IN THE COURT OF APPEALS OF IOWA

No. 2-578 / 11-2112
Filed October 31, 2012

RUSSELL FAUST d/b/a FAUST MILLWORK AND CABINETS,
Plaintiff-Appellee,

vs.

PETER B. SAKAS and GINGER J. SAKAS,
Defendant-Appellants,

and

McAULIFFE EXCAVATING, INC.,
Defendant/Cross-Petitioner-Appellee.

Appeal from the Iowa District Court for Dubuque County, John J. Bauercamper, Judge.

Homeowners appeal a district court order foreclosing two subcontractors' mechanics' liens on their property, contending that the subcontractors did not comply with a statutory notice requirement, rendering their liens unenforceable. **REVERSED AND REMANDED.**

Christopher C. Fry and Joshua P. Weidemann of O'Connor & Thomas, P.C., Dubuque, for appellants.

Daniel H. Swift of Swift Law Firm, Manchester, for appellee Russell Faust.

Peter Williams, Stephen J. Juergens, Jenny L. Weiss, and P. Christopher Weiss of Fuerste, Carew, Juergens & Sudmeier, P.C., Dubuque, for appellee McAuliffe Excavating, Inc.

Heard by Eisenhauer, C.J., and Vogel and Vaitheswaran, JJ.

VAITHESWARAN, J.

Homeowners appeal a district court order foreclosing the mechanics' liens of two subcontractors. They assert the subcontractors did not comply with a statutory notice requirement, rendering their liens unenforceable.

I. Background Facts and Proceedings

Peter and Ginger Sakas decided to construct a home in Dubuque, Iowa. They submitted a list of specifications to Jeff Noack, owner of Advanced Custom Builders. Noack responded with a proposal, which the Sakases accepted.

Advanced Custom Builders retained Russell Faust, owner of Faust Millwork, to install cabinetry, doors, and trim work and McAuliffe Excavating, Inc. to perform excavation services. Eventually, Advanced Custom Builders stopped paying Faust and McAuliffe for their work and declared bankruptcy.

Faust petitioned to foreclose his mechanic's lien, naming the Sakases and others as defendants. McAuliffe was included as a defendant by virtue of its mechanic's lien. The company filed an answer to Faust's petition along with a counterclaim against the Sakases to foreclose its own lien and obtain damages and a personal judgment against the Sakases. All involved conceded the counterclaim was in fact a cross-claim.

The Sakases moved for summary judgment on Faust's petition and McAuliffe's cross-claim. They asserted that the mechanics' liens were unenforceable because Faust and McAuliffe failed to comply with a statutory notice requirement. The district court denied the motions.

Following trial, the district court concluded the Sakases had constructive notice of the work being performed on their home and the mechanics' liens were

enforceable. In response to post-trial motions, the court ordered the Sakases to pay the attorney fees incurred by Faust and McAuliffe. The Sakases appealed.

II. Enforceability of Mechanics' Liens

On appeal, the Sakases reiterate that the subcontractors had an obligation to comply with a statutory notice requirement as a prerequisite to enforcing their mechanics' liens. The Sakases also raise several other arguments in support of reversal on this issue.

Our analysis begins and ends with the notice requirement, which was raised by the Sakases in their motions for summary judgment and was litigated at trial. Although our review of a mechanic's lien action is de novo, *see Carson v. Roediger*, 513 N.W.2d 713, 715 (Iowa 1994), the court's rulings on the notice question raise a legal issue that we review for errors of law. *See Schaffer v. Frank Moyer Constr., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997).

Iowa Code section 572.14 (Supp. 2007), titled "Liability to subcontractor after payment to original contractor" provides in part:

> 1. Except as provided in subsection 2, payment to the original contractor by the owner of any part or all of the contract price of the building or improvement within ninety days after the date on which the last of the materials was furnished or the last of the labor was performed by a subcontractor, does not relieve the owner from liability to the subcontractor for the full value of any material furnished or labor performed upon the building, land, or improvement if the subcontractor files a lien within ninety days after the date on which the last of the materials was furnished or the last of the labor was performed.
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> 2. In the case of an owner-occupied dwelling, a mechanic's lien perfected under this chapter is enforceable only to the extent of the balance due the principal contractor by the owner-occupant prior to the owner-occupant being served with the notice specified in subsection 3. This notice may be served by delivering it to the owner or the owner's spouse personally, or by mailing it to the owner by certified mail with restricted delivery and return receipt to

> the person mailing the notice, or by personal service as provided in the rules of civil procedure.

In a nutshell, subsection 1, states "[e]xcept as provided in subsection 2," an owner's payment to a contractor does not relieve the owner of liability to a "subcontractor" if the subcontractor files a lien within a specified period of time. Subsection 2, in turn, provides that, in the case of an "owner-occupied dwelling," a mechanic's lien is enforceable only to the extent the notice specified in subsection 3 is served on the owner-occupant.[1]

There is no dispute that the Sakases' home was an "owner-occupied dwelling." *See* Iowa Code § 572.1(5) ("'Owner-occupied dwelling' includes a newly constructed dwelling to be occupied by the owner as a homestead, or a dwelling that is under construction and being built by or for an owner who will occupy the dwelling as a homestead."); *Louie's Floor Covering*, *Inc*. *v*. *DePhillips Interests*, *Ltd*., 378 N.W.2d 923, 926 (Iowa 1985) (stating house that was under construction and was being built for the buyer was an "owner-occupied"

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[1] Iowa Code section 572.14(3) provides:

> The written notice required for purposes of subsection 2 shall contain the name of the owner, the address of the property charged with the lien, the name, address and telephone number of the lien claimant, and the following statement:
>
> The person named in this notice is providing labor or materials or both in connection with improvements to your residence or real property. Chapter 572 of the Code of Iowa may permit the enforcement of a lien against this property to secure payment for labor and materials supplied. You are not required to pay more to the person claiming the lien than the amount of money due from you to the person with whom you contracted to perform the improvements. You should not make further payments to your contractor until the contractor presents you with a waiver of the lien claimed by the person named in this notice. If you have any questions regarding this notice you should call the person named in this notice at the phone number listed in this notice or contact an attorney. You should obtain answers to your questions before you make any payments to the contractor.

dwelling). There is also no dispute that Faust and McAuliffe failed to serve the Sakases with the notice prescribed in section 572.14(3). The only apparent dispute is whether Faust was a "subcontractor" to whom the notice provision applied.[2]

A "subcontractor" is defined as "every person furnishing material or performing labor upon any building, erection, or other improvement, except those having contracts directly with the owner." Iowa Code § 572.1(6). While Faust appeared to take issue with this designation at trial, his petition alleged he was a subcontractor, as did his verified mechanic's lien filing. Additionally, Faust conceded he did not sign a written contract with the Sakases; he submitted his bills to Advanced Custom Builders;[3] and Noack—rather than the Sakases—approached him to work on the house. Notably, when Noack requested a release of payments from the lender to the people who worked on the home, his requests denominated Faust a "subcontractor/material supplier."

We recognize that Faust personally met with the Sakases and changed certain work at their behest. This fact does not convert Faust's relationship to that of a general contractor because the entity in charge of building the home and paying those who worked on the home remained Advanced Custom Builders. *See Guldberg v. Greenfield*, 146 N.W.2d 298, 304 (Iowa 1966) ("That certain changes in the work of the subcontractor or extras that are agreed to by him, the

[2] We use the term "apparent" because Faust does not explicitly raise and address this issue. However, it is an undercurrent in his brief and we elect to give him the benefit of the doubt by addressing it. McAuliffe does not argue he was anything but a subcontractor.

[3] Faust asserted that he tried to submit one bill directly to the Sakases but was told he needed to submit it to Advanced Custom Builders.

contractor and owner do not make the former a principal contractor with the owner."). Indeed, the Sakases continued to make payments to Advanced Custom Builders while they were working with Faust.

We conclude Faust was a subcontractor who was obligated to substantially comply with the notice provision of section 572.14(3). *See Henning v. Sec. Bank*, 564 N.W.2d 398, 402 (Iowa 1997) ("The unpaid subcontractors could not have asserted valid mechanic's liens against the Henning property without substantially complying with the statute."). Because he concedes he did not, his mechanic's lien was unenforceable.

The same holds true for McAuliffe's mechanic's lien because McAuliffe did not dispute its status as a subcontractor and its failure to furnish the prescribed notice.

In reaching this conclusion, we have considered the subcontractors' argument that equity demands a different result. There is no question that both subcontractors expended time, effort, and materials for which they were not compensated. Faust, in particular, went to great lengths to accommodate the Sakases' specific design and material requests and evinced an unassailable work ethic. On the other hand, the Sakases did not attempt to get something for nothing. As noted, they requested changes and paid for them through Advanced Custom Builders, the entity with whom they contracted. They could not have anticipated that they would be asked to make duplicate payments directly to the subcontractors. Equity, therefore, cuts both ways.

Significantly, the Iowa legislature was faced with these competing equitable arguments and elected to tip the balance in favor of homeowners rather

than industry insiders. *See Louie's Floor Covering*, 378 N.W.2d at 927 (noting subcontractors were in a better position to evaluate the credit of the contractor than the homeowner and stating chapter 572 "was designed to avoid hardship when the principal contractor goes bankrupt or becomes 'defunct'"); *see also Schaffer*, 563 N.W.2d at 608; *Carson*, 513 N.W.2d at 715. The legislature required the subcontractor to furnish the owner with a formal notice of the mechanic's lien, including a statement of the homeowner's limited liability under the lien. *See* Iowa Code § 572.14. Only then could the subcontractor recover the outstanding balance that was not paid to the general contractor. *See id*. We will not override this clear statutory mandate. *Madrid Lumber Co*. *v. Boone Cnty*., 121 N.W.2d 523, 527 (Iowa 1963) ("Courts of equity can no more disregard statutory requirements than can a court of law. They are bound by positive provisions of a statute equally with courts of law . . . .").

III. Disposition

We reverse the district court decree foreclosing the mechanics' liens of Faust and McAuliffe.

The district court also ordered the Sakases to pay the subcontractors' attorney fees. The subcontractors were not prevailing parties and because the subcontractors would not have been entitled to attorney fees even if they were prevailing parties, we reverse the attorney fee awards. *See* Iowa Code § 572.32(1) (2007) ("In a court action to enforce a mechanic's lien, if the plaintiff furnished labor or materials *directly* to the defendant, a *prevailing* plaintiff may be awarded reasonable attorney fees." (emphasis added)); *see also W.P. Barber*

Lumber Co. *v*. *Celania*, 674 N.W.2d 62, 68 (Iowa 2003) (disallowing attorney fees to subcontractor who did not "directly" contract with owner).

Because McAuliffe's additional cross-claim was premised on its mechanic's lien, which we have found unenforceable, we remand for entry of an order dismissing the cross-claim in its entirety, including the request for personal judgment against the homeowners.[4]

We remand for entry of an order dismissing Faust's petition against the Sakases.

REVERSED AND REMANDED.

[4] "A judgment of foreclosure on a mechanic's lien is not a personal judgment." *See W.P. Barber Lumber*, 674 N.W.2d at 64.