IN THE COURT OF APPEALS OF IOWA

No. 1-334 / 10-1675
Filed June 29, 2011

ENGINEERING SPECIALISTS, INC.
d/b/a MILLENNIUM ENTERPRISES, INC.,
Plaintiff-Appellee,

vs.

JUN KANEKO d/b/a JUN
KANEKO STUDIO, L.L.C.,
Defendant-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Gregory W. Steensland, Judge.

Defendant appeals the jury verdict for plaintiff awarding damages for breach of contract and unjust enrichment. **AFFIRMED.**

William G. Stockdale and Brent M. Kuhn of Harris Kuhn Law Firm, L.L.P., Omaha, Nebraska, for appellant.

Lawrence E. Welch Jr., of Welch Law Firm, P.C., Omaha, Nebraska, for appellee.

Heard by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Anthony Siahpush owns Engineering Specialists, Inc. d/b/a Millennium Enterprises, Inc. (ESI). Jun Kaneko is an artist d/b/a Jun Kaneko Studio (Kaneko). Kaneko hired ESI as general contractor for a project at the Mid-America Convention Center in Council Bluffs, Iowa (Mid-America project). ESI ordered and provided granite to Kaneko for the Mid-America project. After Kaneko terminated ESI, ESI sought damages for breach of contract and unjust enrichment, and Kaneko counterclaimed for breach of contract and fraud. A jury awarded ESI damages on both theories. The jury awarded no damages to Kaneko on its counterclaims.

Kaneko appeals, claiming (1) ESI failed to prove the damages element of its unjust enrichment claim and (2) the court erred in submitting two jury instructions pertaining to breach of contract issues. We affirm.

I. Background Facts and Proceedings.

In 2006, Iowa West Foundation (Iowa West) asked artist Jun Kaneko to provide a concept/plan for the development of a plaza for the Mid-America project. Kaneko in turn hired ESI to provide the materials and do the installation of the project. ESI's Siahpush testified Kaneko accepted ESI's November 6, 2006 "Final Itemized Budget" (construction total $1,226,796) as the contract for ESI to provide and install granite pavers, provide and install granite pedestals, provide and install granite benches, and provide and install steel tables. The contract also required ESI to construct walls and install sculptures and lighting conduit, and detailed tax and management/overhead expenses.

On December 15, 2006, an identical "Final Itemized Budget" was generated by Kaneko employee Susan Schonlau (Jun's stepdaughter) with an additional line at the bottom stating: "Total cost granite material is $441,235.00 @55% Down payment $242,679.25." Jun testified the December 2006 document is Kaneko's agreement with ESI. Ree Kaneko, Jun's wife, testified she realized "there's a separate contract between Mr. Kaneko or Kaneko Studio and ESI" and the "contract between Kaneko and Iowa West."

In February 2007, ESI's Siahpush sent Jun a letter regarding "graffiti and skateboarding" on the Mid-America project. Siahpush stated the stone supplier suggested "protective stain coating" and noted the final coating would be done after installation. Siahpush testified he discussed with Jun that the manufacturer had recommended stain coating the pavers followed by seal coating. Jun testified he never discussed staining granite with Siahpush. Also in February 2007, Jun signed a contract with Iowa West for the Mid-America project.

In March 2007, Kaneko employee Schonlau sent ESI two pictures of granite samples. One picture of black granite was labeled CL017 and one was labeled "new sample." Siahpush testified ESI was going to stain either granite material (CL017 or "new sample") selected for the project. Siahpush explained "the new sample was a little lower density and would absorb the stain better to keep the color . . . ."

In addition to working with Kaneko, ESI had been contacted directly by Iowa West. Iowa West wanted to add materials to the Kaneko granite order, including curbs and seat walls matching "the materials that were being used by Mr. Kaneko." On July 13, 2007, Iowa West and ESI reached an agreement

regarding the additional granite. Kaneko employee Susan Schonlau explained: "[Iowa West was] going to order the granite at the same time to save money on shipping, so it could all be shipped together."

On May 18, 2007, Kaneko sent ESI its first version of Kaneko's granite order. On July 9, 2007, Kaneko sent another version and specified black granite benches. On July 23, 2007, Kaneko sent ESI "our portion of the granite order" and specified *white* benches, black (CL017) pedestals, and black (CL017) pavers. This order did not request solid block benches and pedestals. Kaneko employee Schonlau testified Kaneko then did more research about black thermal finish and heat retention and "went back to black benches, which is what the artist wanted aesthetically . . . ." Employee Schonlau then sent Kaneko's July 25 order to ESI specifying *black (CL017) solid block* benches. The order also specified solid block pedestals. Schonlau testified she considered this the final order.

However, ESI's Siahpush testified he called Schonlau "and I basically told her that the information is incorrect, and the color of the combination [should] be corrected to 'new sample' as discussed." On July 30, Kaneko employee Schonlau sent ESI a new Kaneko order and specified black (new sample) solid block benches, black (new sample) solid block pedestals, and black (new sample) pavers. After receiving Kaneko's July 30 order, ESI ordered the granite from China. ESI ordered "new sample" granite, not CL017 granite. ESI's Siahpush testified about his discussions with Jun Kaneko during late July 2007:

> Q. Now, was there any discussions that last week, prior to you making the order, of any adjustments to the price of the December 15 contract as a part of these adjustments that you're

> making this last week? A. There was a discussion that the one-piece benches were going to be more money, and the items that had been added on, they will be charged accordingly.
>
> Q. Items adding on, what do you mean? A. There was—the benches had gone to a solid block versus a veneer and two legs, and the number of containers was going to be more, and the actual cost of the benches was going to be more.
>
> Q. Why would there be more containers? A. The weight is more. . . . the benches being one-piece versus three-piece.

ESI's Siahpush testified he was "under the gun" to place the order in July so the granite would arrive at the project site by October 15, 2007, under Iowa West/Kaneko timelines.

In early September 2007, ESI's Siahpush flew to China to inspect the granite. While in China, on September 5, 2007, Siahpush sent an e-mail to Kaneko and Iowa West and included pictures of the granite. Siahpush did not get a negative response, so he arranged for the granite to be shipped. The granite arrived in October 2007 and was placed on the Mid-America Center parking lot.

Kaneko issued three checks to ESI totaling $441,235: July 9, 2007 ($242,679.25) (preorder payment); October 2, 2007 ($136,000); and October 2, 2007 ($62,555.75). Siahpush testified ESI was ready to begin installation in October 2007, but was not allowed to move forward and "I never understood really why we were not allowed [to begin]." Jun testified the weather prohibited the granite installation in October 2007. ESI's Siahpush arranged for a fence to be put up around the granite and insured the granite under ESI's policy. Siahpush explained:

> Q. So did you have any discussion with [Jun] Kaneko . . . as to how the granite would be handled pending this delay. A. Basically, we discussed that with Jun to put up a fence around

> the material and secure it and lock it up and basically pay daily visits to make sure nothing would happen.
>
> Q. Specifically, were you requested to build a fence? A. That is correct.
>
> Q. Were you told that you would be reimbursed for the cost of the fence if you built it? A. Well, the fence was an unforeseen thing at the time we had originally bid the contract, and we basically discussed that we were going to build a fence, and we discussed that with Jun Kaneko.
>
> Q. Did [Jun] Kaneko tell you if you built the fence to protect his granite, that he would reimburse you for the cost of the fence? A. It wasn't that fashion. We basically said we will charge you accordingly.

On January 18, 2008, Ree Kaneko, as vice president and secretary of Kaneko, and contractor Kiewit Building Group, Inc. (Kiewit), signed a master agreement "for a period of two years" governing all projects Kaneko awards to Kiewit by executing a work order.

On March 25, 2008, a March 20, 2008 letter from Ree Kaneko appeared on ESI's counter. The letter requested ESI provide Kaneko with numerous documents concerning the "Mid-America Center Project" by March 27. ESI was ordered to "suspend all efforts on your part with respect to the Mid-America project" until Kaneko provided "written notice to proceed." ESI's Siahpush testified he was "confused and upset" and thought the letter was "pretty unusual;" but he talked to Ree and supplied documents.

Ree testified she sent an April 3, 2008 letter stating: "Your recent submittal of the requested information has been reviewed and we find its contents to be inaccurate and incomplete." Ree requested additional information by April 10 and demanded ESI "suspend any further involvement of your services on [Mid-America project] until further notice." At trial, Ree acknowledged getting a blacked-out bill of lading from ESI and "[t]here may have been a list of

containers, but the containers were always confusing to me . . . ." Siahpush testified he didn't remember receiving Ree's April 3 letter.

Ree contacted legal counsel and instructed them to terminate ESI. In an April 16, 2008 letter, Kaneko's attorney told ESI "our clients have not been satisfied with the documentation" and gave ESI "written notice that your services . . . are being terminated." The letter requested invoices for ESI's services to date. Kaneko changed the padlock on the fence securing the granite. On April 25, 2008, ESI faxed a statement detailing the additional costs associated with one-piece benches and listing $15,000 in engineering design costs.

In July 2008, artist Jun, on behalf of Kaneko, executed a work order for the Mid-America project with Kiewit. Jun testified: "The first time I really inspected the granite was after [ESI was] fired as my contractor and the new contractor [Kiewit] started to put the paver on the plaza."

In November 2008, ESI filed suit for breach of contract and, by later amendment, added a claim for unjust enrichment. Kaneko answered, alleged affirmative defenses (failing to provide timely documentation), and counterclaimed for fraud (ESI represented black granite items were to be made from a specific black granite sample selected by Jun, CL017) and breach of contract (failing to provide materials in accordance with the "sample [CL017] for black granite as selected by Jun"). ESI filed a reply to Kaneko's counterclaim and asserted affirmative defenses. After a four-day jury trial in August 2010, the jury returned a verdict for ESI and this appeal followed.

II. Unjust Enrichment.

The doctrine of unjust enrichment "is not grounded in contract law but rather is a remedy of restitution." *Iowa Waste Sys., Inc. v. Buchanan Cnty.*, 617 N.W.2d 23, 29 (Iowa Ct. App. 2000). Accordingly, unjust enrichment is an equitable doctrine. *State v. Unisys Corp.*, 637 N.W.2d 142, 154-55 (Iowa 2001). The defendant's obligation is "created by law for reasons of justice, without any expression of assent and sometimes even against a clear expression of dissent." *Iowa Waste*, 617 N.W.2d at 29. The jury awarded ESI $14,357 in damages for unjust enrichment. On appeal Kaneko claims the trial court committed error by failing to direct a verdict in its favor due to ESI's failure of proof on the damages element.

We review the trial court's denial of a motion for directed verdict for errors at law. *Ag Partners, L.L.C. v. Chicago Cent. & Pac. R.R. Co.*, 726 N.W.2d 711, 715 (Iowa 2007). The evidence is viewed in the light most favorable to the nonmoving party. *Id*. The motion must be overruled if the challenged element is supported by substantial evidence. *Id*.

The jury was instructed:

> **Unjust Enrichment – Elements**
>
> In order to recover on a claim of unjust enrichment, [ESI] must establish three propositions:
>
> 1. [Kaneko was] enriched by the receipt of a benefit.
> 2. The enrichment was at the expense of [ESI].
> 3. It was unjust to allow [Kaneko] to retain the benefits under the circumstances.
>
> **Unjust Enrichment – Damages**
>
> The measure of damages for unjust enrichment is the fair and reasonable compensation for [Kaneko's] use of [ESI's] assets.

ESI's numerous invoice exhibits and Siahpush's testimony established expenses incurred and paid by ESI that were not encompassed by the original contract: (1) site storage, security, and material transfer costs expended to protect the granite as a result of the delay in the commencement of construction; (2) additional costs for the benches as a result of Kaneko's last minute changes to the order; (3) additional shipping and unloading costs; and (4) additional design/engineering costs.

Kaneko does not argue he did not receive a benefit from these expenditures, but instead asserts ESI's evidence failed to prove the expenditures were "fair and reasonable." In support, Kaneko cites *Walz v. Buse*, 260 Iowa 353, 360, 149 N.W.2d 149, 153 (1967). However, *Walz* does not support Kaneko's challenge to ESI's evidentiary proof. In *Walz* "[t]he prayer for relief was for the unpaid installments on the . . . contract. No evidence of damages or value other than that inherent in the contract was offered." *See Walz*, 260 Iowa at 360, 149 N.W.2d at 153. In contrast, ESI offered invoices it had paid as "outside the contract" expenditures and testimony of "outside the contract" expenses. *See also Pexa v. Auto Owners Ins. Co.***,** 686 N.W.2d 150, 156-57 (Iowa 2004) (holding "reasonable value" of medical services can be shown by evidence of the amount billed and paid).

Second, we agree ESI "has the burden of proving the value of the damages as to each item with some reasonable measure of certainty." *See B-W Acceptance Corp. v. Saluri*, 258 Iowa 489, 498, 139 N.W.2d 399, 404 (1966). Based on the testimony and exhibits described above, we find substantial evidence to support the jury's award of damages for unjust enrichment. *See 205*

Corp. v. Brandow, 517 N.W.2d 548, 552 (Iowa 1994) (upholding unjust enrichment damages based on testimony of corporation's sole owner). We conclude the district court did not err in failing to direct a verdict in Kaneko's favor on this issue.

III. Jury Instruction No. 14—Kaneko Affirmative Defense.

Kaneko contends the district court erred in giving Instruction No. 14 because the instruction's first element ("required by contract") was "overly burdensome." Instruction No. 14 provided:

> **AFFIRMATIVE DEFENSES-ESSENTIALS**
> [Kaneko] claims performance was excused because of a material breach by failing to provide timely documentation.
> In order for [Kaneko] to prevail on this defense, [Kaneko] must show:
> 1. [ESI] was required by the contract to provide the documentation.
> 2. [ESI] failed to provide the documentation.
> 3. The failure to provide the documentation was material.
> If [Kaneko has] proved a breach by [ESI], then you should find for [Kaneko].
> If [Kaneko has] failed to prove a breach, then you should decide whether [ESI] is entitled to recover damages.

Kaneko argues the jury should have been instructed ESI "had a reasonable expectation to provide the documentation requested by" Kaneko. Citing no case law, Kaneko broadly asserts its version of the instruction "would have accurately reflected the circumstances and law."

We conclude "to reach the merits of this [issue] would require us to assume a partisan role and undertake [Kaneko's] research and advocacy. This role is one we refuse to assume." *See Inghram v. Dairyland Mut. Ins. Co.*, 215 N.W.2d 239, 240 (Iowa 1974) (noting "[t]he brief fails to cite or mention a single authority; not one case or statute is listed or argued").

IV. Jury Instruction No. 18—ESI Affirmative Defense.

Kaneko counterclaimed for breach of contract. ESI filed a reply and asserted affirmative defenses. On appeal Kaneko argues the court erred in giving Instruction No. 18 because ESI "did not include the affirmative defense [of Kaneko's] timely acceptance or rejection of the black granite materials." Kaneko contends ESI therefore waived a timely acceptance/rejection defense and claims Kaneko was unfairly surprised at trial. *See Smith v. Smith*, 646 N.W.2d 412, 415-16 (Iowa 2002) (discussing waiver for failure to plead the affirmative defense of parental immunity). Kaneko requests a new trial.

Our standard of review concerning alleged errors in respect to jury instructions is for the correction of errors at law. *Banks v. Beckwith*, 762 N.W.2d 149, 151 (Iowa 2009). We review to determine whether prejudicial error has occurred. *City of Cedar Falls v. Cedar Falls Cmty. Sch. Dist.*, 617 N.W.2d 11, 20 (Iowa 2000). Jury instructions must be considered as a whole, and if the jury has not been misled, there is no reversible error. *Thavenet v. Davis*, 589 N.W.2d 233, 236 (Iowa 1999).

Unlike Instruction No. 14 above, Instruction No. 18 does not reference "affirmative defense" and provides:

> [Kaneko] must pay the contract rate for any goods or materials he has accepted. *For [Kaneko] to recover on his counterclaim*, the contract price paid for goods and materials he has accepted and paid for, *it is [Kaneko's] burden to show that within a reasonable time after he discovered, or should have discovered, any breach of the contract for purchase he notified [ESI] of the breach.* Whether [Kaneko] rightfully rejected the goods or materials in a reasonable time after he accepted the goods and materials is an issue for you to decide. Whether [Kaneko] rejected the acceptance within a reasonable time depends on the nature, purpose and circumstance of the matter.

(Emphasis added.) Under Iowa's notice pleading rules, ESI is required to plead "only a short and plain statement" and ESI "was not required to plead the specific factual allegations underlying its affirmative defense[s]."[1] *See Dudley v. GMT Corp.*, 541 N.W.2d 259, 261 (Iowa Ct. App. 1995). "In Iowa, very little is required by way of pleading to provide notice." *Wilker v. Wilker*, 630 N.W.2d 590, 595 (Iowa 2001). Rather, "[p]arties to a lawsuit are entitled to have their legal theories submitted to a jury as long as they are supported by the pleadings and substantial evidence." *See id*. ESI's reply to Kaneko's counterclaim pled:

> **AFFIRMATIVE DEFENSES**
>
> 8. [ESI] affirmatively alleges that [Kaneko] materially breached the contract between [ESI] and [Kaneko] by terminating [ESI] on April 16, 2008 and then refusing to pay for contract amounts then due and owing as a result of [ESI's] performance under the contract.
>
> 9. [ESI] affirmatively alleges that [Kaneko's] termination of [ESI] on April 16, 2008 negated any further performance requirements by [ESI] under the contract.
>
> 10. [ESI] affirmatively alleges that [Kaneko] never provided [ESI] with notice and an opportunity to cure any claim for defective granite as set forth in their counterclaims.
>
> . . . .
>
> 12. [ESI] affirmatively alleges that [Kaneko] waived any claim for damages by improperly terminating [ESI] and subsequently failing to properly notify [ESI] of their claim for portions of defective granite.
>
> 13. [ESI] affirmatively alleges that Defendants are estopped from seeking damages due to their improper termination of [ESI] and failure to properly notify [ESI] of their claim for portions of defective granite.

[1] An affirmative defense is one that rests on facts not necessary to support Kaneko's counterclaim for breach of contract. *See Bond v. Cedar Rapids Television Co.*, 518 N.W.2d 352, 355 (Iowa 1994). We assume, without deciding, Kaneko's timely acceptance or rejection is an affirmative defense.

In addition to ESI's reply to Kaneko's counterclaim, ESI filed a pretrial motion in limine on the issue of disputed black granite. Prior to trial ESI argued in support of its motion in limine and Kaneko responded:

> [ESI]: We were hired essentially to do three things: Procure this granite from China and get it back here to the Mid-America Center, design the installation of the granite, and then install the granite.
>
> We procured the granite from China, we got it here, and we were terminated before we did the installation component of this thing. The reasons set forth for the termination, [failure to provide documentation, have] nothing to do with [Kaneko's] . . . counterclaims that we provided them with improper black granite.
>
> And what I'm asking the Court is, as a part of our case-in-chief, to keep [out] any and all reference to the dispute governing black granite . . . . If they want to counterclaim for that . . . we'll get into that as part of their case-in-chief, but I don't want the jury confused, and I don't want my client prejudiced that someway somehow this black granite issue became the basis for [Kaneko's] claim of termination. . . . .
>
> [The Court]: But instead of separating it out into two different verdicts, you're asking to make sure we separate the cases-in-chief out.
>
> [ESI]: Correct.
>
> . . . .
>
> [Kaneko]: . . . That somewhat eviscerates my defense to this case . . . if I don't get the opportunity to cross-examine him on what did you provide in furtherance of that contract . . . . I think . . . the jury is going to be able to sort all of this out, because it's going to be clear that certain things were done at certain times.
>
> . . . .
>
> [ESI]: . . . I'm requesting that [Kaneko] cannot raise as an affirmative defense that [it] thinks that we didn't provide [it] the requisite black granite, because we had already been terminated. That was not the basis of our termination. And the issue of the black granite didn't come up until eight to nine months later as a part of this litigation. . . . .
>
> I'm not asking as a part of their counterclaim. . . . If they have a right, then, to raise the counterclaim, well, even though we terminated you wrongfully then, we subsequently discovered this black granite that we don't think complies, they can come back and get their own verdict as a set off against [ESI's verdict] . . . .
>
> [Kaneko]: The way this can be handled without tying my hands . . . is simply for [ESI's attorney] to ask the witness . . . what was the basis of your termination, okay? And then the facts . . . are

> going to be clear as to what the basis was. On April 16, when [ESI] was terminated, [Kaneko] didn't know that the black granite was not, in fact, black granite. Very easy fact for the jury to come to that conclusion . . . rather than this idea that I'm limited in terms of my testimony and what I can present on cross-examination with respect to did [ESI] supply the materials and did [ESI] do the things under the contract that [it] was supposed to do to entitle [ESI] to recovery.

The court reserved ruling and subsequently provided the jury with one verdict form[2] with blanks for ESI's claim for breach of contract (jury—$185,764), ESI's claim for unjust enrichment (jury—$14,357), Kaneko's claim for breach of contract (jury—$0), and Kaneko's claim for fraudulent misrepresentation (jury—$0).

Under our notice pleading requirements, ESI's pleading supports the challenged jury instruction. Kaneko's lack of notice to ESI of the alleged defect in the granite encompasses the issue of Kaneko's timely acceptance/rejection of the granite. Further, the parties' argument quoted above reveals Kaneko cannot claim surprise. Additionally, waiver for failing to plead an affirmative defense is not required when an issue "is tried by the consent of the parties." *Dutcher v. Randall Foods*, 546 N.W.2d 889, 893 (Iowa 1996). Accordingly, we find no error and a new trial is not warranted.

AFFIRMED.

[2] The court also submitted a special interrogatory asking the jury whether Kaneko proved fraudulent misrepresentation. The jury stated: "No."