IN THE COURT OF APPEALS OF IOWA

No. 2-1197 / 12-1011
Filed March 13, 2013

CONSTRUCTIVE CONSULTANTS, INC.,
Plaintiff/Counterclaim Defendant-Appellant,

vs.

JON P. BANWART AND MARY JO BANWART,
Defendant/Counterclaim Plaintiffs-Appellees.

Appeal from the Iowa District Court for Cerro Gordo County, Colleen D. Weiland, Judge.

Constructive Consultants, Inc. appeals from the district court's ruling in this mechanic's lien and breach of contract action in favor of the Banwarts. **AFFIRMED.**

Stephen W. Tyler of Whitfield & Eddy, P.L.C., Des Moines, for appellant.

Brian P. Rickert of Brown, Winick, Graves, Gross, Baskerville and Schoenebaum, P.L.C., Des Moines, for appellees.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ.

DOYLE, J.

Constructive Consultants, Inc. (CCI) filed this action to foreclose its mechanic's lien, seeking $144,252.24 for labor and materials CCI asserts it provided to Jon and Mary Jo "Jo" Banwart in building out the Banwarts' Clear Lake store and residence. The Banwarts, in turn, filed counterclaims against CCI and its officer Jarrell "Leigh" Foster for breach of contract, among other things. Following a bench trial, the district court found the parties had an express guaranteed maximum price or "not-to-exceed" contract. The court concluded CCI breached that contract, performed some work unsatisfactorily, and trespassed and converted the Banwarts' property. It awarded the Banwarts total damages in the amount of $103,856, and it dismissed CCI's claims. CCI now appeals those conclusions and seeks reversal and damages. Upon our thorough review of the record, we affirm.

***I. Scope and Standards of Review*.**

"Actions to enforce mechanic's liens are in equity." *Flynn Builders*, *L.C. v. Lande*, 814 N.W.2d 542, 545 (Iowa 2012). Consequently, our review is de novo. Iowa R. App. P. 6.907; *see also id.* Our supreme court has explained that although we are not bound by the district court's fact findings in our de novo review, we do give those finding weight. *See Flynn Builders*, *L.C.*, 814 N.W.2d at 545. Particularly, "in 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.'" *Id.* (quoting *McDonald v. Welch*, 176 N.W.2d 846, 849 (Iowa 1970)).

II. Background Facts and Proceedings.

The following facts are fairly established by the evidence. Business owners Jon and Jo Banwart operate Cookies, Etc., a retail food store with locations in Ames, Mason City, and Clear Lake. The construction work in the building out of the Cookies Clear Lake location is the subject of the parties' litigation and this subsequent appeal.

CCI is an Iowa corporation that conducts much of its business providing glass and window installation and service in the construction industry. The three officers of CCI are Leigh Foster, Julie Foster, and Alan Foster. At the outset of this case, the Banwarts and Leigh were friends. CCI, through Leigh, had previously performed work for the Banwarts on a number of occasions, including working on the construction of the Banwarts' three other Cookies locations.[1] At that time, the parties were satisfied with their working relationship.

In early 2007, the Banwarts became interested in a condominium project under construction in Clear Lake; chewing over opening a Cookies store in a unit of the building. Additionally, because the building was designed for both residential and retail use, the Banwarts contemplated finishing the second level of the unit as a residence for their personal use or as a rental. To that end, the Banwarts consulted their friend Leigh on the feasibility of developing a store and residential rental unit there, and they asked for his advice in preparing a unit for their purposes.

[1] The Banwarts' Cookies Marshalltown location was closed in anticipation of opening the Clear Lake location.

In late April 2007, Leigh visited the jobsite with Jon. At that time, the unit was merely a shell and needed extensive work to be finished, including modifications to make it ready for retail use. Leigh made some initial plans, and he assisted the Banwarts in communicating and coordinating with the developer and architect, as well as with the local bank about financing.

The Banwarts made an offer on the property in May 2007, and their offer was accepted. The Banwarts obtained a $430,000 bank loan, which included $300,000 for the purchase of the unit and $130,000 for finishing construction on the unit. Additionally, the Banwarts and Leigh verbally agreed that CCI would act as project manager. The parties' agreement was never reduced to writing.

Thereafter, Leigh began working on plans for finishing the unit, including hiring a carpenter/laborer and making plans to spend significant time on the jobsite. Although Jo hoped to have the store open in time for the Fourth of July holiday, the closing on the unit was pushed back and did not occur until June 2007. Jo subsequently pushed back the planned opening of the Clear Lake Cookies location to August 1.

Ultimately, work dragged on beyond the anticipated opening date, and the costs of the construction grew. By the end of October 2007, CCI's stated expenditures were closing in on $120,000, though the project was not near completion. The Banwarts began questioning the project's costs, and they requested Leigh provide to them documentation or receipts, but he was generally evasive.

Jo met with Leigh in early November 2007, and they agreed the project would not be able to be finished for $130,000 as initially estimated. The

Banwarts agreed to increase the budget by $40,000 for a maximum budget of $170,000, and their understanding was that Leigh would be able to pay all the existing bills and finish the project with this additional amount. The Banwarts had paid CCI up to that time a total of $109,526.46. The project completion deadline was set for December 15, 2007, but was pushed back again to February 2008 due to problems encountered.

At the beginning of March 2008, the project was still not completed. At that time, Leigh requested a $40,000 payment. The Banwarts were completely dissatisfied with Leigh's documentation of costs and only paid $25,000. The Banwarts met with Leigh and his wife, a corporate officer of CCI, because the costs were exceeding the agreed amount of $170,000, and the Banwarts were hoping to come up with a solution. Leigh told the Banwarts he would email them with suggestions on how they could resolve the situation, and the parties left the meeting with the general understanding that there would be a moratorium on work if they could not resolve the situation. Other than stating in a later email that he was "still crunching the numbers," Leigh never really responded to the Banwarts' requests for suggestions.

On March 17, 2008, the Banwarts sent a letter to Leigh terminating his and CCI's services. The Banwarts asked that Leigh and CCI's employees or subcontractors not enter the property and jobsite, and they requested Leigh call Jon so they could schedule a meeting for Leigh to retrieve his tools and equipment. However, the next day Leigh entered the property and took not only his tools and equipment, he also took fixtures that were to be installed in the unit and other miscellaneous items.

Thereafter, the Banwarts requested to again meet with Leigh to arrange for the return of their items that had been taken and to also pick up lien waivers and other items, but he did not respond. At the end of March, CCI provided the Banwarts an invoice showing the costs to date had exceeded $280,000, along with a statement showing $144,252.24 was still due from the Banwarts.

The Banwarts continued construction of the project through other contractors. More than three months after Leigh was off the job, the Banwarts became aware of a sag in the floor; a sag great enough to cause difficulties in pushing appliances into place. A fix was required. All in all, the Banwarts spent over $60,000 to finish the total job.

On April 30, 2008, CCI filed a mechanic's lien against the Banwarts' property, asserting there was at that time, due and owing, the principal sum of $144,252.24. At the end of 2009, CCI filed its petition to foreclose the mechanic's lien, and, as later amended, added claims of breach of contract, unjust enrichment, and quantum merit against the Banwarts. CCI maintained the parties had a "cost-plus-fee" contract, wherein the Banwarts agreed to reimburse CCI for the costs it incurred, plus a fee, and that there was not a maximum amount set for the costs.

The Banwarts answered, generally denying CCI's claims and asserting numerous affirmative defenses. Additionally, the Banwarts and Cookies, as later amended, asserted counterclaims against CCI and Leigh for breach of contract, fraud, negligent misrepresentation, interference with a prospective business advantage, trespass, and misappropriation of property. CCI and Leigh

answered, generally denying the counterclaims asserted against them and asserting their own affirmative defenses.

A bench trial commenced January 25, 2011. After several days of testimony from the parties, witnesses, and experts, as well as the receipt of numerous exhibits, the court took the matter under advisement. On April 30, 2012, the district court entered its order finding generally in favor of the Banwarts and dismissing CCI's claims. The court determined the parties had an express "not-to-exceed" $170,000 contract, and CCI had breached that agreement. The court found the Banwarts paid a total of $254,600 in labor and materials to complete the store and residential unit, and of that amount, $181,240 was paid directly to CCI or for materials in subcontractor labor costs that should have been a part of the contract. Subtracting the contract price from the grand total paid by the Banwarts, the court determined the Banwarts' damages were $84,600. Additionally, the court added $17,256 to the Banwarts' damages for lost rental income and the cost to repair the sagging floor.

The court also found the Banwarts' claims of trespass and conversion had merit, but noted the costs of replacing materials and pictures taken by CCI constituted part of the cost-to-finish damages awarded by the court for CCI's contract breach. The court awarded an additional $2000 in part as nominal damages to the Banwarts in recognition of the tort liability, and in part as compensatory damages for the Banwarts' additional time and labor necessary to replace these converted fixtures and materials. The court found the Banwarts failed to establish their claims of fraud, negligent misrepresentation, and interference with a prospective business advantage. Additionally, the court

declined to award exemplary damages, finding that the wrong here primarily consisted of a contract breach and the evidence did not demonstrate CCI's conduct was malicious or constituted willful and wanton disregard for the Banwarts' rights or safety. The court also found the evidence fell short in regards to the Banwarts' claim against Leigh individually and Cookies' counterclaims. The court entered judgment in favor of the Banwarts for $103,856, and it dismissed CCI's claims.

CCI now appeals.

III. Discussion.

On appeal, CCI contends the district court erred in (1) failing to enter judgment on CCI's mechanic's lien and breach-of-contract claims; (2) finding that CCI was responsible for a sag in the floor of the apartment; (3) finding that the untimeliness of CCI's performance in constructing the apartment warranted an additional award of consequential damages; (4) ruling that CCI interfered with the Banwarts' property rights; and (5) awarding the Banwarts' damages. We address its arguments in turn.

A. Breach of Contract and Mechanic's Lien.

The law for recovery on a mechanic's lien claim is well established. A person who furnishes materials or labor for, or performs labor on, any building or land "*by virtue of any contract with the owner*, . . . shall have a lien" on the building or land to secure payment. Iowa Code § 572.2(1) (2009) (emphasis added). Consequently, a contractor seeking a mechanic's lien must first establish there is a contract between the contractor and the owner. *See id.* The

contract may be either express or implied. *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 65 (Iowa 2003).

Here, there is no dispute that a contract existed between the parties. However, CCI argues its contract with the Banwarts was a cost-plus-fee contract, wherein the Banwarts would pay all of CCI's costs incurred in the construction of the unit, plus fees.[2] The district court agreed with the Banwarts that the parties' contract was a guaranteed maximum price contract, also known as a "not-to exceed" contract.[3]

The district court was in the best position to determine credibility, and it expressly found, in reaching its decision the contract was a not-to-exceed contract, "the testimony of the Banwarts more credible than that of Leigh." It also found "the observations of the Banwarts' experts to be somewhat more persuasive than the observations made by CCI's experts." In support of its conclusion, the court noted: "Leigh was involved in all of the pre-offer considerations about the property." He "advised the Banwarts on the amount of

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[2] "[U]nder a cost plus fee contract, the contractor receives reimbursement for the costs it incurs, plus a fee." 2 Philip L. Bruner & Patrick J. O'Connor, Jr., *Bruner & O'Connor on Construction Law* § 6:81 (December 2012) (hereinafter "*Construction Law*"). As one treatise explains:

> It is important to carefully define which construction costs incurred by the contractor are to be reimbursed. It is typical to provide reimbursement for wages paid for labor and taxes; benefits; insurance costs based on those wages; rented equipment; subcontract costs; insurance costs; bonding costs; building permit costs; costs of contractor-owned equipment (which can be controversial to determine); and costs of material. . . . Profit and overhead are typically considered to be included within the contractor's fee.

Id. (internal footnotes omitted).

[3] A guaranteed maximum price contract is "where the contractor assumes the risk of the costs exceeding a maximum price. The contractor receives compensation for its costs until the maximum price is reached, but at that point, the contractor receives no further compensation." *Construction Law* § 6:82.

the offer and was familiar with the amount borrowed and the budget available to work with," and the "Banwarts contacted Leigh immediately prior to closing to confirm that he could do the work within the budget." Additionally, the court explained: "Leigh did not apprise the Banwarts of the ongoing costs or approach them for 'change orders' as the project proceeded. I don't think he was interested in 'gouging' his friends, so this indicates to me that the parties intended a certain overall cost." The court also noted that "Leigh did not object or protest when Jo referred to their $130,000 agreement via email on October 26," and "Leigh did not object or protest when Jo referred to the $130,000 budget during an in person discussion on November 1, [2007]." Finally, the court noted it was

> not dissuaded from this opinion by the vague scope and requirements at the project's outset. First, all parties knew what the store had to look like and how it had to operate from previous experiences. Second, these were trusted friends who had worked together before. That they did not more specifically define or detail the scope of work is not surprising.

Upon our de novo review of the record, we concur with the district court's conclusion that the contract was a maximum guaranteed price or not-to-exceed contract, and we find its conclusion was fully supported by the record. In this case, it is clear the Banwarts were working with an initial construction budget of $130,000, which they later increased to $170,000. The record establishes that Leigh did not just show up at the jobsite and begin working on the construction; he was thoroughly involved in the project's planning and development. Based upon their previous projects with Leigh, the Banwarts relied upon Leigh for determining the amount the project should cost. He assisted them in determining

the amount of money needed to finance the construction. He, through CCI, agreed to be the project's general contractor. Additionally, the evidence shows Leigh initially indicated to the Banwarts that $130,000 would be more than enough to complete the project, comparing that cost to the previous Cookies' store project that cost approximately $80,000 to finish, even with unexpected costs in that project related to HVAC issues.

The record further evidences the Banwarts refused to enter into a cost-plus-fee contract with CCI when Jon expressly told Leigh he would not sign the document Leigh had presented containing such language. In addition thereto, the Banwarts' alarm, apparent in their October 2007 emails with Leigh that $120,000 had already been spent with the project far from being finished, is also very telling. They constantly sought reassurance from Leigh he could finish the project within their set price, and they asked for receipts so they could determine why the project was costing more than anticipated when they learned three months after the project started that almost $120,000 was gone. It seems unlikely they would have such a response if the contract did not have a maximum price set. Additionally, Leigh's detailed billing after the termination of the parties' agreement is suspect, given his inability to provide cost documentation early in the project when receipts were requested by the Banwarts. Perhaps the Banwarts should have terminated the contract at this juncture, but based upon their friendship, they continued to rely upon Leigh's reassurances and even agreed to increase their budget to $170,000, giving Leigh the benefit of the doubt. In any event, the record clearly evidences the Banwarts' $170,000 figure

was set out as the maximum price for the contract, and Leigh agreed to that both verbally to Jo and in continuing his work on the project.

We also note briefly we find no merit in CCI's arguments that such contract was contrary to Iowa law, and we find its reliance upon *Welter v*. *Heer*, 181 N.W.2d 134, 136-38 (Iowa 1970), to be misplaced, as the facts in this case are clearly distinguishable. In that case, the court ultimately agreed it was implausible to believe a contractor would agree to a fixed price without detailed plans and specifications. *See id.* Here, the parties' past dealings, their friendship, Leigh's direct involvement in planning and development of the project, and his involvement in financing of the project, demonstrate Leigh did agree to a fixed price.

For all these reasons, we agree with the district court's conclusion the parties had a guaranteed maximum price contract or not-to-exceed contract, and Leigh and CCI breached that agreement in exceeding $170,000. Additionally, we reject CCI's contention that equity demands it be further compensated for its labor and materials provided and that it not be responsible for certain costs incurred by the Banwarts after termination of the contract with CCI. We find the record fully supports the district court's conclusion that additional expenses incurred by the Banwarts were attributable to CCI's breach and that CCI was not entitled to additional compensation for its labor and materials provided on the project. Consequently, we find the court did not err in dismissing CCI's claims.

B. Floor Damages Award.

CCI next contends the court erred in awarding the Banwarts damages for the sagging floor, asserting the Banwarts failed to establish CCI's liability for the sag. We disagree.

An employee of CCI testified he, without supervision, installed the joist trusses on the floor where there had been a stairway which had been relocated by CCI. He specifically testified that he "may not have had one . . . exactly perfect with the other so it could make a—so there could have been a dip in the floor." Given the installation of the floor joists by CCI's employee and the subsequent sagging of the floor, we find no reason, upon our de novo review, to disturb the district court's finding that CCI was responsible for the sagging floor. We find no error in the courts determination CCI was responsible for those damages, and we affirm on this issue.

C. Consequential Damages Award.

CCI also challenges the court's award of consequential damages to the Banwarts for lost rental income. It contends the Banwarts planned to use the apartment only for their personal use or only rent the unit out in the summertime. It argues the Banwarts could not have lost any rental income. Additionally, it argues there was no completion deadline for finishing the residential unit, and it therefore could not be responsible for any lost rental income. We disagree.

At the project's outset, Leigh was aware the second floor of the unit would be used for either a residence or a rental. Additionally, the evidence in the record clearly establishes the parties had a completion deadline of October 15, 2007, for the residence, and the parties pushed back that deadline when Leigh

later agreed he could finish the project for an additional $40,000, raising the total price to $170,000. The project was still not finished in March 2008 when the Banwarts terminated the contract. The unit was not rented until the summer of 2008. Consequently, we find no reason to disturb the district court's award of damages for lost rental income upon our de novo review. Accordingly, we affirm on this issue.

D. Trespass and Conversion Damages Award.

Having already affirmed the district court's finding a not-to-exceed contract existed between the parties, we find no merit in CCI's argument that its taking of fixtures, installed or not, and other miscellaneous items from the Banwarts' property belonging to the Banwarts did not constitute conversion because the Banwarts had not paid for those items. Additionally, we find no merit in CCI's argument that its taking of its tools from the property was not trespass. CCI's contract with the Banwarts was terminated, and they reasonably requested Leigh contact them to set up a time to retrieve his tools, and he chose to enter the property, including the locked portion, without permission anyway. Upon our de novo review, we find no reason to disturb the district court's findings that Leigh both trespassed upon and converted the Banwarts' property.

E. Failure to Mitigate Damages.

Finally, CCI argues the Banwarts were not entitled to damages for costs they assert they incurred to complete the project after CCI's contract was terminated, because the Banwarts failed to mitigate their damages. We find no merit in this argument.

Here, the record clearly evidences the Banwarts went out of their way to work with Leigh and CCI to complete the project, and they gave them every chance to finish the project within the set deadline and contract price. Unfortunately, Leigh and CCI continued to have delays and increased costs, which resulted in termination of the contract. Under the facts of this case, we find without merit CCI's argument that since it was the Banwarts that terminated the contract, they opened themselves to incurring additional expenses to complete the work, and in doing so, they exposed themselves to damages they could have avoided had CCI been permitted to complete the contract. Accordingly, we find the Banwarts did not fail to mitigate their damages, and we therefore affirm on this issue.

***IV*. *Conclusion*.**

For all of the foregoing reasons, we affirm the ruling of the district court.

AFFIRMED.