IN THE COURT OF APPEALS OF IOWA

No. 2-1093 / 12-0922
Filed February 27, 2013

POOL & SPA CONCEPTS, L.L.C.,
Plaintiff-Appellant/Cross-Appellee,

vs.

DAVID C. RUSSETT and
KATHY L. RUSSETT,
Defendants-Appellees/Cross-Appellants.

Appeal from the Iowa District Court for Dubuque County, Michael J. Shubatt, Judge.

Pool & Spa Concepts, L.L.C. appeals from the district court order denying its petition to foreclose a mechanic's lien. **AFFIRMED.**

Anne E.H. Loomis of Allen, Vernon & Hoskins, P.L.C., Marion, for appellant.

Greg Adam Rehmke of O'Connor & Thomas, P.C., Dubuque, for appellees.

Considered by Potterfield, P.J., and Danilson and Tabor, JJ.

TABOR, J.

David and Kathy Russett hired Pool & Spa Concepts, L.L.C. (Pool & Spa) to construct a swimming pool in their backyard. Pool & Spa started but did not complete work on the pool. Unhappy with the quality of the work, the Russetts did not pay the entire amount owed under the contract. This action arose when Pool & Spa filed a mechanic's lien against the property and then petitioned to foreclose the lien. The Russetts counterclaimed for breach of contract. The district court deemed the mechanic's lien null and void and awarded the Russetts $1990 on their breach-of-contract claim.

After reviewing the record de novo, we agree with the district court's determination that Pool & Spa failed to prove its damages. This failure prevents Pool & Spa from foreclosing its mechanic's lien. Accordingly, we affirm.

I. Background Facts and Proceedings

The Russetts decided to build a swimming pool in the backyard of their Asbury home. In January 2008, they talked to several builders about the project and eventually settled on Pool & Spa to construct the pool. They entered into a written contract with Pool & Spa on April 20, 2008. The contract set forth a description of the equipment to be used to construct the pool at a price of $47,900.

The Russetts wanted the pool completed by July 4, 2008 and believed construction would take three weeks. But the contract did not list start or finish dates. Pool & Spa began construction on July 17, 2008. The Russetts testified that workers spent only two or three days per week on the project. The concrete

was poured around the pool in late August 2008 and Don Snyder, owner of Pool & Spa, finalized the installation of the pump and filter on September 4, 2008. David Russet did not see Snyder again after that date.

David Russett testified he called Snyder on September 18, 2008. Snyder called back the next day to say the workers were on their way, but they never arrived. Snyder testified that during the phone call David Russett fired Pool & Spa, so Snyder called the workers back. Snyder claims ninety percent of the work on the pool had been performed by the time construction ceased in September 2008. He estimated forty more hours of work would have completed the project in full.

In addition to the $47,900 listed in the contract, Pool & Spa billed the Russetts for $5971.12 in "extras." It deducted $1780.32 from the contract price for undelivered equipment. The Russetts provided Pool & Spa with the $5000 down payment set forth in the contract and paid an additional $26,765 toward construction costs before the work stopped. Pool & Spa sent the Russetts an invoice for the remaining $20,315.80 on October 21, 2008.

On March 29, 2010, Pool & Spa filed a mechanic's lien against the Russetts' property. It filed a petition to foreclose the mechanic's lien on June 25, 2010. The Russetts answered, alleging Pool & Spa had failed to substantially perform under the contract. In the alternative, they claimed any compensation they owed to Pool & Spa was offset by material breaches to the contract. The Russetts counterclaimed for breach of contract.

A bench trial was held in January 2012. The Russetts called Alvin Wernimont as an expert witness. As part of his work, Wernimont installs pools, though he never constructed the type of pool installed on the Russetts' property. Wernimont opined that to fix the problems with the Russetts' pool would require removing their deck, fence, and landscaping; removing and replacing the pool; and returning the yard back to its original state. He estimated the cost of doing so would be $109,135.

The district court entered its written ruling on April 20, 2012. The court found because no written orders existed for the "extras" listed by Pool & Spa, as required by the parties' contract, the Russetts were not responsible for those costs. The court found David Russett's testimony that Pool & Spa abandoned the job to be more credible than Snyder's testimony that Russett fired him. The court also gave little credence to Snyder's estimate that ninety percent of the work had been performed, finding "no explanation as to how he arrived at this figure." The court noted Snyder conceded the validity of some of the Russetts' complaints, but the court discounted Snyder's claim he would have addressed those complaints if Pool & Spa had been allowed to return to the job site. Instead, the court found Pool & Spa abandoned the job.

Ultimately, the court rejected Pool & Spa's claim because it was unable to calculate damages based on "anything more than speculation." The court found: "Pool & Spa offered no delineation as to the value of the work that actually was performed compared to the work that was not performed or that needed further attention." On this basis, the court deemed the mechanic's lien null and void.

As to the Russetts' counterclaim for breach of contract, the court found it suffered from the same failure to prove damages. The court was concerned because expert witness Wernimont's damage estimate "was not broken down in any meaningful way." The court did award the Russetts $1990 for damages done to their driveway during construction. It declined to award attorney fees to either party and assessed costs to Pool & Spa. Pool & Spa filed a timely appeal.

II. Scope and Standard of Review

An action to enforce a mechanic's lien is in equity. *Flynn Builders, L.C. v. Lande*, 814 N.W.2d 542, 545 (Iowa 2012). Therefore, our review is de novo. *Id.* We give weight to the district court's fact findings, but we are not bound by them. *Id.* In mechanic's lien cases "involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties," Iowa's appellate courts have "frequently held the trial court is in a more advantageous position than we to put credence where it belongs." *Id.*

III. Analysis

A mechanic's lien is purely statutory and is driven by the doctrines of restitution and prevention of unjust enrichment. *Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994). Iowa Code section 572.2(1) (2011) provides that

> [e]very person who furnishes material or labor for, or performs any labor upon, any building or land for improvement, alteration, or repair thereof . . . shall have a lien upon such building or improvement, and land belonging to the owner on which the same is situated . . . to secure payment for the material or labor furnished or labor performed.

The mechanic's lien statute is liberally construed to effectuate its purpose and to assist parties in obtaining justice. *Carson*, 513 N.W.2d at 715.

The district court found Pool & Spa's claim must fail because it did not prove the extent of its damages. Pool & Spa argues it is entitled to recover on its mechanics lien because there was a reasonable basis from which the court could determine its damages. On appeal, the Russetts assert the district court was correct in ruling Pool & Spa did not present sufficient evidence it incurred any damages.[1]

The party seeking damages has the burden of proving them. *Sun Valley Iowa Lake Ass'n v. Anderson*, 551 N.W.2d 621, 641 (Iowa 1996). Cases recognize a distinction between proof that a party has suffered damages and proof regarding the amount of those damages. *Id*. If the record is uncertain and speculative regarding whether a party has sustained damages, the fact finder must deny recovery. *Id.* If the uncertainty only exists as to the amount of damages suffered, a fact finder may allow recovery so long as there is a reasonable basis in the evidence by which the fact finder can infer or approximate damages. *Id.*

Pool & Spa cites two supreme court cases in support of its argument: *Doden v. Housh*, 105 N.W.2d 78 (Iowa 1960) and *Miller v. Rohling*, 720 N.W.2d 562 (Iowa 2006). In *Doden*, our supreme court found sufficient evidence to support a damage award for extra services performed based on testimony approximating the number of hours it took to perform the additional work. 105 N.W.2d at 82. In *Miller*, the court found the plaintiffs' testimony regarding the

[1] The Russetts do not perpetuate their argument raised in the trial court that Pool & Spa failed to show substantial performance under the building contract. The Russetts also abandon their cross appeal on the breach-of-contract claim.

approximate time they spent cleaning debris provided a reasonable basis by which the court could approximate their damages. 720 N.W.2d at 572. Pool & Spa argues Snyder's testimony the pool was approximately eighty to ninety percent complete provides a sufficient basis for the court to infer or approximate its damages.

The cases cited by Pool & Spa addressed situations where the plaintiffs established they suffered damage and only the amount remained in question. Here, the district court did not find credible evidence from which it could "compute a damage figure based on anything more than speculation." The court did not believe Snyder's estimate of eighty to ninety percent completion. The court determined Pool & Spa failed to finish certain tasks promised under the contract, and improperly performed other work on the pool. The court concluded: "Pool & Spa offered no delineation as to the value of the work that actually was performed compared to the work that was not performed or that needed further attention." In other words, Snyder offered no reliable proof from which the court could calculate whether the value of the work completed by Pool & Spa, and not yet compensated by the Russetts, exceeded the value of the work not performed or performed so shoddily that it needed correction. Essentially, the record lacked evidence to find Pool & Spa had suffered any net damages.

On our de novo review, we agree Pool & Spa is not entitled to damages from the Russetts because the construction company did not show the amount the homeowners owed was greater than their cost of completing or remedying Snyder's work. *See Lewis Elec. Co. v. Miller*, 791 N.W.2d 691, 695 (Iowa 2010)

(finding electrical contractor could recover only if remaining contract price was greater than Miller's cost of completing or remedying the electrical work). Snyder acknowledged the concrete coping around the edge of the pool had not been finished; the pump needed to be checked for leaks and the filtering material needed to be installed; the gas piping was not hooked up to the heater; the automatic pool cover required adjustment; a salt generator had not been installed; and a gasket needed to be checked and possibly reinstalled to fix a leak in the liner. In addition to these defects, Wernimont testified the entire liner needed to be replaced at a cost of $3000 to $3500; the pump and filter were damaged, requiring replacement after one year at a cost of almost $2000; the diving board was improperly installed, requiring repair at a cost of $2000; and the automatic track for the cover needed to be replaced. Wernimont also testified Pool & Spa had improperly backfilled around the pool, resulting in settling and the shifting. To repair the damage, Wernimont believed the entire pool and surrounding landscaping would need to be removed and replaced, with a price tag of $109,135.

Snyder's incredible testimony that his work was nearly ninety percent done does not support Pool & Spa's claim it was damaged given the countervailing testimony regarding the defects in its performance. Snyder did not place a monetary value on the work completed, while Wernimont opined the cost of repairing the defects could exceed the cost of the pool. Because Pool & Spa failed to prove its damages, we affirm.

AFFIRMED.