IN THE COURT OF APPEALS OF IOWA

No. 0-099 / 09-1311
Filed March 24, 2010

L & L BUILDERS CO.,
Plaintiff-Appellee,

vs.

DEAN QUIRK d/b/a
SPRING LAKE CONSTRUCTION,
Defendant-Appellant.

Appeal from the Iowa District Court for Carroll County, Joel E. Swanson, Judge.

The defendant appeals from the district court's order declaring the amount due pursuant to a contract between the parties. **AFFIRMED AS MODIFIED AND REMANDED.**

Dee Ann Wunschel of Wunschel Law Firm, P.C., Carroll, for appellant.

John D. Mayne of Bikakis, Mayne, Arneson, Karpuk & Hindman, Sioux City, for appellee.

Considered by Vogel, P.J., Eisenhauer, J., and Mahan, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

VOGEL, P.J.

I. Background Facts and Proceedings.

L&L Builders Co. is a company engaged in general contracting, with its office located in Sioux City, Iowa. In December 2006 or January 2007, L&L Builders learned that Wal-Mart was planning on building a store in Carroll, Iowa, and would be accepting bids for the general contract at 2:00 p.m. on February 7, 2007. L&L Builders had previously been the general contractor for several Wal-Mart stores and began preparing a bid. Generally, L&L Builders did not perform any of the work on the construction project, but would subcontract the work to be done. Approximately three weeks prior to the bid being due, L&L Builders contacted several material suppliers and subcontractors with whom they had previously worked. The plans and specifications were made available at L&L Builders' office and website, as well as at a bank in Carroll. L&L Builders spoke with and received proposed bids from several subcontractors, including ones the company had not previously worked with.

Dean Quirk, doing business as Spring Lake Construction, viewed the plans and specifications at the bank in Carroll. He then prepared a bid for Phase I and Phase II of site preparation, which included the preliminary earthwork necessary to prepare the site for construction, for a total of $1,296,211. He faxed this bid to L&L Builders on the night of February 6, 2007. The following morning, Quirk revised his bid for a total of $1,288,100 and faxed this to L&L Builders. In neither of these proposed bids did Quirk include the "rock subbase" work, which is the placement and compaction of a layer of rock to function as a base for laying asphalt or concrete.

On the morning of February 7, 2007, Rhonda Hill, who was employed by L&L Builders as an estimator, spoke with Quirk about his proposed bids. L&L Builders had not previously worked with Quirk and Hill wanted to ensure he would be able to complete a large job, as well as clarifying the specific work included in his proposed bids. Because other subcontractors had proposed bids lower than Quirk's, Hill asked Quirk to submit proposed bids for storm sewer work, site demolition, rock subbase, and fly ash. Quirk then faxed another proposed bid that included those four components for a total of $1,091,085. In preparing the bid for Wal-Mart, Hill utilized another subcontractor's bid for the rock subbase work, which was based upon approximately 30,000 tons of rock subbase for a total price of $450,000.

On approximately February 16, 2007, L&L Builders was awarded the general contract to build the Wal-Mart Supercenter. Subsequently, L&L Builders began subcontracting for the work to be done. Hill phoned Quirk and after some discussion, Quirk agreed to do the rock subbase work for $400,000. Quirk testified that his bid was for 8800 tons, a figure he claimed Hill gave him when she asked for a proposed bid. However, Hill denied this. Rather, she testified that she had estimated approximately 30,000 tons of rock subbase would be necessary and never had a conversation with Quirk about how many tons of rock subbase would be required. Additionally, Hill testified that she believed Quirk's bid was lower than the other subcontractor because he owned a gravel pit and thirty trucks to haul the gravel, which was not true. Quirk denied telling Hill that he owned either a gravel pit or trucks.

On March 13, 2007, Hill prepared a written "Subcontract," which stated that "per plans and specifications," Quirk was to "furnish and install modified sub-base under all asphalt paving and truck turn-around" and the "total for [the] subcontract [was] $400,000." Quirk received the contract and next to the phrase "per plans and specifications," he wrote: "8800 ton, $45.45 per ton, $400,000." Quirk faxed back the contract to L&L Builders. However, L&L Builders did not notice the alteration to the contract.[1]

In August 2007, Quirk began the subbase rock work. After delivering approximately 7000 tons, and realizing considerable additional tonnage would be needed, Quirk went to L&L Builders' office and spoke to Hill and John Lee on September 6, 2007. Quirk informed Hill that he was near completion of his contract—providing and installing 8800 tons of rock subbase. It became apparent that L&L Builders thought Quirk was to provide and install rock subbase for the parking lot and truck turnaround and Quirk thought he was only to provide and install 8800 tons of rock subbase.

On approximately September 17, 2007, Quirk spoke to the project manager for L&L Builders, Charlie Salmen. According to Salmen, he informed Quirk that the subcontract required Quirk to finish the job for the price of $400,000. However, in order to avoid delays and to be fair, Salmen told Quirk he would pay him an additional $100,000, for a total of $500,000, to complete the entire job. Quirk agreed to $25 a ton. On September 20, 2007, Hill prepared and

[1] Quirk claims that he faxed a document dated March 22, 2007, to Hill stating that his address and fax number had changed, as well as "I need to get a contract in place for the following: Sub-base material, 8800 ton @ $45.45/ton $400,000." However, there was no evidence he faxed this to Hill and Hill denied ever receiving it. The subcontract was mailed to his previous address and was received on March 31, 2007.

sent a written change order to Quirk that provided for Quirk to provide rock subbase at $25 per ton up to 20,000 tons. It stated that the original contract total was $400,000, to which $100,000 would be added, for a "revised contract total [of] $500,000." On September 24, 2007, Quirk faxed a letter to Salmen stating that he had completed his contract and had received the change order, but the terms were "vague and unacceptable." He testified that he had changed his mind about agreeing to $25 per ton and requested $45.45 per ton. On September 24 and 25, 2007, Salmen responded with handwritten notes to Quirk on Quirk's September 24 letter, that again stated there was no tonnage in the terms of his contract and restated the terms of the change order, a total of $500,000 for the rock subbase job. Quirk testified that Salmen had not agreed to $900,000 at that time. However, Quirk also testified that Salmen later agreed to pay him $900,000 during a phone conversation, which Salmen denies. On September 25, 2007, Quirk altered the change order to note a contract total of $900,000. It was disputed whether he ever sent the altered change order to L&L Builders.

In addition to the disagreement over the quantity of rock subbase, the parties had other issues regarding material men and subcontractor releases. In September 2007, L&L Builders issued a payment to Quirk in the amount of $90,000. Along with that payment, it also began requesting Quirk provide releases from his suppliers—material men and subcontractors. However, Quirk did not immediately provide those and Quirk's trucking subcontractors began looking for payments from L&L Builders, some of whom suggested they would file mechanics liens if not paid. L&L Builders testified that if mechanics liens

were filed, L&L Builders would have to purchase a lien waiver bond and Wal-Mart could potentially take L&L Builders off its bidders list for future projects. To prevent this, L&L Builders issued joint checks payable to Quirk and the subcontractors in the amounts of $31,048.68, $109,285.68, and $6600.87. L&L Builders paid a total of $236,935.23 to Quirk or Quirk and his subcontractors. Additionally, L&L Builders paid $2000 to JEO Consulting Group on behalf of Quirk. Finally, because Quirk did not have the subbase ready on schedule for paving, L&L Builders hired another construction company to complete the job at a cost of $5232.84.

On January 4, 2008, Quirk filed a mechanics lien in the amount of $1,316,665.14. He claimed that he was to be paid for 29,898.53 tons of rock at $45.45 a ton. Pursuant to an agreement with Wal-Mart, L&L Builders obtained a bond lien waiver for double the amount of the lien at a cost of $18,117. The lien was discharged against Wal-Mart's property. *See* Iowa Code § 572.15 (2007).

On February 27, 2008, L&L Builders filed a petition for declaratory relief requesting that the court declare the amount L&L Builders owed to Quirk was $148,982 and that Quirk produce lien waivers from all of its material men and subcontractors before L&L Builders pay this amount. Quirk answered and counterclaimed to foreclose the mechanic's lien, seeking a judgment of $1,300,000 against L&L Builders, and requesting L&L Builders be ordered to pay attorneys fees, costs, and interest.

A trial was held on July 21 and 22, 2009. On August 14, 2009, the district court issued its ruling and granted L&L Builders' petition for declaratory judgment. It found that there was no "mutual agreement" between the parties

and thus, a binding agreement never existed. However, the parties "ultimately agreed upon a sum of $500,000 payable to Dean Quirk . . . for completion of the subbase portion of the Wal-Mart project." The district court then deducted the amount paid to Quirk ($263,000), the expenses of finishing the project ($5232.84), the surveyor's bill ($2000), and the proportionate share of the surety bond ($18,117.00). Thus, the total due to Quirk was $211,650.16. The district court found that Quirk presented no evidence in support of his counterclaim of $1,300,000 and therefore, dismissed Quirk's counterclaim. Each party was ordered to pay their own attorney fees and one-half of the costs.

Quirk appeals and asserts the district court should have awarded him a larger money judgment, as well as attorney fees, costs, and interest on the judgment.

II. Standard of Review.

As the petition for declaratory judgment was tried in equity, our review is de novo. *Owens v. Brownlie*, 610 N.W.2d 860, 865 (Iowa 2000) ("We review declaratory judgment actions according to the manner [in which] the case was tried in the district court. If tried in equity, as in this case, our review is de novo."); *see also Van Sloun v. Agans Bros., Inc.*, ___ N.W.2d.___, ___ (Iowa 2010). We give weight to the factual findings of the district court, but are not bound by them. *Id*.

III. Analysis.

A. Money Judgment.

Quirk asserts that the district court should have awarded him a larger money judgment because two contracts existed—a subcontract whereby Quirk

was to provide and install 8800 tons of rock subbase in exchange for $400,000 and a change order whereby Quirk was to provide 20,000 tons of rock subbase in exchange for an additional $500,000, for a total due of $900,000. He argues the district court should have entered judgment for $663,664.77. We agree with Quirk that two contracts existed; however, we do not agree with his understanding of the terms of those contracts.

Through the subcontract, L&L Builders made an offer to Quirk for Quirk to furnish and install the rock subbase under all the asphalt paving and truck turnaround, "per the plans and specifications" for the Wal-Mart construction, in exchange for $400,000. Quirk, however, did not accept this offer. He altered the subcontract by inserting the new terms of 8800 tons of rock subbase in exchange for $400,000 and faxed the altered subcontract to L&L Builders. This was a rejection of L&L Builder's offer and a submission of a counteroffer. *See Rick v. Sprague*, 706 N.W.2d 717, 724 (Iowa 2005) ("In a contract by offer and acceptance, the acceptance must conform strictly to the offer in all its conditions, without any deviation or condition whatever. Otherwise there is no mutual assent and therefore no contract."); *O'Brien v. Fitzhugh*, 204 Iowa 787, 790, 215 N.W. 944, 946 (1927) ("Unless it may be said that the alleged acceptance by the appellee of the offer of appellant embodied the same terms as contained in his offer, there is no acceptance, but a rejection of the offer."). L&L Builders faults Quirk for failing to alert it to the changes he made in his counteroffer. However, the changes made were readily apparent on the face of the subcontract and Hill testified that L&L "should have noticed that that was written on, but we didn't, you know, so it got filed . . . ." *See Bryant v. Am. Express Fin. Advisors*, *Inc.*, 595

N.W.2d 482, 486-87 (Iowa 1999) ("Failure to read a contract before signing it will not, as a rule, affect its binding force." (quoting 17A Am. Jur. 2d *Contracts* § 225, at 229-30 (1991))).

Further, we find that L&L Builders then accepted Quirk's counteroffer by its actions. "Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer." Restatement (Second) of Contracts § 50, at 128 (1979). Restatement Second of Contracts section 19 provides:

> (1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
>
> (2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
>
> (3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

Id. § 19, at 55. Although L&L Builders argues that it could not have accepted Quirk's counteroffer because it did not know of the counteroffer or its terms, a party may manifest assent to a contract in spite of the fact that a party does not in fact accept. *See id.* L&L Builders remained silent after receiving the counteroffer and then permitted Quirk to begin the work. *See id.* § 69, at 164 (stating that silence and inaction only operate as acceptance in limited situations, including "where one takes the benefit of offered services with reasonable opportunity to reject them and reason to know they were offered with the expectation of compensation"). We find acceptance of the counteroffer.

Additionally, L&L Builders argues that it could not have accepted the counteroffer by its actions because article 9 of the counteroffer specifically required acceptance to be in writing. This article stated:

> No extra work or charges under this Agreement will be recognized or paid for, unless agreed to in writing by the Contractor before the work is done or the changes made. Either party concerning the subject matter of this Agreement will make no oral agreement.

An offer may specify that acceptance must be in writing. *See id.* § 50, at 128; *see also*, *id.* § 30 cmt. a, at 85 ("The terms of the offer may limit acceptance to a particular mode; whether it does so is a matter of interpretation."). However, we do not believe that is the case here. Article 9 of the contract did not explicitly require the acceptance of the contract to be in writing, but rather that additional changes after the acceptance of the contract be in writing. Therefore, when L&L Builders accepted Quirk's counteroffer by its actions, a contract was formed.

Later a second contract was formed between the parties. After the parties confronted the fact they were at odds regarding the quantity of subbase rock, they entered into a second agreement. *See id.* § 89, at 237 ("A promise modifying a duty under a contract not fully performed on either side is binding (a) if the modification is fair and equitable in view of circumstance not anticipated by the parties when the contract was made . . ."). According to Salmen's testimony, he and Quirk discussed the tonnage shortfall in a phone conversation and agreed that Quirk would finish the job, up to supplying an additional 20,000 tons of rock subbase in addition to what he had already supplied, in exchange for a total payment of $500,000. This agreement was memorialized by the written change order. This document clearly provided that the original contract provided

for a payment to Quirk of $400,000, $100,000 was being added to this amount, for a total payment to Quirk of $500,000. Although Quirk claimed at trial that these were not the terms of the agreement, he also testified at one point that after receiving the change order, he changed his mind and then requested $45.45 per ton of rock subbase. We note that the district court made specific credibility assessments, finding that L&L Builders' witnesses were more credible and Quirk's interpretation of the agreement was "difficult to follow." Therefore, we find the parties entered into a second contract whereby Quirk was to provide and install the rock subbase for the entire parking lot and truck turnaround in exchange for a total amount of $500,000.

We agree with the district court's method in calculating the amount due to Quirk. However, a figure used in the calculation was incorrect. The district court found that the total amount payable to Quirk was $500,000 minus the amount paid to Quirk ($263,000), the expenses of finishing the project ($5232.84), the surveyor's bill ($2000), and the proportionate share of the surety bond ($18,117.00), for a total due to Quirk of $211,650.16. The amount paid to Quirk was actually $236,935.23, the figure L&L Builders also uses in its appellate brief.[2] Therefore, we remand for the sole purpose of entering the correct judgment amount, based upon the record already created. The amount due to Quirk should be modified to $237,714.93.

[2] Although L&L Builders states in its brief that Quirk does not challenge the deductions, L&L Builders then asserts $236,935.23, the correct figure, was paid to Quirk or to Quirk and his subcontractors.

Quirk states in his brief that L&L Builders paid him or him and his subcontractors payments of $90,000, $31,048.68, $109,285.68, and $6000.87, for a total of $236,335.23. However, the $6000.87 payment was actually $6600.87.

B. Attorney Fees, Costs, and Interest.

Additionally, Quirk argues that the district court should have awarded him attorney fees, costs, and interest. Quirk first argues that he was "entitled to an award of reasonable attorney fees" under Iowa Code section 572.32. *See W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 66 (Iowa 2003) (discussing that attorney fees are generally not allowable unless authorized by contract or statute). This section provides that "[i]n an action to enforce a mechanic's lien . . . a prevailing plaintiff *may* be awarded reasonable attorney fees." Iowa Code § 572.32 (emphasis added). An award pursuant to this section is discretionary, not mandatory. *See Schaffer v. Frank Moyer Const., Inc.*, 628 N.W.2d 11, 23 (Iowa 2001) (discussing that under a previous version of section 572.32, an award of attorney fees was mandatory where the statute used the phrase "shall be awarded"). L&L Builders argues that Quirk is not entitled to attorney fees under this section because his mechanic's lien was discharged by the surety bond and also dismissed by the district court. *See id*. (stating that a plaintiff that is entitled to enforce his mechanic's lien is a successful plaintiff). We need not reach this argument because even if attorney fees were permitted under this statute, we find the district court's ruling was well within its discretion in denying fees. *See Golden Circle Air, Inc. v. Sperry*, 543 N.W.2d 629, 633 (Iowa Ct. App. 1995) ("Iowa district courts have considerable discretion in awarding attorney fees under a statute.").

Next, Quirk argues that costs should have been assessed to L&L Builders under Iowa Code section 625.1. "Court costs are taxable only to the extent provided by statute." *Schark v. Gorski*, 421 N.W.2d 527, 528 (Iowa 1988).

Section 625.1 provides that "[c]ourt costs shall be recovered by the successful against the losing party." "The rule is well established that in an equity action the trial court has a large discretion in the matter of taxing costs and we will not ordinarily interfere therewith." *Wymer v. Dagnillo*, 462 N.W.2d 514, 519 (Iowa 1968); *see also McNamara v. McNamara*, 181 N.W.2d 206, 217 (Iowa 1970) (discussing that "this being an equity action, the court's discretionary determination is ordinarily dispositive" regarding the assessment of costs). In this case, the district court granted L&L Builders' petition for a declaratory judgment establishing the amount L&L Builders owed to Quirk; the district court dismissed Quirk's counterclaim and specifically found Quirk had presented no evidence in support of it. We find no error in the district court's order splitting the costs equally between the parties.

Finally, Quirk argues that he should have been awarded interest on the judgment amount. The district court did not rule on this claim, and Quirk did not request the district court address the claim in a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). As a result, Quirk's claim regarding interest is waived and not preserved for our review on appeal. *Schaffer*, 628 N.W.2d at 22; *see also Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) ("It is well settled that a rule [1.904(2)] motion is essential to preservation of error when a trial court fails to resolve an issue, claim, defense, or legal theory properly submitted to it for adjudication.").

IV. Conclusion.

We find the parties entered into two contracts, with the second one requiring Quirk to provide and install the rock subbase for the entire parking lot and truck turnaround in exchange for $500,000. Additionally, we find the method the district court used to calculate the amount due to Quirk was correct, but contained a clerical error prompting us to remand to the district court to enter the correct judgment. The amount due to Quirk should be modified to $237,714.93. Finally, we affirm the district court's ruling on attorney fees and costs. Quirk did not preserve his interest claim for appeal. Costs on appeal are to be split equally between the parties.

AFFIRMED AS MODIFIED AND REMANDED.