

IN THE COURT OF APPEALS OF IOWA

No. 3-648 / 12-1990
Filed October 2, 2013

**JOEDY VANVELZEN and
DEBORAH VANVELZEN,**
Plaintiffs-Appellees,

vs.

SECURITY STATE BANK,
Defendant-Appellant.

Appeal from the Iowa District Court for Polk County, Robert A. Hutchison,
Judge.

A bank contends insufficient evidence supports the jurors' finding that its
breach of a construction loan contract caused the homeowners' damages.

AFFIRMED.

Chester C. Woodburn III of Hansen, McClintock & Riley, Des Moines, for
appellant.

Benjamin P. Long and Clark I. Mitchell of Grefe & Sidney, P.L.C., Des
Moines, for appellees.

Heard by Vogel, P.J., and Danilson and Tabor, JJ.

TABOR, J.

Joedy and Deborah VanVelzen entered into a construction contract with homebuilder Silverado Homes LC (Silverado), and a construction loan contract with Security State Bank (SSB). As Silverado requested construction advances, SSB paid the advances without obtaining lien waivers. Silverado defaulted on the construction contract, and subcontractors placed liens on the VanVelzens' unfinished home. The VanVelzens paid to have the liens released and to have the home finished. They also incurred additional interest charges on a long-term mortgage. The VanVelzens sued SSB for breach of the construction loan contract term requiring future advances to be "in person or by phone upon receipt of lien waivers in multiples of \$1000." The jury found SSB breached the contract and awarded damages.

On appeal, SSB *concedes* the VanVelzens offered sufficient evidence to show it breached the construction loan contract,¹ but contends the district court erred in denying its motion for judgment notwithstanding the verdict (JNOV). SSB argues insufficient evidence supports the jury's finding SSB's breach *caused* the VanVelzens' damages, and as a matter of law, the VanVelzens did not present substantial evidence of foreseeability.

¹ SSB did not make this concession during the trial. Rather, bank vice president Lonny Flack, who signed the construction loan contract, testified SSB did everything it was required to do under the contract.

I. Background Facts and Proceedings

The VanVelzens entered into a residential construction contract with Silverado—signed by homebuilder Jim Crotty. The construction contract provides:

Contract Price and Payment Procedures. The contract sum, subject to additions and deductions made by the Owner is:

- a. Land Cost: \$82,500.
- b. Estimated Cost of Improvements: \$380,000 The Contract Price shall be paid in periodic draws, not to exceed two per month.
- c. Total Estimated Cost: \$462,500.
- d. Final draw will withhold \$5000 until Owners review all work has been completed to their satisfaction.

Final payment also depends on Silverado Homes providing the Owners with completed waivers of lien forms from suppliers and subcontractors that state they have been paid in full and have no legal claim against the Owners.

To pay for the lot and home, the VanVelzens entered into a construction loan contract with SSB allowing them to borrow up to \$465,000. The loan contract provides for multiple advances and states: “Conditions: the conditions for future advances are in person or by phone upon receipt of lien waivers in multiples of \$1000.” Joedy explained: “As the lien waivers were obtained, then [Crotty] would be allowed to have more advances or more money.” SSB’s internal lending policy for construction loans provides:

Construction loans are those loans undertaken on an interim basis to provide funding for construction This type of loan requires that *added care be taken to assure that advances are paced with completion of certain phases of construction* and that no intervening liens (mechanics liens) are allowed to be placed which would jeopardize our lien position. These loans are generally multiple advance, closed end lines of credit which are made with a maturity date that coincides with the completion of construction.

(Emphasis added.)

Construction started in April 2009. Joedy testified Crotty's requests for advances or draws originally were to go to the VanVelzens. On April 15, 2009, Silverado sent an e-mail to Joedy and provided a letter from the VanVelzens to SSB to expedite the draw process. Because Joedy was away serving in the military, the VanVelzens "agreed that we would allow the contractor to go directly to the bank . . . to ask for a draw." The letter from the VanVelzens to SSB vice president Lonny Flack states: "This letter is to inform you that Jim Crotty Builder/Developer of Silverado Homes will submit all draw requests directly to Security State Bank for the [Cumming] residence." SSB advanced money to Crotty without obtaining lien waivers and advanced all of the VanVelzens' loan proceeds, \$465,000, before the home was completed. After SSB had advanced all of the loan funds, Silverado Homes defaulted on its construction contract with the VanVelzens.

The VanVelzens sued SSB for breach of contract. Joedy testified SSB's failure to obtain lien waivers before advancing money caused their damages. First, the VanVelzens paid \$13,153.38 to extinguish the liens the subcontractors placed on the house. Second, the VanVelzens paid \$36,358.81 in "costs of completion" to have other subcontractors finish the house. Finally, "when the house wasn't done and there were liens on the house, we weren't able to get conventional long-term financing."²

² The VanVelzens were to pay off the construction loan upon the home's completion by obtaining a home mortgage. Initially, they were approved for long-term financing at 4.731 percent. When they secured the long-term financing, the rate was 5.065 percent.

The VanVelzens' expert witness, banker David Keller, had experience administering construction loan agreements. He explained the construction loan between SSB and the VanVelzens was a "standard, basic note" and "fairly common." In Keller's experience the note's multiple advances provision meant "there are going to be requests for funds to be advanced under the note. And if the conditions are met, [SSB] then would make those advances." Keller testified the specific condition required by SSB for it to make advances was "upon the receipt of lien waivers." Keller explained the process—lien waivers accompanying requests for advances—accomplishes two goals. First, the process provides an accounting function—an accounting of the funds being advanced while at the same time specifying "who is getting the money." Second, the process preserves and protects the loan assets for the benefit of both the bank and the borrower in that (1) the work for which money is advanced has been done, (2) the lien waivers have been provided for the completed work, and (3) the contractor is not going to file liens at a later date for the completed work. Based on Keller's experience in the banking industry, if SSB did not receive lien waivers, it should not have provided the funds "requested on that particular advance." Further:

Q. . . . Is it foreseeable at the time of entering into this agreement that failing to gather lien waivers could lead to liens being placed on the property? A. Yes.

Q. Why . . . ? A. If you don't get the lien waivers, you don't know what work necessarily has been done, you don't know if the individuals have or are going to be paid. You just have no information to determine whether or not potential liens are out there.

Mr. Keller specifically opined, without the lien waivers “there is no way for [SSB] to know whether the funds have been used as they were intended to be; therefore, it is likely or certainly possible that there wouldn’t be sufficient funds.”

At the close of the VanVelzens’ evidence, SSB moved for a directed verdict, arguing the evidence fails to show “certain elements of the damages claimed” were proximately caused by “anything the bank did or did not do.” Regarding the “costs of completion,” the bank’s attorney argued: “[F]ailure to get lien waivers did not cause those damages by the proof here [P]roof that Mr. Crotty’s breach of his contract . . . was somehow caused by the lack of lien waivers simply hasn’t been established by the evidence.” Finally, SSB contended “there is very little connection between these lien waivers” and “the higher interest rate” the VanVelzens had to pay, and any delay in obtaining financing “was delay of [their] own making.”

The VanVelzens’ counsel stated: “Regarding causation, Mr. VanVelzen and Mr. Keller both testified the out-of-pocket expenses, the liens filed against the home, and thereby the loss of interest rate were a direct result of additional advances being given to Jim Crotty without lien waivers.” Regarding costs of completion, counsel specifically argued:

[T]hose expenses are causally related to [SSB’s] failure to gather lien waivers because, as Mr. VanVelzen testified, had lien waivers been gathered and some sort of accounting taken place, the money would not have been able to have been expended without the project being completed. And that testimony . . . creates a fact question for the jury.

The district court stated: “I’m having trouble seeing why the failure to obtain lien waivers necessarily leads to a cost to your client to exceed. The problem [is] the contractor didn’t honor his obligations.”

VANVELZEN COUNSEL: Yes, Your Honor. I think that’s an argument for intervening cause, which I think is the argument [SSB’s counsel] has been making [T]hat is a fact question for the jury.

THE COURT: No What he is arguing is that you have failed to show that the failure to obtain lien waivers was a proximate cause of the cost to finish the house. Is that a fair statement?

SSB COUNSEL: That’s true, Your Honor.

Counsel for the VanVelzens reiterated Mr. Keller’s testimony—the lien waivers are an accounting method and also protection for both the bank and the borrower, thereby making it foreseeable the project would not be completed if SSB did not follow the process.

In other words, if the contractor makes a draw for a certain amount for a particular item, garage doors for example, and then provides a lien waiver at a subsequent date which does not match or provide sufficient accounting for [the garage doors], it is going to raise red flags both for the borrower and for the bank to do something about it at the time. That opportunity was not provided to [the VanVelzens] here because the bank failed to gather that accounting method at any point in the process.

The court overruled SSB’s motion for directed verdict “except as to this element of the cost of finishing the home. I’m withholding ruling on that element [and] I’ll let the jury tell me what they think . . . and then we can deal with this in a post-trial motion.”³

³ At the close of all the evidence, defense counsel stated: “We re-urge what we urged before. No further record.” The court “ruled the same as before.”

During closing arguments, SSB argued, “if you decide the bank was required to verify the lien waivers,” then you should “find the amount of the liens . . . the \$13,000 . . . is due and owing.” Also,

there is no jump from not having the lien waivers because the only liens that were filed were the \$13,000. So there is no jump as to what caused that [Silverado-VanVelzen] contract to be breached. And, therefore, those costs associated with completion of the house are really not recoverable because there is no cause and effect between the lien waivers and those particular costs.

In July 2012 the jury returned a verdict in favor of the VanVelzens. The jury awarded \$31,911.93 for costs to finish the home, \$11,460.00 for costs to satisfy liens, and \$7,096.38 for costs of a more expensive mortgage. The court entered judgment for \$50,468.31, plus costs and fees.

SSB filed a motion for JNOV, and the VanVelzens resisted. The court denied SSB’s motion, finding (1) the evidence is undisputed “the bank neither sought nor received any lien waivers until all of the money authorized for the construction loan had been advanced by the bank”; and (2) “the bank later told [the VanVelzens] they were responsible for obtaining the lien waivers from the contractor and subcontractors; this notification was also after all of the construction funds . . . had been paid by the bank.” The court ruled: “There is substantial evidence to support [the VanVelzens’] contention the bank’s advancement of funds without lien waivers was a cause of each of the elements of damage claimed by [the VanVelzens] and found by the jury.”

II. Scope and Standards of Review

We review the district court's ruling on a motion for JNOV for errors at law. See *Mitchell v. Cedar Rapids Cmty. Sch. Dist.*, 832 N.W.2d 689, 694 (Iowa 2013). We view the evidence in the light most favorable to the VanVelzens, the nonmoving party. See *id.*

III. Analysis

A. Did the Bank's Failure to Collect Lien Waivers Cause Injury to the VanVelzens?

In this breach of contract action, the VanVelzens had to prove they "suffered damages as a result of the breach." See *Iowa-Illinois Gas & Elec. Co. v. Black & Veatch*, 497 N.W.2d 821, 826 (Iowa 1993) (emphasis added). SSB argues the evidence is insufficient to show its failure to obtain lien waivers caused the VanVelzens' damages. We recognize "[q]uestions of proximate cause are ordinarily questions of fact that, only in exceptional cases, may be taken from the jury and decided as a matter of law." *Vogan v. Hayes Appraisal Assoc., Inc.*, 588 N.W.2d 420, 424 (Iowa 1999) (ruling jury could find one purpose of the appraiser's progress report was to assist the bank in disbursing funds for plaintiffs' home construction, and faulty report caused the bank to disperse funds it otherwise would have retained thereby causing injury to plaintiffs).

SSB does not appeal the jury's finding SSB breached the loan contract. During closing argument, SSB told the jury if SSB breached the loan contract, then the \$13,000 paid to extinguish the subcontractor liens would be appropriate

damages. Accordingly, we find no merit to SSB's sufficiency challenge regarding the \$11,460 awarded for the costs of extinguishing subcontractor liens.

Turning to the remaining categories of damages—costs to complete the home and additional financing costs—we likewise reject SSB's claims regarding those costs. We agree with the district court's well-reasoned JNOV ruling:

The bank's obligation, as specified in the contract, was to advance funds in multiples of \$1000 only when lien waivers were obtained. The undisputed fact is the bank advanced all of the construction funds before it obtained a single lien waiver.

There is substantial evidence to support [the VanVelzens'] contention the bank's advancement of funds without lien waivers was a cause of each of the elements of damage claimed by [the VanVelzens] and found by the jury. A jury question was certainly generated as to each item of damage claimed, and as to whether [the VanVelzens] were required to expend [money] they would not have [had] to spend in absence of breach of contract by the bank. The jury did not award the full amount of damages claimed by [the VanVelzens], either for work not completed before advancement of the funds or [for] the less favorable mortgage. Substantial evidence supports the award made by the jury

We are persuaded by the testimony of banker Keller, the VanVelzens' expert, concerning accountability and the protection of assets. Had SSB complied with the "conditions for future advances" and required the receipt of lien waivers before it advanced any additional funds, the homeowners would have had an accounting and a warning if the work for which SSB advanced money had not been done *or* had not been done for the amount advanced—thereby protecting the assets. The warning provided by the accounting process allows the homeowners to question the builder and seek an explanation and potential corrective action before any additional funds are released by the bank. Without SSB's oversight and matching of lien waivers to the funds it issued, the

VanVelzens did not have any effective accounting process to measure Silverado's progress or provide a warning. See *Vogan*, 588 N.W.2d at 424. In other words, after Silverado's first draw, if lien waivers were not provided and SSB followed the condition and refused to make future advances until Silverado provided the *corresponding* lien waivers, the process would have protected the assets and prevented accounting flaws from leading to an incomplete project.

Regarding the damages awarded for increased mortgage costs, the VanVelzens offered testimony that but for the delay occasioned by the time it took them to satisfy the unexpected liens they would have been able to secure a more favorable interest rate. Accordingly, substantial evidence supports the jury's award of these damages.⁴

B. Did SSB Preserve its Foreseeability Argument?

SSB, noting only contract damages that are foreseeable may be recovered, argues the VanVelzens "did not present substantial evidence of foreseeability." See *Kuehl v. Freeman Bros. Agency, Inc.*, 521 N.W.2d 714, 718 (Iowa 1994) (ruling contract damages "must have been contemplated by the parties" when they entered into the contract). The VanVelzens argued SSB did not preserve error on this issue and alternatively, if error was preserved, the testimony of their banking expert provides sufficient evidence of foreseeability.

We first address the preservation issue. A motion for JNOV "must stand on grounds raised in the motion for directed verdict." *Mitchell*, 832 N.W.2d at

⁴ The jury calculated the damages related to the increased interest rates to be less than the amount requested by the VanVelzens, impliedly finding the VanVelzens could mitigate through refinancing.

695. We require claimed errors to be raised “with some specificity in a directed verdict motion.” *Id.* Thus, a litigant’s “general averments in a motion for directed verdict will not typically maintain particular issues for the district court’s further consideration in ruling on motions for” JNOV. *Id.*

We cannot conclude from SSB’s directed verdict motion, or from the district court’s ruling on the motion, that the foreseeability argument SSB advances on appeal was adequately brought to the district court’s attention. In fact, the court reframed SSB’s directed verdict argument for opposing counsel, and SSB agreed with the court’s formulation. At no point during its directed verdict argument did SSB address foreseeability. Accordingly, we conclude SSB failed to preserve this claim for appellate review.

AFFIRMED.