IN THE COURT OF APPEALS OF IOWA

No. 2-1182 / 12-0103
Filed February 27, 2013

PAPER'S LUMBER & SUPPLY,
Plaintiff-Appellee,

vs.

BRADLY SCHIPPER and
KIMBERLY SCHIPPER,
Defendants-Appellants,
and

ERIC BIRELY and HEATHER
BIRELY d/b/a E&H ENTERPRISES,
Defendants-Appellees.

ERIC BIRELY d/b/a E&H ENTERPRISES,
Plaintiff/Counter-Defendant,

vs.

BRADLY SCHIPPER and
KIMBERLY SCHIPPER,
Defendants/Counter-Plaintiffs.

Appeal from the Iowa District Court for Scott County, Marlita A. Greve, Judge.

Appeal from the foreclosure of mechanic's liens. **AFFIRMED.**

Jack Dusthimer, Davenport, for appellants.

David Treimer, Davenport, for appellee Paper's Lumber & Supply.

Michael J. McCarthy of McCarthy, Lammers & Hines, Davenport, for appellees Eric and Heather Birely.

Considered by Eisenhauer, C.J., and Danilson and Bower, JJ.

EISENHAUER, C.J.

Bradly and Kimberly Schipper appeal from the district court order foreclosing a mechanic's lien and rejecting their affirmative defenses. They contend there was not substantial performance entitling the contractor to foreclosure of its mechanic's lien. The Schippers also challenge the reasonableness of the attorney fee award. We affirm.

I. Background Facts and Proceedings

Brad Schipper and Eric Birely were friends and jointly coached their sons' baseball team. Eric is a firefighter and, with his wife Heather, does home construction as E & H Enterprises.

In 2008 the Schippers' home was damaged by a falling tree. They contracted with Birely to demolish the house and construct a new house. Work began in late 2008. Birely sent monthly invoices, which the Schippers paid in January, February, and March 2009. An April 3 invoice was not paid. In April, relations between the parties deteriorated, with the Schippers questioning costs and charges. On April 16 Birely's attorney prepared four written change orders for the Schippers to sign to cover oral requests for changes. The attorney also prepared a notice of default, listing five violations of the construction contract. Birely's attempt to discuss the problem with the Schippers on Friday evening April 17 after a baseball game ended when tempers flared. Birely said, "Let's just go our separate ways, and we will talk about this another time."

Birely was not scheduled to work on the home on Saturday because he was scheduled to work as a firefighter. Birely worked on the home Sunday and Monday. Because he was concerned about being locked out of the job site,

Birely put all his tools, equipment, and supplies in his truck or on his trailer and took them with him on Monday. He also advised the building materials supplier, Paper's Lumber and Supply, to pick up materials not yet installed so Paper's would avoid the risk of nonpayment.

On Monday evening Birely sent an e-mail to the Schippers:

> Brad and Kim,
> We have the basement cleaned up so that you can empty your storage container. If there is a hole cut in floor try not to put any thing under it, also try to keep area under the bathrooms and the south wall under kitchen clear otherwise the entire area on the south side of the bearing wall is ok for storage. It will be dusty so you may want to cover with plastic. The north side of bearing wall needs to be left open as this is where all of the mechanicals will be going in. The upstairs has been cleaned up in preparation for insulation and drywall. The tubs and valves are all installed with the exception of the soaker tub as it needs a plug since there is no shower on that. Be careful in garage as siding and soffit are sitting on the ground and the soffit dents very easily. We also need to know what kind of finish you want in each room, also paint colors for each room. The baseball equipment will be sent with my boys to the game the game tomorrow along with roster and positions and pitch count info. If you have any questions please call or email me.
> Thanks, Eric

Birely was not scheduled to work on the home on Tuesday because he was scheduled to work as a firefighter.

Tuesday evening Kim Schipper sent Birely an e-mail. Birely learned of the e-mail Wednesday morning on his way home from his firefighting job when his wife called him. The e-mail read:

> You have shown your clear intent by walking off the job and doing the following items:
> 1. You called Paper's lumber and asked them to come pick up all the insulation that had been previously delivered by Paper's and was sitting in my garage on the job site. Noting that all the insulation that had been delivered was the correct size, type and amount that had been needed for our job site.

> 2. You took all your tools, ladders and any and all equipment that was previously being used at our job site and was still necessary to complete work on the job site.
> 3. You removed the furnace and heating duct work that had previously been delivered for installation at our job site.
> 4. You removed the pro-vent water heater that had previously been delivered for installation at our job site.
> 5. You removed any and all items that were not nailed down or already attached to the home site. Dumping your garbage out of the cans and onto my garage floor and leaving it there.
> Now that you have walked off the job and taken everything off our job site the contract is null and void.
> We now need all paid invoices for all supplies currently in the home and an itemized labor bill from you for the 37 days you worked on our job site from January 3, 2008 to April 19, 2008.
> Since you have already taken everything off our job site, you are no longer allowed at the job site.
> Thank you,
> Kim and Bradly Schipper

Also on Tuesday, the Schippers posted "No Trespassing" signs at the job site.

Neither Birely nor his crew returned to the Schipper house after the e-mail. Birely sent a revised invoice to the Schippers on April 21. It was not paid.

Both Paper's and Birely filed mechanic's liens on the Schippers' property. In June, both filed petitions to foreclose their mechanic's liens. Birely also filed a cross-claim against the Schippers for any amount the court might determine Birely owed Paper's. The court consolidated the actions and heard them together in late September. The district court concluded the Schippers breached the construction contract with Birely by terminating the contract and not permitting Birely to return to the job site after April 20. It concluded Birely was entitled to be paid for the work performed through April 20. The court also awarded Birely attorney fees.

Concerning Paper's claim, the court found Birely owed Paper's for the construction material used in the Schippers' house. The court set off that amount

against the amount the Schippers owed Birely. "In other words, Schipper shall pay a total of $31,629.47 plus attorney's fees, costs and interest. Of that, Schipper shall pay $12,421.81 to Paper's plus interest. Schipper shall pay [the remaining] $19,207.66 to Birely plus $13,364.91 in attorney's fees and costs . . . ."

Both Birelys and Schippers filed post-trial motions to amend or enlarge. The Birelys asserted Paper's was not entitled to attorney fees from the Schippers because it had not furnished the building supplies directly to the Schippers, so although Paper's was entitled to have its mechanic's lien foreclosed, it was not entitled to the attorney fees allowed under the mechanic's lien statute. Birelys also asserted Paper's was not entitled to attorney fees from them because Paper's claim against them was on an open account, not an action to enforce a mechanic's lien.

The Schippers alleged Birely walked off the job and breached the contract. They further alleged entitlement to credit for amounts paid to other contractors to "correct plumbing and framing issues." They also alleged the attorney fee award to Birely was excessive.

The court amended its ruling and judgment to delete the judgment directing Birely and Schipper each to pay one-half of Paper's attorney fees and costs. It denied the Schippers' motion in its entirety. The Schippers appeal.

II. Scope and Standards of Review

Actions to enforce mechanic's liens are in equity; our review is de novo. *Flynn Builders, L.C. v. Lande*, 814 N.W.2d 542, 545 (Iowa 2012). "In equity cases, especially when considering the credibility of witnesses, the court gives

weight to the fact findings of the district court, but is not bound by them." Iowa R. App. P. 6.904(3)(g). "[I]n mechanic's lien cases, 'involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs.'" *Flynn Builders*, 814 N.W.2d at 545 (quoting *McDonald v. Welch*, 176 N.W.2d 846, 849 (Iowa 1970)).

III. Merits

Mechanic's Lien. The Schippers contend the court erred in enforcing Birely's mechanic's lien because Birely did not substantially perform the construction contract, but instead walked off the job. *See id.* at 545-46. In *Flynn Builders*, the supreme court, remanding the case after concluding Flynn did not substantially perform the contract, noted "there may be additional legal and factual issues that were not reached by the district court that could have an impact on the disposition of this case." *Id.* at 547. As examples, the court listed "the factual disputes in the record for the reason Flynn walked off the job and whether lack of specific performance might be excused by the conduct of the Landes." *Id.* at 547-48. In the case before us, the district court reached the issue whether the conduct of the Schippers affected Birely's ability to substantially perform the contract. Relying heavily on its assessment the Birelys were more credible than the Schippers, the court found the Schippers breached the contract by telling Birely he was no longer permitted on the job site and by putting up no trespassing signs on the property. The Schippers also did not pay either the April 3 invoice or the revised April 21 invoice. The district court concluded:

> In all contracts there is an implied term that the person for whom the work is contracted to be done will not obstruct, hinder or delay the contractor, but, on the contrary, will in all ways facilitate the performance of the work to be done by him. Therefore, if a party to the contract prevents the other party from performing its obligations under the contract or fails to cooperate to allow the obligations to be completed, the other party is excused from performance and is not required to comply with its obligations under the contract.

(Citations and internal quotation marks omitted.)

By mid-April, the Schippers had begun questioning costs and charges. Birely, upon learning of their concerns, acted to protect himself and his suppliers by keeping his tools with him in his truck and asking suppliers to pick up materials the Schippers had not yet paid for. In an apparent effort to calm the situation, Birely cleaned the house so the Schippers could empty their storage container and store their belongings in the house. He also indicated he intended to continue performing the contract by asking the Schippers for their decisions on interior finishes and colors and by explaining where to put their belongings so they would not hinder construction or installation of equipment. The Schippers responded by unequivocally declaring the contract "null and void" and prohibiting Birely from returning to the job site or continuing to perform on the contract. The Schippers' actions excuse any lack of substantial performance by Birely. *See Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 332 (Iowa 1982); *see also Horsfield Constr., Inc. v. Dubuque Cnty.*, 653 N.W.2d 563, 573 (Iowa 2002).

We affirm the district court decision granting the petition to foreclose the Birelys' mechanic's lien.

Attorney Fees. The Schippers contend "it is clear it is the Birelys, and not the Schippers, who should be paying attorney fees." They argue the amount of fees awarded to the Birelys is not reasonable and should be adjusted based on the Birelys' lack of substantial performance.

"In a court action to enforce a mechanic's lien, a prevailing plaintiff may be awarded reasonable attorney fees." Iowa Code § 572.32 (2009). The construction contract between the Birelys and the Schippers also provided for "reasonable attorney fees and costs expended in the enforcement" of the non-breaching party's rights.

The district court initially determined both the Birelys and Paper's were entitled to attorney fees under the mechanic's lien statute. Upon consideration of the Birelys' motion to amend or enlarge, the court agreed the action by Paper's was based on an oral contract instead of a mechanic's lien, so there was no statutory or contractual provision for attorney fees. The award of attorney fees and costs to the Birelys on their $31,629.47 mechanic's lien was $13,364.91. The Schippers asserted the award was excessive when compared to the net award to the Birelys of $19,207.66. The district court's ruling on the post-trial motions expressly found the attorney fee award was not excessive and denied the Schippers' request to modify it.

An attorney fee award is "vested in the district court's broad, but not unlimited discretion." *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 22 (Iowa 2001) (citation omitted). Only when the district court bases its discretionary decision "on grounds that are clearly unreasonable or untenable" will we reverse. *See Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d

363, 368 (Iowa 2000). On appeal, the Schippers again compare the attorney fee award to the net award to the Birelys to support their claim the award, at nearly seventy percent of the net award, was excessive. They do not challenge the hourly amount billed or the number of hours worked. The Schippers do not cite any authority holding an award above a certain percentage of the underlying judgment is per se unreasonable. We note the attorney fees awarded are just over forty percent of the underlying judgment on the mechanic's lien. We agree with the district court the attorney fee award was reasonable.

The Birelys request an award of appellate attorney fees. We decline the request.

AFFIRMED.