STATE OF MINNESOTA
IN COURT OF APPEALS
A09-144

Sternberg & Son Development, LLC,
Appellant,

vs.

Mary Jane Marshall,
Respondent.

Filed October 27, 2009
Reversed and remanded
Stoneburner, Judge

St. Louis County District Court
File No. 69DUCV06247

William D. Paul, 1217 East First Street, Duluth, MN 55805-2402 (for appellant)

Mary Jane Marshall, 1613 West Knife River Road, Two Harbors, MN 55616 (pro se respondent)

Considered and decided by Wright, Presiding Judge; Kalitowski, Judge; and Stoneburner, Judge.

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

STONEBURNER, Judge

Appellant contractor challenges the award of damages to respondent for breach of a contract to build a horse shelter. Because the district court erred in determining respondent's damages, we reverse and remand.

FACTS

Respondent Mary Jane Marshall contracted in writing with appellant Michael Sternberg, d/b/a Sternberg & Son Development, to construct a horse shelter described in the contract as a

> 24 x 36 building on 2 foot sq parameter[1] footing. Building will be shell only with openings as per blue print. Roof will be ice & water sheild [sic] only, no shingles or finished eves. Temporary doors and window opening covers with hinges and handles inc. Floor area will be gravel, 2 x 6 walls with T-1 11 sheeting, with post and beam roof design.

The price to complete the project, including scraping the site level, digging the footings, as necessary and leveling 40 yards of class-five gravel in the floor area, was $13,000: 50% ($6,500) was due as a down payment, 30% ($3,900) was due when the concrete was poured, and the remaining 20% ($2,600) was due on completion. The job was to be "done as weather permits."

Sternberg started work on the building in the fall of 2004 but did not complete his work on the project until July 2005. Marshall made all payments called for by the contract except the final payment of $2,600 that was due on completion of the building. When Marshall failed to make the final payment, Sternberg filed a mechanic's lien on the property and attempted to foreclose on the lien. Marshall answered and counterclaimed, asserting that Sternberg did not perform the work as described in the contract and caused damage to her property while engaging in activities beyond the scope of the contract.

[1] The contract uses the word "parameter" which is also used by the district court, but it appears that the word should be "perimeter," such that the footings were to be two feet wide, two feet deep around the *perimeter* of the building.

Tony DeRosier, a licensed, bonded, and insured residential contractor, testified at trial for Marshall. DeRosier testified that due to the local climate, the two-foot by two-foot perimeter footings contracted for were inadequate for the type of building constructed, and the footings Sternberg built did not conform to the contract because they were less than two feet by two feet. DeRosier testified that the building required below-the-frost-line footings that would have cost more than the footings required by the contract. DeRosier also testified that the siding was falling off of the building because it had not been nailed onto the building properly and that internal support studs were bowed also due to improper nailing.

DeRosier prepared an estimate to "repair" the building which included moving the building, constructing below-the-frost-line footings, and moving the building back onto the new footings. DeRosier estimated that the total cost would be $12,195: $2,895 to move the building; $2,500 to excavate for below-the-frost-line footings; $2,200 for concrete; $600 for materials; and $4,000 for labor to nail the siding on correctly, add bracing, and form and pour the footings.

The district court dismissed the mechanic's lien and found that Sternberg breached the contract "by not providing a two-foot square parameter footing and by not performing the work in a workman-like manner." The district court found that the footings were, at most, only one foot wide by one foot deep, that Sternberg failed to adequately nail the siding to the frame, and that the siding and beams supporting the roof had begun to separate, causing Marshall damages.

The district court expressed reluctance to award Marshall the full $12,195 estimated by DeRosier for repair, noting that the amount exceeded what Marshall had paid for the building and that Marshall did have "something" as a result of Sternberg's work. The district court stated that DeRosier's estimate appeared to overstate labor costs and awarded Marshall $10,000 for Sternberg's breach of the contract.

This appeal followed, in which Sternberg challenges only the $10,000 award for breach of contract.[2]

D E C I S I O N

Sternberg first argues that the district court erred by awarding breach-of-contract damages to Marshall when Marshall failed to give him notice of claimed defects and an opportunity to cure. Sternberg relies on *Zobel & Dahl Constr. v. Crotty*, 356 N.W.2d 42 (Minn. 1984), to support his argument that he should be allowed to correct any problems with the building. But *Zobel* stands for the proposition that an owner who unreasonably hinders a contractor's completion of a house beaches the contract, entitling the contractor to the unpaid contract price less the amount it would have cost to complete performance. 356 N.W.2d at 46. Marshall did not hinder Sternberg's completion of the project in this case. Sternberg told Marshall that the project was complete and sought final payment. Sternberg has not provided any authority to support his claim that Marshall could not pursue a claim for breach of contract without first giving Sternberg an opportunity to cure alleged defects. We conclude that this argument has no merit.

[2] The district court also awarded Marshall $1,535 for damages to a well caused by Sternberg while performing work unrelated to the contract. Neither the dismissal of Sternberg's claims nor the award for damage to the well is affected by this appeal.

Sternberg also argues that the district court failed to apply the correct measure of damages for breach of contract because the award is based on an estimate to build different footings than were called for in the contract. We agree.

The district court correctly articulated the measure of damages for breach of a construction contract in Minnesota as: 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 economic waste. *Johnson v. Garages, Etc., Inc.*, 367 N.W.2d 85, 86 (Minn. App. 1985) (quoting *N. Petrochem Co. v Thorsen & Thorshov, Inc.*, 297 Minn. 118, 124, 211 N.W.2d 159, 165 (1973)). The district court's order makes it clear that it intended to award damages that would "put the property into the condition which was contemplated by the contract." But the estimate used by the district court for cost of "repair" of the footings is, as DeRosier testified, for a more costly type of footing than that for which Marshall contracted.

Because the record does not support the district court's findings about the amounts required to repair the footings to contract specifications, we remand for a redetermination of such damages and consequent redetermination of Marshall's damages for Sternberg's breach of contract, in such proceedings as the district court deems appropriate.

Reversed and remanded.