

IN THE COURT OF APPEALS OF IOWA

No. 2-005 / 10-1777
Filed February 1, 2012

CARSON DARNEL CUSICK,
Plaintiff-Appellee,

vs.

WALTER SCOTT,
Defendant-Appellant.

Appeal from the Iowa District Court for Page County, J.C. Irvin, Judge.

Defendant appeals the district court's summary judgment ruling foreclosing a mechanic's lien. **AFFIRMED.**

Seth E. Baldwin of Johnson Law, P.L.C., Shenandoah, for appellant.

Alan H. Kirshen, Red Oak, for appellee.

Considered by Eisenhauer, P.J., and Danilson and Bower, JJ.

EISENHAUER, P.J.

Carson Cusick petitioned to foreclose a mechanic's lien against Walter Scott. The district court granted Cusick's motion for summary judgment and foreclosed the lien. Walter appeals and argues the existence of a genuine issue of material fact. We affirm the district court.

I. Background Facts and Proceedings.

Walter's answer to the petition admitted: (1) Walter, a California resident, and his brother Lyle were repairing an Iowa house for sale at a joint profit; (2) prior to Lyle's death, Lyle "acted as the agent of [Walter] in the joint enterprise;" (3) Walter is a titleholder of the house; (4) Cusick demanded \$5000 with interest for work performed and materials supplied for the house's repair, and Walter did not pay; and (5) Cusick filed and recorded a mechanic's lien.

Cusick moved for summary judgment and attached his affidavit stating:

3. That beginning approximately January 17, 2008, Lyle S. Scott, individually and as partner and agent of Walter Scott, contracted with and hired Affiant to perform work and supply materials . . . specifically the installation of rough-in plumbing, (but not finish plumbing) . . . for the agreed upon sum of Five Thousand Dollars (\$5,000.00), to be partially offset for the performance of certain drywall work by Lyle S. Scott at Affiant's residence

4. While the work performed by Affiant was completed by October 22, 2008, no offsetting work was ever performed by Lyle S. Scott or Walter Scott due to the death of Lyle S. Scott on October 24, 2008.

5. That following the death of Lyle S. Scott, Affiant contacted Walter Scott, and was assured by him that Affiant would be paid for the work performed. Affiant thereupon sent an invoice to Walter Scott for the work performed [\$5,000] together with interest at 1.5% per month on the unpaid amount. A copy of said invoice, Exhibit "A" is attached

Walter filed a resistance admitting Cusick and Lyle, Walter's brother and partner, "had verbally agreed to an arrangement involving cash payment and

offsetting labor.” Walter attached three exhibits, two involving plumbing and one for duct work. Walter’s pleading alleged the three exhibits

show estimates and invoices for work needed and work performed to complete and correct the tasks [Cusick] was hired to perform. These exhibits tend to prove that [Cusick] did not complete the work for which he was hired, and that at least some of the work performed was of such poor workmanship that it had to be redone.

The district court, after hearing, granted Cusick’s motion for summary judgment. The court specifically noted Walter’s arguments are “entirely unsupported by affidavit.” Although Walter filed a resistance, it

contained only general and unsupported assertions that some additional plumbing work and installation of ventilation ducts remained to be performed on the premises. However, there is no evidence, other than the Resistance itself, to substantiate that the duct work, (for which [Cusick] made no claim in the Mechanic’s Lien or in this action) had anything to do with the plumbing work which was the subject of [Cusick’s] claim.

Walter now appeals the trial court’s grant of summary judgment.

II. Standard of Review.

We review the district court’s summary judgment rulings for the correction of errors at law. *City of Cedar Rapids v. James Props., Inc.*, 701 N.W.2d 673, 675 (Iowa 2005). The record before the district court is reviewed to determine whether a genuine issue of material fact existed and whether the district court correctly applied the law. *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 121 (Iowa 2001).

III. Mechanic’s Lien.

Summary judgment is appropriate only when the entire record demonstrates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Stevens v. Iowa Newspapers, Inc.*,

728 N.W.2d 823, 827 (Iowa 2007). We review the evidence in the light most favorable to the nonmoving party. *Id.* A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented. *Id.* After our review of the record, we find no error. Walter's three exhibits, without an affidavit or sworn deposition testimony, do not raise a genuine issue of material fact.

IV. Interest Award.

Walter also argues it "was unreasonable for the court to order interest at 18% per annum." However, neither his answer to the petition nor his summary judgment resistance raise the legal arguments now advanced. The hearing on the summary judgment motion was unrecorded and the only indication as to what was argued is the district court's order ruling on the motion. The order does not address the legal arguments now urged on appeal, and Walter did not file any type of post-ruling motion asking the court to address these claims.

Parties "must take necessary measures to construct a record in order to preserve error for appellate review." *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002) (citation omitted). It "is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider." *Id.* (citation omitted). Walter was obligated to alert the trial court to any failure to rule by filing a motion following entry of judgment. See *Meier v. Senecaut*, 641 N.W.2d 532, 537-39 (Iowa 2002). Because Walter filed no such motion, this issue was not preserved for our review.

AFFIRMED.