject to the objection." Landes argue the court incorrectly applied the public record exception to hearsay. Flynn argues the exhibit was not hearsay in that it was not offered to prove the truth of the matter asserted but was offered merely to give an indication of the condition of the house when Flynn stopped work.

In our de novo review, we need not address the admissibility of the county assessor's record because there is sufficient evidence in the record for us to reach the same result without considering the challenged record. *See Williker*, 630 N.W.2d at 598.

C. Business Record Exception to Hearsay (Issue 6). Landes offered a lien waiver from Menards. The district court excluded it based on Flynn making

[7] Gregg Flynn testified the computer inserts the current date when the document is printed. Nothing else in the exhibits differed from the original.

an objection for lack-of-foundation. When Landes argued it was a business record, the court still sustained the objection based on finding the document was "not a public or business record that would be open to the public," noting earlier testimony that the parties "were reluctant to speak to these issues at all." Landes argue the exhibit meets all the foundational elements of Iowa Rule of Evidence 5.803(6).

From our review of the record, we can ascertain what the cost of the materials from Menards was and what Landes paid as part of the "materials" package in the cost to build. We, like the district court, can see what Flynn did to try to hide the undisclosed markup in the cost of the materials package. The information provided by the excluded lien waiver is cumulative. Its exclusion is harmless.

7. Judicial Bias. Landes contend the judge did not act impartially in this case, but "was abusive, demeaning, and oppressive" in dealing with them and their attorney. They point to a number of instances in the trial transcript as evidence the judge did not act impartially.

From our de novo review of the entire transcript, we find no merit in this claim. The judge was not "abusive, demeaning, and oppressive" as Landes claim. The court got involved in questioning witnesses, but it appeared to be trying to move things along. The language Landes quote from *Pickerell v. Griffith*, 238 Iowa 1151, 1165-66, 29 N.W.2d 588, 595-96 (1947), is in the context of a judge's remarks in front of a jury that would affect the jury's view of the

evidence. This case was tried to the court, not a jury. We see no evidence of bias and affirm on this issue.

8. Bankruptcy. Landes assert the court erred in ordering that the judicial liens imposed for payment of the mechanic's lien judgment and the attorney fees were not dischargeable in bankruptcy.

11 U.S.C. § 522(f)(1) provides that a debtor may avoid a judicial lien to the extent it impairs a debtor's allowable exemptions (unless the judicial lien is for a domestic support obligation).[8] The language in the order on appeal that appears to conflict with the provisions of the United States Code need not be addressed by this court. It is doubtful that the district court's order that its judicial lien is not dischargeable in bankruptcy is of any effect if it conflicts with the United States Code. If Landes file for discharge of debts in bankruptcy, the issue would be one to be resolved in the bankruptcy action.

9. Burden of Proof. Landes contend the court required a higher burden of proof of the terms of oral agreements than a preponderance of the evidence.

The only statement of the court we can find that might be read as imposing any burden of proof is where the court says "you need to make it *clear* to me." (Emphasis added.) The portion of the court's decision cited by Landes does not appear to say anything about burden of proof. The court is primarily

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[8] This statute provides,

> . . .the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) of this section, if such lien is—
>
> > (A) a judicial lien, other than a judicial lien that secures a debt of a kind that is specified in section 523 (a)(5) [a domestic support obligation]; . . .

11 U.S.C. § 522(f)(1).

applying the "substantial performance" reduction percentages to the various amounts claimed by the builder. We find no basis for this claim and affirm on this issue.

10. Burden of Production. Landes claim the court erred by placing the burden on them to prove the builder did not comply with the mechanic's lien statute, the "cost to build" was not a contract, and what the agreement was between the parties. They incorporate some of their earlier bias argument here, contending the court required proof from them that it did not require from the builder and in requiring them to prove a negative.

The burden is on the mechanic's lien claimant. *Giese Const. Co. v. Randa*, 524 N.W.2d 427, 430 (Iowa Ct. App. 1994). The evidence presented by Flynn established the existence of a contract and substantial performance of that contract. The mechanic's lien form demonstrated substantial compliance with the statute. The builder's evidence also dealt with the common industry practice of a markup as a vehicle for the builder's profit. Landes' claim the court's error in placing the burden on them appears merely to be the court seeking evidence to refute the proof the builder had already made in its case in chief. The court's decision also reflects that it placed the burden on the builder, not Landes. We find no error.

11. Attorney Fees. Landes contend the court erred in not awarding them attorney fees under section 572.32(2). That section applies only if the person challenging the mechanic's lien prevails. Because we have affirmed the district court, section 572.32(2) does not apply.

Having considered all the arguments and issues raised on appeal, whether or not expressly discussed in this opinion, we affirm the district court.

AFFIRMED.