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STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1862

Sela Roofing and Remodeling, Inc.,
d/b/a as Sela Gutter Connection,
Respondent,

vs.

Timothy Moot, et al.,
Appellants,

Associated Bank National Association, et al.,
Defendants.

Filed September 5, 2017
Affirmed in part, reversed in part, and remanded
Schellhas, Judge

Dakota County District Court
File No. 19HA-CV-14-3947

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Considered and decided by Bjorkman, Presiding Judge; Schellhas, Judge; and Hooten, Judge.

U N P U B L I S H E D   O P I N I O N

SCHELLHAS, Judge

Appellants seek reversal of a judgment against them in a breach-of-contract and mechanic's lien foreclosure action, arguing that the district court erred by denying their claims for offsets to the balance due under their contracts with respondent and by awarding excessive attorney fees to respondent. We affirm in part, reverse in part, and remand.

FACTS

Appellants Timothy and Dianna Moot contracted with respondent Sela Roofing and Remodeling d/b/a Sela Gutter Connection for the repair of storm damage to their home. A contentious relationship developed during the course of Sela's work for the Moots, and Sela ultimately terminated its work before final inspection by a City of Eagan building official.

Sela filed a mechanic's lien against the Moots' property on September 30, 2014,[1] and initiated this action against the Moots and their mortgagee, defendant Associated Bank National Association, seeking to recover the $43,217.93 unpaid contract balance. The Moots filed an answer, denying liability and asserting affirmative defenses of, inter alia, offset, setoff, and/or recoupment, and counterclaiming for breach of contract, based on alleged damage to their home by Sela's failure to properly flash a skylight and failure to complete or properly complete contract work.

[1] The September 30 mechanic's lien statement corrected and replaced a previously filed mechanic's lien statement that was filed on August 22, 2014.

More than six months into the litigation, the parties stipulated to an order, as follows: Sela completed the final items necessary for the home to pass inspection with the city; Associated released $23,840.95 in funds to Sela; and Sela filed a partial release of the mechanic's lien for the same amount. At some time before trial, the Moots themselves paid Sela $13,091.60, which left $6,285.38 of the contract balance in dispute.

The district court conducted a bench trial over three days in March 2016. During the trial, the Moots identified numerous alleged deficiencies in Sela's performance and/or overcharges totaling about $6,000 and argued that Sela was not entitled to any recovery. Sela disputed the alleged deficiencies and overcharges and asked for judgment for the full remaining contract balance.

On May 2, 2016, the district court filed detailed findings of fact and an order for judgment in favor of Sela. The district court made express factual findings regarding the course of Sela's contract work, including that: the Moots turned away Sela's crews from their home on numerous occasions; Sela ceased work in July 2014, with a "small amount of work remaining" and billed the Moots $43,000 on July 25, 2014; an inspection by the City of Eagan on July 28, 2014, found a few minor violations, but Sela was unaware of this inspection and not present during the inspection; Sela was unable to set up another final inspection because the Moots would not agree to a date; and a final inspection was not completed until after the Moots commenced litigation. The court further found that the doctrine of discharge by supervening frustration applied, and that Sela substantially performed under the contract and "properly provided for an allowance for small items not completed when it sent [the Moots] its final bill." The district court concluded that the

Moots "should pay to [Sela] $6,285.38 for work performed within the scope of the contract." The district court denied the Moots' counterclaim.

On September 27, 2016, the district court filed an order denying the Moots' motion for amended findings or a new trial, and awarding Sela $39,872 in attorney fees (less than half the $83,584.25 that Sela sought) and costs of $402. The court acknowledged the goal of proportionality and the modest resources of the Moots but balanced that against their unreasonable actions in failing to pay undisputed contract amounts until May 26, 2015. The court concluded that "a reasonable compromise of competing interests is for [the Moots] to pay reasonable fees and costs from October 14, 2014 (filing of the Complaint) to May 26, 2015 (when Sela was made whole for all but $6,285.38)." For that time period, the court reduced the attorney fees billed ($44,000) because of excessive attorney time and insufficient time-record detail to reach the $39,872 attorney-fee award.[2]

On November 8, 2016, the district court filed findings of fact, conclusions of law, and an order for amended judgment in the amount of $46,793.18, including interest. The court also made findings on Sela's mechanic's lien and ordered the sale of the Moots' property to satisfy the lien.

The Moots filed this appeal, and the parties stipulated to a stay of judgment pending appeal.

[2] The district court also awarded significantly reduced costs and no disbursements, which are not at issue on appeal.

DECISION

"On appeal from judgment following a court trial, this court reviews whether the district court's findings were clearly erroneous and whether the district court erred as a matter of law." *In re Distrib. of Attorney's Fees*, 855 N.W.2d 760, 761 (Minn. App. 2014), *aff'd*, 870 N.W.2d 755 (Minn. 2015). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the [district] court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01.

I.

The Moots challenge the district court's finding that Sela substantially performed the contract and argue that the district court erred by denying their claims for offsets. The Moots also challenge the district court's finding that the doctrine of supervening frustration applies. Because the district court's finding of substantial performance is sufficient to support the judgment, we do not reach the issue of whether the district court erred by finding supervening frustration.

Regarding substantial performance, we initially note that, although the Moots claim to challenge the district court's substantial-performance finding, their payment of the bulk of the contract price and request for recovery based on incomplete or not properly completed items is *consistent* with a finding of substantial performance. Moreover, the district court does not appear to have clearly erred in determining that Sela substantially performed the contract. *See Ylijarvi v. Brockphaler*, 213 Minn. 385, 392, 7 N.W.2d 314,

319 (1942) (holding that whether a party has substantially performed under a contract is a question of fact).

Substantial performance is

> performance of all the essentials necessary to the full accomplishment of the purposes for which the thing contracted for has been constructed, except for some slight and unintentional defects which can be readily remedied or for which an allowance covering the cost of remedying the same can be made from the contract price. Deviations or lack of performance which are either intentional or so material that the owner does not get substantially that for which he bargained are not permissible.

Material Movers, Inc. v. Hill, 316 N.W.2d 13, 18 (Minn. 1982) (quoting *Ylijarvi*, 213 Minn. at 390, 7 N.W.2d at 318). The Moots assert that the essential purpose of the contract was that Sela "complete its work to an extent that it complied with Code so the [city building official] could issue a report stating that Sela's work passed the City's final inspection" and that Sela did not substantially perform until May 2015. We conclude that the district court did not clearly err by rejecting the Moots' assertion and concluding that the minor items that the city identified for correction actually support the finding that the contract was substantially performed when Sela left the project in July 2014.

The Moots' challenges to the district court's denial of their requested offsets fall into two categories: (A) their attempt to recover the amount deducted as depreciation by Sela's insurer on the claim for damage to property caused by Sela's failure to properly flash the skylight; and (B) their attempt to reduce the amount of Sela's judgment for work not performed or not properly performed. We address these two categories in turn.

A. Depreciation deduction from skylight-related damages

As a threshold matter, we address Sela's argument that the Moots waived this claim by failing to assert it in their answer or discovery answers. Sela brought a motion in limine on this basis, and the district court might have acted within its discretion to preclude this claim. *See, e.g.*, Minn. R. Civ. P. 8.01 (requiring pleading to state amount of relief sought for unliquidated claims of less than $50,000); 26.01(a)(1)(c) (requiring disclosure of computation of each category of damages sought); 37.03(a) (generally precluding use of evidence not disclosed). But the district court implicitly denied the motion in limine by addressing and denying the Moots' counterclaim in its April 29 order. Accordingly, we review this issue on the merits.

"In a breach of contract action, the damage award is the monetary amount sufficient to place the plaintiff in the same situation as if the contract had been performed." *Christenson v. Milde*, 402 N.W.2d 610, 613 (Minn. App. 1987). Specifically with respect to construction contracts, the supreme court has defined damages as:

> Either the cost of reconstruction in accordance with the contract, if this is possible without unreasonable economic waste, or the difference in the value of the building as contracted for and the value as actually built, if reconstruction would constitute unreasonable waste.

Lesmeister v. Dilly, 330 N.W.2d 95, 102 (Minn. 1983) (quotation omitted). "In addition, non-breaching parties should recover damages sustained by reason of the breach which arose naturally from the breach or could reasonably be supposed to have been contemplated by the parties when making the contract as the probable result of the breach." *Id.* at 103 (citing *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854)); *see also Imdieke v.*

Blenda-Life, Inc., 363 N.W.2d 121, 125 (Minn. App. 1985) ("Consequential damages are the damages which naturally flow from the breach of a contract, or may reasonably be contemplated by the parties as a probable result of a breach of the contract.").

Here, the damages that the Moots sought to recover—for the cost to repair property that was not within the scope of Sela's contract but was damaged as a natural and probable result of Sela's failure to properly perform the contract—are in the nature of consequential damages for breach of a construction contract. The Moots offered evidence in the form of an insurance adjustment from Sela's insurer reflecting the anticipated cost to repair the damage caused by the faulty installation of the skylight. The insurance company specified that it would deduct $2,879.52 of the damage amount from Sela's insurance claim for depreciation. The district court found that Sela was entitled to collect its full contract price without any offset for this portion of the repair cost that was not covered by Sela's insurance company—the amount reflecting depreciation of $2,879.52. We can discern no basis for deducting this depreciation amount from the amount of damages that the Moots were entitled to recover from Sela. *See Lesmeister*, 330 N.W.2d at 102–03. Accordingly, we conclude that the district court clearly erred by finding that the Moots were not entitled to the full cost of repairs.

B. Incomplete work under the contract

The balance of the Moots' requests for offsets are fact-intensive, and the district court did not make specific findings regarding them. But the court noted in its order denying amended findings that "many of its findings depended on credibility determinations." Although the better practice is for the district court to provide more

detailed findings, the court's order clearly reflects its rejection of all of the Moots' allegations regarding incomplete work under the contract. Sela rebutted most of the Moots' claims of incomplete work. For instance, the Moots sought recovery for allegedly incomplete contract work that Sela maintained is not within the scope of the contract; Sela disputed the Moots' claim that Sela overbilled them; and Sela maintained that it had no knowledge of products that the Moots claimed were missing. Moreover, to the extent that any of the Moots' testimony was uncontradicted, the district court, as finder of fact, was free to discredit that testimony. *See Costello v. Johnson*, 265 Minn. 204, 211, 121 N.W.2d 70, 76 (1963) (holding that "uncontradicted testimony does not compel a finding in accordance therewith" and that fact-finder "is not compelled to believe any witness merely because his testimony is uncontradicted"). Accordingly, we cannot conclude that the district court clearly erred in rejecting the Moots' claim for offsets based on incomplete contract work.

II.

Under Minnesota law, attorney fees are recoverable if allowed by contract. *Kelbro Co. v. Vinny's on the River, LLC*, 893 N.W.2d 390, 399 (Minn. App. 2017). Fees also may be awarded in the discretion of the district court in a mechanic's lien action. *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 831 (Minn. App. 1994), *review denied* (Minn. June 15, 1994). This court "will not interfere with a district court's award of attorney fees absent an abuse of discretion," and "will not set aside a district court's factual findings underlying an award of attorney fees unless they are clearly

erroneous." *Kelbro*, 893 N.W.2d at 399 (quotations omitted); *see also Automated Bldg.*, 514 N.W.2d at 831.

The Moots assert that the attorney-fee award in this case is unreasonable because it is more than six times greater than the amount of the $6,285 judgment ultimately awarded to Sela. The district court considered proportionality concerns, as expressed in the caselaw on mechanic's lien attorney fees and in Minn. R. Civ. P. 1. But the court found that the attorney fees awarded were justified by the Moots' conduct in refusing to pay any of the $43,217.93 due on a contract on which 85% of the work was completed before this litigation was initiated. The Moots challenge the district court's findings that they were responsible for the contract not getting paid, but the district court's findings in this regard are supported by trial testimony and not clearly erroneous. The Moots do not otherwise challenge the district court's computation of the fee award. On this record, we conclude that the district court did not abuse its discretion by awarding $39,872 in attorney fees.

In sum, we affirm the district court's denial of the Moots' claim for offsets for incomplete contract work and the attorney-fee award. But we reverse the district court's denial of the Moots' claim for an offset for the $2,879.52 deducted by Sela's insurer from the skylight repair costs. We therefore reverse the entry of judgment in the amount of $46,793.18 and remand for entry of judgment in the amount of $43,913.66.

Affirmed in part, reversed in part, and remanded.