STATE OF MINNESOTA
IN COURT OF APPEALS
A07-758

Rich Johnson Homes, Inc.,
Appellant,

vs.

Daniel Sheehan, et al.,
Respondents,

Wells Fargo Home Mortgage, Inc., et al.,
Defendants,

DayCo Concrete Company, Inc.,
Respondent,

Dave's Floor Sanding & Installing,
Respondent,

Tradesman International, Inc.,
Respondent,

Dakota County Lumber Co.,
Respondent.

Filed May 6, 2008
Affirmed
Worke, Judge

Hennepin County District Court
File No. 27-CV-05-015610

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Considered and decided by Worke, Presiding Judge; Hudson, Judge; and Harten, Judge.*

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

WORKE, Judge

In this construction dispute, appellant argues that (1) the judgment is defective because it omits part of the parties' stipulation; (2) the district court erred by granting judgment in favor of subcontractors who did not appear at trial; (3) the district court improperly required clear and convincing evidence to prove oral changes to the contract; (4) the record shows that some changes were proven by clear and convincing evidence or were approved by respondent homeowners and the judgment is mathematically inconsistent; and (5) the district court erred in awarding respondent homeowners damages because the award includes storage and rent expenses when the homeowners chose to put their property in storage and rent a townhome while their home was under construction. We affirm.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

FACTS

In September 2003, appellant Rich Johnson Homes, Inc.,[1] (RJH), a general contractor, and respondents Daniel Sheehan and Gillian Doyle (homeowners) entered into a fixed-price contract for a home remodeling project in the amount of $413,579. Under the contract, "[a]ny alteration or deviation from [] specifications involving extra costs will be executed only upon written change orders, and will become an extra charge over and above the contract." RJH informed the homeowners that the project would be complete by the end of March 2004. The homeowners moved into a rental property during the project securing a lease through the end of March 2004. Because the project was not completed as anticipated, the homeowners extended their lease through the end of July 2004. Around August 1, the homeowners moved into their home, which was still not completed.

After moving back into their home, the homeowners were served with mechanic's liens from subcontractors who remained unpaid by RJH. Many of the amounts demanded by the subcontractors were in excess of the allowances provided for in the contract. The homeowners paid $15,343.79 directly to the subcontractors. In October 2004, RJH left an undated document with the homeowners entitled "Changes to Contract." This was the second changes-to-contract form RJH provided to the homeowners. The first was delivered earlier and listed additions to the contract totaling $19,607.50; the homeowners agreed to the changes and paid that amount in full. Additionally, certain items totaling $22,080 were removed from the contract. The second changes-to-contract form included changes totaling $79,047.35, to which the homeowners had not consented. RJH left the

incomplete construction project. The homeowners attempted to reach RJH, but were unsuccessful. The homeowners retained an attorney who sent letters to RJH requesting that RHJ return and finish the project. RJH failed to respond. At that point, the homeowners had already paid RJH $333,607.50. When RJH ceased work on the project in October with significant work remaining, the homeowners were forced to hire another general contractor. The homeowners entered into a fixed-price contract with Orfield Design and Construction. The homeowners paid Orfield $98,696.59 to complete the work left unfinished by RJH.

RJH subsequently filed a mechanic's lien in the amount of $179,458.05 against the property and filed a complaint against the homeowners, as well as defendants Wells Fargo Home Mortgage, Inc., et al., and respondents DayCo Concrete Company, Inc.; Dave's Floor Sanding & Installing; Tradesman International, Inc.; and Dakota County Lumber Co (subcontractors). The homeowners filed a counterclaim and the subcontractors filed counterclaims and cross-claims against the homeowners. Prior to trial, the subcontractors dismissed their cross-claims against the homeowners. The parties also reached stipulations, including a stipulation that the subcontractors were owed for the work completed on the project and that RJH and the homeowners agreed orally to extras above the contract price in the amount of $32,443.80. During the court trial, the attorney for RJH represented the subcontractors. Following the trial, the district court found that RJH failed to prove the extras by clear and convincing evidence and found that RJH breached the contract. The district court concluded that RJH owed the homeowners for the rent and storage fees incurred as a result of the project lasting longer

than anticipated. The homeowners' award was offset by the amount that was left owing on the contract and the amount the homeowners paid Orfield to finish RJH's job. The district court awarded the homeowners $9,920.56 and ordered judgment in favor of the subcontractors against RJH. RJH did not file any post-trial motions. This appeal follows.

D E C I S I O N

When no motion for a new trial or amended findings was made and substantive questions of law were not raised during trial, we review only whether the evidence supports the district court's findings and whether the findings support its conclusions of law. *Alpha Real Estate Co. of Rochester v. Delta Dental Plan of Minn.*, 664 N.W.2d 303, 310 (Minn. 2003). "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. We view the record in the light most favorable to the district court's judgment and will not disturb the district court's findings when there is reasonable evidence to support them. *Rogers v. Moore*, 603 N.W.2d 650, 656 (Minn. 1999). However, we review questions of law de novo. *Alpha Real Estate Co. of Rochester*, 664 N.W.2d at 311.

Stipulation

RJH argues that the district court failed to incorporate into the judgment the stipulation that the parties agreed to extras in the amount of $32,443.80. RJH contends it is owed that amount; the homeowners argue that the $32,443.80 in agreed-on extras is

incorporated into the judgment. Prior to trial, the parties stipulated that during the course of the project, the homeowners and RJH agreed orally on extras above the contract price totaling $32,443.80, including a 15% contract fee. The district court found that "[t]here were certain agreed-to additions to the Contract. The total cost of these changes, including 15% Contract fee to RJH, is $32,443.80." The court found that the amount owed to RJH upon completion of the project would have been $99,613.03, when all deductions, extras, and amounts paid were calculated; RJH does not challenge this calculation. Based on the record, the district court included the agreed-on extras in arriving at this figure; in fact, the district court's number for agreed-on extras was even higher than the stipulated amount—the original contract was $413,579.45 plus $34,984.87 (agreed-on extras) less $348,951.29 (total payments to RJH and subcontractors/suppliers) equals $99,613.03 (the amount unpaid to RJH). The district court did not fail to incorporate the stipulation into the judgment.

Subcontractors

RJH argues that the district court erred by granting judgment in favor of the subcontractors. RJH claims that none of the subcontractors appeared at trial to present their claims against RJH; conversely, RJH contends that the subcontractors were represented by RJH's counsel at trial because the subcontractors understood that their recovery was dependent on RJH's recovery against the homeowners.

Under the rules, "[a] party appears when that party serves or files any paper in the proceeding." Minn. R. Civ. P. 5.01. RJH's complaint included the subcontractors as defendants. The subcontractors filed answers and counterclaims against RJH and cross-

claims against the homeowners. The subcontractors dismissed the cross-claims, but they did not dismiss the counterclaims against RJH. In its reply brief, RJH indicated that when the subcontractors agreed that RJH's counsel would represent them at trial, they agreed to dismiss their claims against RJH. Although not originally addressing this issue and, instead, arguing merely that the subcontractors failed to appear, RJH argues that the subcontractors entered into a contingency-fee agreement, whereby they withdrew their claims against RJH. But this agreement is not part of the appellate record. And there is nothing in the record dismissing the subcontractors' counterclaims against RJH. Additionally, on the first day of trial, the parties entered into a stipulation that the subcontractors were owed for materials and work performed. The district court did not err in ordering judgment in favor of the subcontractors.

Disputed Changes

RJH argues that the district court applied the incorrect standard for proving changes to the contract. The district court found that the parties entered into a fixed-price contract, under which any alteration or deviation involving extra cost would be executed only upon written change orders.

As a general rule in contract interpretation, the standard of proof is preponderance of the evidence. *See, e.g.*, *ICC Leasing Corp. v. Midwestern Mach. Co.*, 257 N.W.2d 551, 555 (Minn. 1977); *Marshall v. Marvin H. Anderson Constr. Co.*, 283 Minn. 320, 326, 167 N.W.2d 724, 728 (1969). But when a party asserts that there has been an enforceable oral modification of the written terms of a contract, that party "has the burden of proving the modification [of the written contract] by clear and convincing

evidence. The burden is not met by a mere preponderance of the evidence." *Merickel v. Erickson Stores Corp.*, 255 Minn. 12, 15, 95 N.W.2d 303, 305 (1959) (footnote omitted) (involving a claim that the parties had modified a written construction contract to change the dimensions of a building while under construction). Here, RJH attempted to prove that the parties agreed orally to certain changes to the contract. The contract required alterations involving extra cost to be executed only upon written change orders. Therefore, the district court did not err in determining that RJH was required to prove oral modifications to the written contract with clear and convincing evidence.

RJH argues that even if clear and convincing evidence is the standard, the disputed changes were proved. RJH relies on *New Ulm Bldg. Ctr., Inc. v. Studtmann*, 302 Minn. 14, 16, 225 N.W.2d 4, 5 (1974), in which the supreme court provided that the property owners, who were fully aware of the fact that extras were included as work progressed, waived receipt of written notice of additional expenses. In *New Ulm*, however, the property owners did not challenge the notice requirement in the parties' agreement and conceded to the "extras"; the real issue was "whether the extra work done and extra materials furnished were in amounts which correctly reflected their value." 302 Minn. at 17, 225 N.W.2d at 6. Here, the homeowners challenged whether the "extras" were required to be done, not the value of extra work and material. Additionally, the record shows that some of the "extras" were included in the original contract and were not actually "extras." The district court found that the parties agreed on extras based on written change orders. RJH provided the homeowners with one written change order during the course of the project and the homeowners immediately paid RJH for the

extras. The record is composed mainly of testimony from the court trial. We give due regard to the district court's credibility determinations and will not challenge the district court's reliance on testimony supporting the district court's determination. *See Powell v. MVE Holdings, Inc.*, 626 N.W.2d 451, 457 (Minn. App. 2001), *review denied* (Minn. July 24, 2001). Although RJH argues that the testimony supports a different conclusion, on appeal from a court trial, it is not this court's task to reconcile conflicting evidence. *See Porch v. Gen. Motors Acceptance Corp.*, 642 N.W.2d 473, 477 (Minn. App. 2002), *review denied* (Minn. June 26, 2002). Therefore, we will not reevaluate the district court's findings that are supported by the record; RJH's claim that it proved disputed oral extras to the contract fails.

RJH also argues that the district court's order results in the homeowners receiving "an impossibly good deal." But the record supports the findings and the findings support the conclusions; it does not matter what type of "deal" the homeowners received. The $916.44 difference between the amount owed to RJH on the contract ($99,613.03) and the amount paid to Orfield to finish the work left unfinished by RJH under the contract ($98,696.59) does not appear to be the "impossibly good deal" that RJH believes the homeowners received. This is especially true considering that RJH's actions prolonged the project, displacing the homeowners for months, and that RJH breached the contract, causing the homeowners to hire another general contractor who would and could finish the project.

Damages

Finally, RJH argues that the district court erred in awarding the homeowners damages because the homeowners chose to store their property and rent a townhome during the project. The district court found that RJH breached the contract. It is well settled that "[t]he appropriate measure for breach-of-contract damages is the amount that will place the nonbreaching party in the same position he would be in had the contract been performed." *Kellogg v. Woods*, 720 N.W.2d 845, 853 (Minn. App. 2006). The district court found that RJH told the homeowners that the project would be complete by the end of March 2004. The homeowners relied on that time frame and leased a townhome but were ultimately forced to extend their lease because the project was not completed as anticipated. If RJH had completed the project within the time frame provided, the homeowners would not have incurred additional expenses for rent and storage. The court concluded that the homeowners were entitled to rent and storage fees, less the difference between the RJH contract and the Orfield contract to complete the unfinished work. This amount puts the homeowners in the position they would have been in had the contract been performed. The district court did not err in awarding the homeowners damages.

Affirmed.

[1] The parties agree that the correct corporate name is Rich Johnson Homes, Inc., although the district court's decision and the resulting judgment mistakenly refer to Richard Johnson Homes, Inc. This clerical mistake should be corrected in the district court in accordance with Minn. R. Civ. P. 60.01.