IN THE COURT OF APPEALS OF IOWA

No. 0-489 / 09-0815
Filed September 9, 2010

AMERICAN DISASTER SERVICES, INC.,
Plaintiff-Appellee,

vs.

CLAUDIA C. WAGGENER and
TIMOTHY WAGGENER,
Defendants-Appellants.

Appeal from the Iowa District Court for Benton County, Marsha M. Beckelman, Judge.

Defendants appeal the district court decision granting plaintiff's action to foreclose a mechanic's lien and denying their counterclaims. **AFFIRMED.**

John G. Daufeldt of Daufeldt Law Firm, P.L.C., Conroy, for appellant.

Robert F. Wilson, Cedar Rapids, for appellee.

Considered by Vaitheswaran, P.J., Eisenhauer, J., and Huitink, S.J.*

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

HUITINK, S.J.

I. Background Facts & Proceedings

In November 2006 there was a fire at a home owned as rental property by Timothy and Claudia Waggener in Urbana, Iowa. American Disaster Services, Inc. (ADS) and Claudia Waggener entered into a contract for ADS to repair the fire and smoke damage to the home. The insurer for the home, Benton Mutual Insurance Company, approved a payment of $35,364.86. The contract assigned the insurance payment to ADS. The Waggeners accepted responsibility for payments to ADS for its work.

ADS started work in December 2006 after the tenant moved out. The company was paid $10,996.75 in January 2007 for start-up costs. On January 26, 2007, Keith Rath, the project manager, had a heart attack, but he testified he had other people help him out and "[w]e were continuing to do that which was needed for the reconstruction."

Under the terms of the contract the Waggeners were to continue to have water, heat, and electricity at the home. Claudia had the water turned off, and ADS paid for the water bill during the reconstruction project. Also, for a period of time the electricity was turned off. Rath testified he had difficulty contacting Claudia, and she would not return telephone calls.

In May 2007 Claudia agreed to put a new steel roof on the house, which would be an additional cost. In the later summer of 2007, Jerry Michael, the Urbana building inspector looked at the electrical work before the drywall was installed. He found the work had been done according to code. He also found

no problems with a stairway or the framing. He did not conduct a full inspection at the time. Like Rath, Michael testified he had a difficult time contacting Claudia.

Claudia stated she would order the drywall for the repairs. She ordered the drywall, cancelled the order, reordered the drywall, and then cancelled it again. Finally, on September 27, 2007, Rath ordered the drywall and started putting it up. In October 2007, James Lane, an experienced general contractor, visited the home. He stated the workmanship was "fine." He stated it would have taken about two weeks to finish the work. Douglas Wagner, a licensed subcontractor, also went through the home in October 2007 and stated "[e]verything I saw was in good workmanship manner." He stated it would have taken "a couple of weeks" to complete the project.

Claudia became dissatisfied with the progress of the repairs. On October 2, 2007, she sent a letter to ADS terminating the contract, which it received on October 10. At that time the project was not yet completed.

ADS filed a mechanic's lien claiming the Waggeners owed $29,036.94 for work done on the home. On November 6, 2007, ADS filed a petition seeking to foreclose on its mechanic's lien. The Waggeners filed a counterclaim, alleging they had damages for lost rent, dumpster fees, unused materials, and heating costs. They also claimed they would have to redo nearly everything done by ADS, and this would cost $28,300.

At the trial, ADS presented evidence as outlined above. The Waggeners presented the testimony of Jerome Wisnousky Jr., Claudia's son, who was a part-time construction worker. He testified the work by ADS was "very poor; very

poor," and "it was just not done right." Claudia's ex-husband, Jerome Wisnousky Sr., an unlicensed contractor, stated the roof had not been installed correctly. Erik Schulte finished the work on the home after ADS was asked to leave. Schulte stated he was not a licensed contractor "because I kind of thought it was just a load of crap, really." Schulte finished the work in about two weeks. He stated, "the upstairs bedrooms were pretty decent," when he started, but the work as a whole was unfinished and he felt the electrical wiring was not right. In rebuttal, Rath testified that most of the work done by Schulte was remodeling in excess of the agreement ADS entered into to repair the fire and smoke damage to the home.

The district court determined the mechanic's lien was enforceable. The court concluded Claudia and her witnesses were not credible. The court found that most of the work done after ADS left the job was "extreme remodeling" which was not within the scope of the contract with ADS, and that ADS was not responsible for these extras. Additionally, much of the delay in finishing the job was caused by Claudia's request for a new roof, the problems with ordering the drywall, and communication difficulties. The court concluded ADS had completed seventy percent of the work, and what it had completed had been done in a workmanlike manner. The court determined ADS was entitled to a mechanic's lien in the amount of $20,968.97 for the work it had completed on the home, plus interest. The Waggeners' counterclaims were dismissed on a finding they were without merit. The Waggeners appeal the decision of the district court.

II. Standard of Review

An action to enforce a mechanic's lien is in equity. Iowa Code § 572.26 (2007); *Schumacher Elec., Inc. v. DeBruyn*, 604 N.W.2d 39, 41 (Iowa 1999). On appeal, our review is de novo. *Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d 363, 366 (Iowa 2000). We give weight to the factual findings and credibility determinations of the district court, especially in mechanic's lien cases. *Giese Constr. Co. v. Randa*, 524 N.W.2d 427, 430 (Iowa Ct. App. 1994). "[I]nvolving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs." *Nepstad Custom Homes Co. v. Krull*, 527 N.W.2d 402, 404-05 (Iowa Ct. App. 1994).

III. Merits

A. The Waggeners first contend ADS is not entitled to a mechanic's lien because it did not substantially perform under the contract. They claim ADS only performed about forty percent of the work it was supposed to do. The Waggeners point out that ADS's own witnesses testified that the work still to be completed would have taken about two weeks or "a couple of weeks" to finish.

In order to enforce a mechanic's lien, a contractor must show substantial performance of the contract. *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293, 295 (Iowa Ct. App. 1995). Substantial performance will allow only omissions or deviations from the contract that are inadvertent or unintentional, that are not the result of bad faith, and do not impair the structure as a whole.

Moore's Builder & Contractor, Inc. v. Hoffman, 409 N.W.2d 191, 193 (Iowa Ct. App. 1987). A technical, exact, or perfect performance is not necessary. *Farrington v. Freeman*, 251 Iowa 18, 24, 99 N.W.2d 388, 391 (1959).

There is an exception to the substantial performance requirement if the homeowner hinders or delays the contractor's performance of the contract. *See Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 332 (Iowa 1982) ("[T]here is an implied term that the person for whom the work is contracted to be done will not obstruct, hinder or delay the contractor, but, on the contrary, will in all ways facilitate the performance of the work to be done by him."); *Employee Benefits Plus, Inc. v. Des Moines Gen. Hosp.*, 535 N.W.2d 149, 155 (Iowa Ct. App. 1995) ("[I]f one party to a contract prevents the other from performing a condition or fails to cooperate to allow the condition to be satisfied, the other party is excused from showing compliance with the condition.").

On our de novo review, we find the homeowner, Claudia, hindered or delayed ADS's performance of the contract. Claudia did not maintain water, heat, and electricity at the home, as she was required to do under the contract. Furthermore, she twice cancelled the order for drywall, which delayed the installation of the drywall. Also, the additional work of putting on the metal roof delayed the completion time initially estimated under the contract. Finally, we note there were communication problems between the parties, with both Roth and Michael testifying they had a difficult time contacting Claudia. We find no error in the district court's conclusion ADS should not be prohibited from enforcing the mechanic's lien due to lack of substantial performance.

B. The Waggeners contend the amount of the mechanic's lien is excessive. They assert that if ADS is entitled to a mechanic's lien it should only be in the amount of $3911.33, instead of the $20,968.97 awarded by the district court. The Waggeners dispute the following amounts: (1) $13,128.65 for the remainder of the contract, instead of $2789.19; (2) $2501.60 for the balance owed on labor and materials for the roof, instead of $1585.32; (3) $1000 for the deductible on Waggeners' insurance; (4) $571.88 for the water bill, instead of $240.56; (5) $1516.14 for work not covered by the insurance, instead of $891.58; (6) $1200 for work on the stairways; (7) $350 for electrical usage and a pressure gas test; and (8) $700.70 for debris removal.

The evidence does not support the Waggeners' claim that ADS only completed forty percent of the work, and so should only be entitled to forty percent of the contract price. The evidence amply supports the district court's finding that ADS finished seventy percent of the work required under the contract, and so should be entitled to $13,128.65 under the parties' agreement. The Waggeners' complaints about work that was not completed primarily relate to additional work that was not required under the contract. The other awards are supported by receipts and invoices submitted by ADS. We affirm the determination that the amount of the mechanic's lien should be $20,968.97.

C. The Waggeners claim the district court should have awarded them damages on their counterclaims. The counterclaims are based on their assertions of poor workmanship in the work done by ADS. A homeowner has the

burden to show defects and incompletions in work by a contractor. *Nepstad*, 527 N.W.2d at 406.

The district court, which had the advantage of observing the parties, found Claudia, Jerome Wisnousky Jr. and Jerome Wisnousky Sr. were not credible witnesses. The court also discounted the criticisms of Schulte, who was not a licensed electrician, concerning the work of the licensed electrician used by ADS. We concur in the district court's conclusion that the Waggeners' counterclaims were without merit based on the evidence presented.

We affirm the decision of the district court.

AFFIRMED.