IN THE COURT OF APPEALS OF IOWA

No. 1-185 / 09-1658
Filed June 15, 2011

KEVIN KUHLMAN d/b/a KUHLMAN WELDING,
Plaintiff-Appellant,

vs.

TED CARLSON and JO CARLSON,
Defendants-Appellees.

Appeal from the Iowa District Court for Dickinson County, David A. Lester, Judge.

Kevin Kuhlman, d/b/a Kuhlman Welding, appeals the district court's finding he did not substantially perform on the parties' contract. **AFFIRMED.**

Gregg L. Owens of Maahs & Owens, Spirit Lake, for appellant.

Sean J. Barry of Montgomery, Barry & Bovee, Spencer, for appelleeS.

Considered by Eisenhauer, P.J., and Doyle and Tabor, JJ.

EISENHAUER, P.J.

Kevin Kuhlman, d/b/a Kuhlman Welding, appeals the district court's finding he did not substantially perform on a contract for installation of a hillside lift. He asserts the lift was in working condition when he completed the job and he should be awarded payment in full for amounts due for materials and labor. Our review for this action in equity is de novo. Iowa Code § 572.26 (2003).

Ted and Jo Carlson are the owners of lakeside property on West Lake Okoboji. To assist Mrs. Carlson to descend to their dock, they contracted with Kevin Kuhlman to install a hillside lift system.[1] Kuhlman prepared an invoice for $23,540 on November 14, 2003. Carlson testified he believed this was a fixed price for the entire job and paid Kuhlman $10,000 as a down payment. No plans or drawings were provided to the Carlsons, although a brochure from the lift manufacturer illustrated an example of the lift. After work began, the Carlsons protested that the posts used to support the lift were sticking three to four feet above the ground, which was not in the original design as shown in the brochure. Mrs. Carlson's mobility was limited, and the Carlsons found extra steps to get into the lift unacceptable. To place the lift at ground level, Kuhlman had to switch the drive unit, which he was able to do at no cost, but had to hire additional help for work including concrete footing and electrical.

[1] Kuhlman also built a cart and track system for the Carlsons to move a boat from the boathouse to the lake. The installation of the cart and track system is not part of this appeal.

Upon completion of the lift, the Carlsons paid Kuhlman $15,000 and considered this full payment of the $23,540 contract.[2] Kuhlman disagreed the extra services were covered by the original invoice amount and claimed the Carlsons owed him an additional $13,520.78. Kuhlman testified there was never a fixed bid; he had given the Carlsons just an estimate for the costs associated with the additional work. Carlsons argued they were unaware they would be responsible for any extra costs, as the original invoice served as a fixed bid for the entire job. Kuhlman filed a mechanic's lien, and subsequently a petition for foreclosure of mechanic's lien, after the Carlsons refused to pay for the extra work. The Carlsons counterclaimed for defective workmanship, arguing the lift had never functioned properly.

Following a trial on foreclosure of the mechanic's lien, in June 2009, the court granted and denied both the mechanic's lien and counterclaim in part. The court found the Carlsons would have owed Kuhlman $34,633.60 in total, leaving a balance of $9633.60, after the $25,000 already paid. However, the court determined Kuhlman was not entitled to recover for the cost of the hillside lift, as he failed to substantially perform that portion of the contract. Specifically, the court found the hillside lift "has not operated properly since shortly after it was installed." The court valued the lift at $20,900, deducted Kuhlman's balance of $9633.60, and entered judgment for the Carlsons for $11,266.40 plus 2.55% interest until the judgment is paid in full.

[2] Carlson testified he agreed to pay the additional $1400 for the fabrication and installation of a metal railing.

Kuhlman appeals. Kuhlman contends the court erred in finding he did not substantially perform on the contract. He claims the hillside lift was in working condition when he completed the job and he should be awarded payment in full for amounts due for materials and labor. In order to successfully enforce a mechanic's lien, substantial performance of the contract is required. *Bidwell v. Midwest Solariums, Inc.*, 543 N.W.2d 293, 295 (Iowa Ct. App. 1995). Substantial performance allows only the omissions or deviations from the contract that are inadvertent or unintentional, not the result of bad faith, do not impair the structure as a whole, are remedial without doing material damages to other portions of the building, and may be compensated for through deductions from the contract price. *Id.* Although the burden of proof regarding the showing of substantial performance rests with plaintiff-contractor, the defendant-homeowner has the burden of showing any defects or incompletion. *Moore's Builder & Contractor, Inc. v. Hoffman*, 409 N.W.2d 191, 194 (Iowa Ct. App. 1987).

The district court found Kuhlman failed to meet his burden to show he substantially performed those portions of the contract that involved the installation of the lift system. It further found he failed to establish that any defect was easily remedied so the Carlsons could be compensated by making deductions in the contract price to reflect those defects. The court found the lift system had never functioned properly since it was installed, and thus was of no value to the Carlsons. While the court found the record was not clear as to what portions of the amount paid by the Carlsons was attributable to the lift system itself versus the cost of the installation, it used past invoices from Kuhlman in order to make a fair valuation. *See Nepstad Custom Homes v. Krull*, 527 N.W.2d

402, 405 (Iowa Ct. App. 1994) (explaining that in mechanic's lien cases involving numerous charges and counter charges which depend entirely on the credibility of the parties, the trial court is in a more advantageous position to put credence where it belongs).

Upon our de novo review, we agree with the trial court's conclusion that Kulhman did not meet his burden of showing substantial performance of the portion of the contract providing for installation of the hillside lift system and is not entitled to foreclose on this portion of his mechanic's lien. We also agree with the district court's valuation finding Kuhlman should be able to recover the cost of the additional work, but because he failed to substantially perform on the contract, that amount should be off-set by the amount the Carlsons are entitled to recover based on the cost of the hillside lift. *See id.* at 404 (stating that a builder may recover from an owner for extras ordered or agreed upon that were not covered by the contract, but at the same time, the owner is entitled to offsets for defects in the builder's work and for omissions from the contract).

AFFIRMED.