

IN THE COURT OF APPEALS OF IOWA

No. 6-1018 / 06-0070

Filed April 25, 2007

**SAYDEL COMMUNITY SCHOOL
DISTRICT,**

Plaintiff-Appellee/Cross-Appellant,

vs.

THE DENIS DELLA VEDOVA, INC.,

Defendant-Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County, Arthur E. Gamble (summary judgment) and Richard G. Blane II (trial), judges.

A general contractor appeals from the district court's ruling in the school district's favor on the district's petition for declaratory judgment arising from a school remodeling project. **AFFIRMED.**

Stephen Marso of Whitfield & Eddy, P.L.C., West Des Moines, for appellant.

Randall Stefani of Ahlers & Cooney, P.C., Des Moines, for appellee.

Heard by Zimmer, P.J., and Miller and Baker, JJ.

ZIMMER, P.J.

Denis Della Vedova, Inc. (DDVI), a general contractor, appeals from the district court's ruling in the Saydel Community School District's (District) favor on the District's petition for declaratory judgment arising from a middle school remodeling project. We affirm the district court.

The District hired DDVI to perform general contractor duties for a renovation project at Woodside Middle School. The District hired FEH Associates, Inc. (FEH) as the project architect. FEH designated Mark Weiser as the architect in charge of the project. DDVI divided the project into two construction phases. Phase I called for the addition of administrative offices to the middle school, and Phase II involved remodeling restrooms and the cafeteria in the middle school. Work on Phase I commenced in the fall of 2002.

In May 2003 Weiser informed DDVI the woodwork in the administrative board room needed to be removed and replaced. DDVI contended removal was unnecessary and maintained it could repair any defects. Weiser repeatedly asked DDVI to remove and replace the woodwork, but DDVI eventually left the project prior to completion.

Disputes also arose during Phase II of the project regarding cafeteria wall tile and wall and floor tile in the restrooms. Weiser told DDVI its subcontractor's installation was unacceptable, and he demanded complete removal and replacement of all wall and floor tile in the restrooms. DDVI refused to replace the tile and left this aspect of the project prior to completion as well. DDVI left the project for good in late September or early October 2003.

The District filed a petition for declaratory judgment and retained \$163,886.22 for completion of the project. The petition indicated the District had received an Iowa Code chapter 573 (2003) claim from a subcontractor, total repair bids for completing the project ranged from \$72,000 to \$88,000, and the architect estimated the cost to complete remaining punch list items totalled \$28,000. In addition, the District maintained DDVI was liable for additional architectural costs under the contract.

DDVI filed a motion to stay the action and compel arbitration to determine whether DDVI met construction standards. The district court denied the motion and agreed with the District the case involved a dispute over aesthetics.¹ DDVI later filed a motion in limine attempting to prevent the District from introducing evidence of industry construction standards at trial due to the District's stance in response to its motion to stay. The district court denied the motion on the basis the industry construction standards also related to aesthetics.

DDVI filed an answer and a counterclaim alleging the District could only retain \$7186.28 and its refusal to turn over the rest of the retained funds was a breach of contract and a violation of chapter 573.² DDVI also sought attorney fees. Later DDVI filed a motion for summary judgment contending the District had to remit \$163,886.22 to DDVI plus attorney fees under *Midland Restoration Co. v. Sioux City Community School District*, No. 02-0625 (Iowa Ct. App. May 29, 2003). The district court denied the motion for summary judgment. The court

¹ Under the contract, disputes over aesthetics were specifically listed as an exception to compelled arbitration.

² DDVI claimed it had one chapter 573 claim on file for \$3593.14, so the District could only retain double the amount of the subcontractor's claim.

determined *Midland* was not controlling legal authority under Iowa Rule of Appellate Procedure 6.14(5). In addition, the court found the *Midland* court did not analyze whether section 573.16 created a private cause of action for a general contractor against a public corporation that withholds payments. The court also found *Midland* is not authority for the proposition that a public corporation must pay a contractor for work that was not performed in accordance with contract specifications. The court rejected DDVI's motion to reconsider its ruling and disagreed with DDVI's contention that rule 6.14(5) violates the "judicial power clause" of Article V, section 1 of the Iowa Constitution.

The matter was tried to the district court. Pursuant to the mutual requests of the parties, the trial court personally inspected the premises. After carefully considering the evidence, the court ruled in favor of the District on all but one of its claims. The court denied the District's claim for an allowance to replace certain solid-surface materials in the board room and restroom areas. The court concluded the District could retain funds up to \$44,440 for board room woodwork, \$24,007 for restroom tile work, \$3100 for cafeteria tile work, \$17,400 for remaining punch list items, \$11,399.92 for past architectural invoices if paid by the District, and future architectural fees up to \$5495. The court ordered that any remaining balance be paid to DDVI.

DDVI appealed and has raised the following arguments: (1) Iowa Rule of Appellate Procedure 6.14(5)³ is unconstitutional, so the district court erred in denying DDVI's motion for summary judgment; (2) the court erred in allowing

³ Iowa Rule of Appellate Procedure 6.14(5) states: "An unpublished opinion of the Iowa appellate courts or of any other appellate court may be cited in a brief; however, unpublished opinions shall not constitute controlling legal authority."

construction standards evidence at trial; (3) the court erred in ruling DDVI had not rendered substantial performance under the contract terms; (4) the court erred in allowing DDVI's performance to be judged by the architect, who allegedly acted in bad faith; (5) the court erred in finding DDVI liable for continuing architectural fees after it withdrew from the project; and (6) the court erred in failing to determine it would not constitute economic waste for DDVI to replace woodwork and tile rather than attempt repairs. The District cross-appealed and contends the court erred in failing to allow it to retain funds adequate to replace solid surface material when the material did not conform to the contract requirements.

DDVI contends Iowa Rule of Appellate Procedure 6.14(5) is unconstitutional. Therefore, the contractor argues the district court erred in denying its motion for summary judgment, which was based on an allegedly controlling unpublished opinion. Upon our review, we find it unnecessary to address the constitutional issue raised by DDVI. We reach this conclusion because we do not believe *Midland*, even if published, would require a different result than that reached by the district court. As we have already mentioned, the *Midland* court was not presented with and did not address the question of whether section 573.16 created a private cause of action for a general contractor against a public corporation that withholds payments; the *Midland* court only addressed whether Iowa's competitive bidding law had been violated and whether the defendant's agent in that case had authority to order the work at issue. *Midland*, No. 02-0625, 3-6. Accordingly, we reject this assignment of error and now turn to DDVI's remaining claims.

The court found the deficiencies in the board room woodwork related to aesthetic effect.⁴ The court determined Weiser's decision to remove and replace the woodwork was consistent with the intent expressed in the contract documents and DDVI did not establish his decisions were made in bad faith. The court concluded DDVI's installation of the woodwork did not conform to the contract. However, the court determined DDVI was not responsible for problems with solid surface material used on the board room table and in the restrooms because the product and color were selected by Weiser. The court found the tile problems were noticeable even to its "untrained eye" during the inspection, and the court concluded the problems were related to aesthetics and subject to Weiser's decisions. Again, the court found Weiser's decision to reject the tile installation was not contrary to the contract documents. The court concluded DDVI had not substantially complied with the contract as to either phase, so it remained liable for continuing architectural expenses under the contract terms. The court concluded any subcontractor chapter 573 claims were untimely and dismissed DDVI's counterclaim because the contractor was not a proper claimant under that chapter. Because we agree with the district court's findings of fact, conclusions of law, and decision, we affirm. See Iowa Ct. R. 21.29.

AFFIRMED.

⁴ The contract documents state: "The Architect's decisions on matters relating to aesthetic effect will be final if consistent with the intent expressed in the Contract Documents."