

IN THE COURT OF APPEALS OF IOWA

No. 3-080 / 12-1469
Filed March 27, 2013

GROSSE STEEL CO., INC.,
Plaintiff-Appellee,

vs.

**MIDTOWN DEVELOPMENT, LLC, DONNA
NELSON D/B/A NELSON PROPERTIES,**
Defendants-Appellants, and
**BOURBON STREET RESTAURANT, LLC,
AND DARIN BECK PROPERTIES, LTD.,**
Defendants-Appellees.

Appeal from the Iowa District Court for Black Hawk County, Bradley J.
Harris, Judge.

Two defendants appeal the district court's order awarding the plaintiff damages and dismissing other defendants in a breach of contract action.

AFFIRMED.

Corey R. Lorenzen of Beecher, Field, Walker, Morris, Hoffman & Johnson,
P.C., Waterloo, for defendants-appellants.

Patrick C. Galles and Emily C. Chase of Correll, Sheerer, Benson, Engels,
Galles & Demro, P.L.C., Cedar Falls, for plaintiff-appellee.

Timothy J. Luce of Anfinson & Luce, P.L.C., Waterloo for defendants-
appellees.

Considered by Vogel, P.J., and Potterfield and Doyle, JJ. Bower, J. takes
no part.

VOGEL, P.J.

Midtown Development, LLC (Midtown) and Donna Nelson d/b/a Nelson Properties (Nelson) appeal the district court's ruling in this breach of contract action which awarded Grosse Steel Company \$8854.41 from Nelson and dismissed Midtown along with Bourbon Street Restaurant, LLC (Bourbon Street) and Darin Beck Properties, Ltd (Beck Properties). Midtown and Nelson assert the district court's ruling, which found Nelson in breach of its contract with Grosse Steel, is not supported by substantial evidence.

The evidence here supports district court's conclusion that Nelson is responsible for the "extra" invoices. The district court is entitled to determine what evidence to believe and is in a better position to assess the credibility of the witnesses. While Nelson and Midtown argue that the construction workers on site should be responsible for the invoices in question, those construction workers were not made a part of this litigation and did not have a contract with Grosse Steel. We find sufficient circumstantial evidence to support the district court's ruling.

I. BACKGROUND FACTS AND PROCEEDINGS.

Midtown owns a building in downtown Waterloo. Midtown is owned and run by the Nelson family. Bourbon Street entered into a lease agreement with Midtown for the first floor, a portion of the mezzanine, and the eighth floor of the building to run a restaurant. An extensive remodel was required for Bourbon Street to operate. Darin Beck, owner of Bourbon Street and Beck Properties, prepared the original plans, which were then developed by an architect. The plans included a schedule for doors. The door plans were submitted to Gross

Steel who provided a quote. That quote was accepted by Nelson¹ and signed by Nelson's vice president, Vern Nelson III, on March 10, 2009. The contract had a provision which stated, "Any additional material required will be charged as an extra to the contract at prices in effect by us at the time the additional material is ordered."

The doors for the remodel project were provided by Grosse Steel, and Nelson paid the contract price of \$25,534.93. However, Nelson refused to pay for five other invoices that had the notation of "extra." These invoices totaled \$5805.82, plus finance charges at the time of trial of \$3048.59.

When the "extra" invoices were not paid, Grosse Steel filed suit against Midtown, Nelson, Bourbon Street, and Beck Properties. The case proceeded to a bench trial. Grosse Steel called its owner, Bob Grosse, to testify at trial. He confirmed that the "extra" invoices were faxed to Nelson, to the attention of Vern Nelson III, though Bob Grosse did not personally fax the invoices. He also testified that his employee, Warren Ledtje, faxed a quote for several of the "extras" and notated on the side of the quote the approval or disapproval once it was received. He also confirmed that all the materials itemized in the "extra" invoices were delivered to the remodel project by his company.

Vern Nelson III testified for Midtown and Nelson asserting he never received the "extra" invoices, and he did not approve the extras. He asserted that the extras were likely the result of Chris Reed, the foreman of the

¹ It is unclear in this record why Nelson entered into the contract with Grosse Steel for the doors instead of Midtown, which owned the building and leased the space in the building to Bourbon Street.

construction crew employed by Darin Beck,² ordering the materials because Reed's name and phone number appears on a number of the "extra" invoices.

Darin Beck testified for Bourbon Street and Beck Properties. He maintained that Beck Properties had nothing to do with Bourbon Street or the remodel project. Bourbon Street leased the space in question from Midtown and Barmuda, another one of his companies, did some of the construction for the remodel. He confirmed he had an agreement with either Midtown or Nelson for Barmuda to provide skilled labor for the remodel project. Some of the remodel work was subcontracted out directly by Nelson, and neither of Beck's companies was in charge of paying for any of the subcontracted work.

Beck testified his companies had nothing to do with the door contract with Grosse Steel other than to receive deliveries if Nelson's employees were not around. Chris Reed was his lead construction employee on site and did sign for several of the "extra" invoices, but he never ordered material unless he had the approval of Nelson. Beck also pointed out that while his employees' names were on several of the "extra" invoices that remained unpaid by Nelson, the same employees' names can also be found on the invoices from Grosse Steel that were paid by Nelson.

Barmuda's employee, Nick Bonewitz, also testified at the trial. He worked on the remodel project directly under Chris Reed, who, at the time of trial, was no longer employed with Barmuda. When changes had to be made with respect to

² In addition to owning Bourbon Street and Beck Properties, Darin Beck owned a construction company known as Barmuda, MMC (Barmuda), which did some of the remodeling work in the building pursuant to an agreement with Midtown. Barmuda was not a party to the litigation.

the doors, Bonewitz testified that Chris Reed would measure, then go through Vern Nelson III, and may call in the measurements to Grosse Steel, but would never place an order. A quote would be sent and would then need to be verified or ordered. However, on cross-examination Bonewitz testified he never actually saw Chris go to Vern Nelson III to seek approval to order additional doors. As far as Bonewitz knew, all the items listed in the “extra” invoices were needed and ordered because of inspections or necessities that changed during the construction process. Bonewitz testified that neither Chris Reed nor anyone working for Beck would have ordered something without getting approval.

The district court ruling awarded Grosse Steel the full amount of its claim—\$8854.51—against Nelson and dismissed the claims against Midtown, Bourbon Street, and Beck Properties. The court concluded,

The invoices in dispute are clearly extras contemplated by the agreement between Nelson Properties and Grosse Steel executed on March 10, 2009. The items were delivered to the Black’s Building by Grosse Steel Company in the same manner as those items provided by Grosse Steel which are not in dispute herein. The items were received by workers at the Black’s Building in the same manner as those items received at the Black’s Building which are not in dispute herein. Defendant Nelson Properties is liable for the cost of said extra items provided by Grosse Steel Company to the Black’s Building.

The court acknowledged Nelson’s argument that in the lease agreement Bourbon Street agreed to be responsible for the remodel, but the court went on to say,

Although Midtown Development, LLC is owned by the same parties that own Nelson Properties, the lease between Midtown Development, LLC and Bourbon Street Restaurant, LLC cannot affect the contract rights of Grosse Steel Company, Inc. in their contract with Nelson Properties.

Additionally, the workers who were performing some of the remodeling at the Black’s Building and who accepted delivery of the

product from Grosse Steel Company were employees of Barmuda, MMC. Barmuda, MMC is not a party to this litigation.

Nelson and Midtown appeal contending the district court ruling is not supported by substantial evidence.

II. SCOPE AND STANDARD OF REVIEW.

As this case was filed and tried at law, our review is for correction of errors at law. See Iowa R. App. P. 6.907; *Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 689 (Iowa 1999). "If the trial court's findings of fact are supported by substantial evidence and were not induced by an erroneous view of the law, they will be sustained." *Yost v. City of Council Bluffs*, 471 N.W.2d 836, 838 (Iowa 1991). "Evidence is substantial when a reasonable mind would find the evidence presented adequate to reach the same findings." *Magnusson Agency v. Pub. Entity Nat'l Co.*, 560 N.W.2d 20, 25 (Iowa 1997). "We view the evidence in a light most favorable to the trial court's judgment." *Van Oort Constr.*, 599 N.W.2d at 689.

III. BREACH OF CONTRACT.

On appeal, Nelson and Midtown do not dispute the language of the contract or that the materials in the "extra" invoices were delivered to the building and incorporated into the remodel project. Nelson and Midtown's only issue on appeal is that there was not substantial evidence to support the conclusion that *Nelson* ordered the "extra" material. Nelson asserts that if the extras were not ordered by it, then it is not responsible to pay for the materials under the contract. The provision of the contract provides, "Any additional material required will be charged as an extra to the contract at prices in effect by us at the time the

additional material *is ordered*. (Emphasis added.) Nelson asserts that Vern Nelson III was the only person who testified who had personal knowledge of what Nelson ordered or did not order from Grosse Steel. Since Vern Nelson III testified he never ordered the extra material or received the “extra” invoices, Nelson asserts the evidence does not support the district court’s conclusion that Nelson is responsible to pay the “extra” invoices.

“The standard of review on appeal, however, is whether substantial evidence supports the finding actually made by the trial court, not whether substantial evidence would have supported a different finding.” *Id.* at 691. The evidence here supports the district court’s conclusion that Nelson is responsible for the “extra” invoices. Bob Grosse testified that for three of the five “extra” invoices a quote was faxed to Vern Nelson III for approval in advance of the invoice; two of those faxed quotes indicate that approval was received based on the handwritten notations in the margins saying “Yes,” “No,” and “Go ahead,” along with finish and color selections. Bob Grosse testified the margin notations were from his employee, Warren Ledtje. Grosse also testified that all the material in those invoices was sent to the remodel project.

Both Darin Beck and Nick Bonewitz testified the construction workers on site would never have ordered anything except with the approval of Nelson. While some of the invoices in question had Chris Reed’s name and phone number or were signed by other employees of Barmuda, invoices that were not in dispute in this case also had the same notations.

While Vern Nelson III testified he never saw or approved of the “extra” invoices, there is substantial evidence to support the district court’s conclusion

that Nelson is responsible for the charges. The district court, as the trier of fact in this case, “has the prerogative to determine which evidence is entitled to belief.” *Tim O’Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). In addition, the district court is in the better position to evaluate the credibility of the witnesses. *Id.* “[O]ur task is to determine whether substantial evidence supports the district court’s findings according to those witnesses whom the court believed.” *Id.*

Circumstantial evidence is equally probative to direct evidence. *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 800 (Iowa 1984). The circumstantial evidence in this case has “sufficient probative force to constitute the basis for a legal inference” and is not “mere speculation.” *Id.* While Nelson and Midtown argue that Barmuda’s employees ordered the material and should be responsible for the cost, Barmuda was not made a party to the litigation, nor did Barmuda have a contract with Grosse Steel. The district court’s ruling entering judgment against Nelson and in favor of Grosse Steel in the amount of \$8854.41 is affirmed along with the dismissal of Midtown, Bourbon Street, and Beck Properties.

AFFIRMED.