

IN THE COURT OF APPEALS OF IOWA

No. 5-950 / 05-0162
Filed April 26, 2006

**JERRY PALMER HOMES, INC.,
and JOE ARKFELD,**
Plaintiffs-Appellees/Cross-Appellants,

vs.

DAVID and KATHY SIMPSON,
Defendants-Appellants/Cross-Appellees.

Appeal from the Iowa District Court for Mills County, Gordon Abel, Judge.

David and Kathy Simpson appeal and Jerry Palmer Homes, Inc. cross-appeals from the district court's rulings in a lawsuit that arose from a construction contract. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.**

Mary Schott of Sodoro, Daly & Sodoro, P.C., Omaha, Nebraska, for appellants.

Brett Ryan and Bruce Green of Willson & Pechacek, P.L.C., Council Bluffs, for appellees.

Considered by Zimmer, P.J., and Miller and Vaitheswaran, JJ.

ZIMMER, P.J.

Jerry Palmer Homes, Inc. (Palmer Homes) and David and Kathy Simpson (Simpsons) entered into a contract that provided Palmer Homes would construct a residence for the Simpsons. A series of disputes arose during construction of the home, and the parties became embroiled in litigation. Following a bench trial, the district court entered judgment in favor of Palmer Homes on its claim based on a promissory note executed by the Simpsons while their home was under construction. The court concluded both parties had breached the construction contract and were precluded from recovery under their contract claims. The Simpsons appealed, and Palmer Homes cross-appealed. We affirm in part, reverse in part, and remand with directions.

I. Background Facts

On August 4, 1997, Palmer Homes¹ and the Simpsons contracted for the construction of a home for the Simpsons in Glenwood, Iowa, for approximately \$375,000. The contract anticipated construction would be complete in approximately six to eight months. The Simpsons left town on vacation immediately after signing the contract. By the time they returned, Palmer Homes had poured the concrete foundation for their home. As construction progressed, Palmer Homes issued monthly bills as provided by the contract. The billings totaled \$208,100.40 through October 31, 1997. As of that date, the Simpsons had paid Palmer Homes \$20,780.21.

¹ Jerry Palmer is the president of the corporation. His company has been constructing six to seven homes per year since 1965.

The parties executed a subsequent contract in December of 1997. The contract set a new price of \$353,000 for the construction of the home and made a few other modifications to the original contract. The substituted contract provides that “[a]pproximately every 30 (thirty) days Builder will submit to Owner a billing,” and if “payment not received within ten working days, work will cease until payment has been made.” In a separate cost estimate dated December 3, 1997, the parties agreed the Simpsons would provide some services and materials directly, including cabinets, plumbing, heating and air-conditioning, the well, propane, electrical service from the power company, radiant floor heat, and appliances.

The Simpsons secured financing for their new home with Team Bank during December of 1997, and on December 24, 1997, the bank paid \$160,176.66 to Palmer Homes for work it had completed on the Simpsons’ home. Following this payment, the Simpsons still owed Palmer Homes a balance of \$26,854.78. On the same date, the Simpsons gave Palmer Homes a promissory note for \$26,854.78. The promissory note was due and payable on January 10, 1998. The note provided that an unspecified amount of interest would accrue from November 19, 1997, which was the date of the builder’s last billing to the Simpsons. The note further provided the Simpsons would pay any legal fees incurred by Palmer Homes if a lawsuit was necessary to collect the note. The Simpsons failed to pay the promissory note when it came due January 10, 1998.

Palmer Homes continued working on the home after the second contract was executed. As construction progressed, Jerry Palmer discovered the

Simpsons were bringing in their own subcontractors to work on several aspects of the project that were not contemplated by the contract documents, including subcontractors for floor coverings, brick paving, roof flashing, and countertops. According to Jerry Palmer, construction was delayed because of scheduling problems caused by the Simpsons' subcontractors who were not under his control.

On several occasions while their home was being built, the Simpsons noted deficiencies in the construction process and complained to Palmer. The problems included a cracked and improperly waterproofed foundation, a dented garage door, a leaking roof, a cracked concrete drive, poor painting and staining, deficient drywall, and incomplete electrical work. The Simpsons also complained about the cost of their entrance drive.²

Jerry Palmer and the Simpsons met at the Simpsons' home on May 13, 1998, to review the Simpsons' list of construction deficiencies. The parties have different recollections of that meeting; however, they agree that Palmer told the Simpsons any deficiencies in the painting and staining would be corrected by the painting subcontractor, Mr. Memo, at no additional cost to the Simpsons. At the meeting, the Simpsons paid Palmer Homes \$40,865.77, the balance of the builder's then outstanding invoices, excluding the delinquent promissory note. The parties scheduled another meeting for May 29, 1998, for the purpose of reviewing the deficiencies in the painting job with Mr. Memo and Mr. Schiffbaur, the Simpsons' painter. The Simpsons canceled this meeting and hired Mr.

² The trial court ultimately concluded that the Simpsons' complaints with respect to their driveway were the result of their failure to provide adequate specifications for a firm bid on the project.

Schiffbaur to repair the paint job without informing Palmer. Schiffbaur's bills indicate that he began work on May 23, 1998.

Palmer attempted to gain access to the property sometime after May 29, but he discovered the Simpsons had placed a locked gate across the entrance drive. Palmer maintains he was locked out of the project, while the Simpsons allege Palmer abandoned the project.

II. Proceedings

This protracted litigation began in the fall of 1998 when Palmer Homes sued to enforce a mechanic's lien that it had placed on the Simpsons' house. The Simpsons responded with a counterclaim that alleged Palmer had breached the construction contract. Palmer Homes then filed its own counterclaim, alleging the Simpsons had breached the construction contract. In its counterclaim, Palmer Homes also sought to recover on the note the Simpsons signed in December of 1997. The mechanic's lien was released by an order entered in May of 2002. Following a series of delays, the parties' remaining claims were tried to the court on August 14 and 15, 2003, and March 19, 2004.

At trial, Palmer Homes asserted it was entitled to the full amount of the promissory note plus accrued interest and attorney fees related to the collection of the note. The corporation also sought to recover the remaining balance of the contract price. The Simpsons contended Jerry Palmer breached the contract by walking away from the job and canceling the builder's risk insurance. They claimed any amounts due Palmer Homes under the building contract should be reduced by the costs they had already incurred in completing their house and by costs they expected to incur in correcting some remaining deficiencies.

In a ruling entered December 30, 2004, the court entered judgment in favor of Palmer Homes for the balance remaining on the promissory note in the amount of \$19,372.03. The court also found Palmer Homes was entitled to accrued interest of \$11,139.66 and attorney fees of \$3000 related to collection of the note. The court found the Simpsons breached the contract by expanding the number of subcontractors they provided, by directly purchasing building materials beyond the scope of the original contract, and by failing to permit Palmer to allow his painting subcontractor to remedy deficiencies in the painting and staining. It found the Simpsons prevented Palmer Homes from repairing the foundation by effectively locking Palmer and his subcontractors out of the worksite. The court concluded the Simpsons were not entitled to an offset or reduction in the amounts owed to Palmer Homes due to their claimed construction deficiencies because they did not permit Palmer to access the property to complete repairs. The Simpsons contend they provided Palmer and all the subcontractors with keys to the property.³

The court concluded Palmer Homes breached the building contract by canceling the builder's risk insurance. The court concluded Palmer Homes was entitled to payment of all sums it billed to the Simpsons, but no additional sums based on the total price of the contract. Both parties appealed.

III. Issues on Appeal

The Simpsons raise six issues on appeal. First, they contend Palmer Homes failed to substantially perform its duties as a general contractor. Second, they contend they should have been awarded the reasonable cost of remedying

³ Corey Goss, one of Palmer's subcontractors, testified he never received a key.

the defects in their house. Third, they contend the court abused its discretion in granting continuances to Palmer Homes. Fourth, they contend Palmer Homes should not have been awarded prejudgment interest because of the plaintiff's lack of diligence in prosecuting this case. Fifth, they contend that if Palmer Homes is entitled to interest, it should be at the rate of five percent under Iowa law rather than eight percent as awarded by the court. Last, the Simpsons contend Palmer Homes breached the express warranty on their home.

In its cross-appeal, Palmer Homes maintains it did not commit a material breach of the parties' contract by canceling the builder's insurance on Simpson's property, and it argues it should have been permitted to recover the benefit of the bargain under the construction contract.

IV. Scope & Standards of Review

The parties agree this matter was tried to the district court at law. Accordingly, we review for the correction of errors at law. Iowa R. App. P. 6.4. The court's findings of fact are binding on us if supported by substantial evidence. Iowa R. App. P. 6.14(6)(a); *Hartzler v. Town of Kalona*, 218 N.W.2d 608, 609 (Iowa 1974). We consider evidence substantial when a reasonable mind would accept it as adequate to reach a conclusion. *Falczyński v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995).

V. Discussion

A. Contract Claims

Both parties take issue with the trial court's conclusions regarding their contract claims. A breach of contract occurs when a party fails to perform any promise which forms a whole or a part of the contract without legal excuse.

Employers Mut. Cas. Co. v. United Fire & Cas. Co., 682 N.W.2d 452, 455 (Iowa Ct. App. 2004). In breach of contract claims, the complaining party must prove (1) the existence of a contract, (2) the terms and conditions of the contract, (3) that it has performed all the terms and conditions required under the contract, (4) the defendant's breach of the contract in some particular way, and (5) that the plaintiff has suffered damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). If one party to a contract prevents the other from performing a condition of the contract or fails to cooperate to allow the condition to be satisfied, the other party is excused from showing compliance with this condition. See *Sheer Constr., Inc. v. W. Hodgman & Sons, Inc.*, 326 N.W.2d 328, 332 (Iowa 1982) (holding all contracts contain an implied term that the person for whom the work is contracted to be done will not obstruct, hinder or delay the contractor, but will facilitate the performance of the work to be done by him or her).

We first address the trial court's decision to deny the Simpsons' contractual claims. The Simpsons acknowledge they gave Palmer Holmes a promissory note which had an unpaid balance remaining at the time of trial.⁴ However, they contend they should have been awarded damages to cover the cost of repairing the defects in their home in an amount which equals or exceeds the balance on the note.

⁴ The Simpsons were in default of their contract for nonpayment at the time they signed the December 24 promissory note, and the court found they received "good and valuable consideration from Palmer in exchange for the note, by virtue of his declining to enforce the provision of the contract which permitted him to stop work on the project until his bill was paid."

Upon review of the record, we find it unnecessary to address each of the Simpsons' individual complaints regarding defects in their home. We reach this conclusion because we conclude substantial evidence supports the trial court's ultimate conclusion that the Simpsons are not entitled to an offset or reduction because of the claimed deficiencies in their home.

The trial court concluded that at the meeting held May 13, Jerry Palmer assured the Simpsons his subcontractors would return to their home to correct any deficiencies. As the court noted, the parties scheduled a May 29 meeting which was to include the parties and their respective painters. The Simpsons canceled the meeting and hired Schiffbaur to repair the paint job without informing Palmer. Schiffbaur began working at the home on May 23. The Simpsons admit they installed a locked gate across their entrance drive sometime in the spring of 1998. This coincides with the time period Palmer claims he was effectively locked off the property.

We find substantial evidence supports the court's finding that the Simpsons did not permit access to the building site for purposes of completing corrections or repairs to claimed deficiencies. In reaching this conclusion, we recognize the district court had the advantage of listening to and viewing the witnesses. *Weinhold v. Wolff*, 555 N.W.2d 454, 458 (Iowa 1996). In matters of witness credibility, we are particularly inclined to give weight to the district court's findings. *Id.* We agree with the district court's conclusion that the Simpsons are not entitled to an offset or reduction in the contract price on account of their claimed deficiencies.

We now turn to Palmer Homes' claim it is entitled to recover the "benefit of its bargain" under the construction contract.⁵ The court held Palmer Homes was entitled to recover the amount due on the promissory note plus accrued interest and attorney's fees necessary to recover on the note. However, the court concluded Palmer Homes was not entitled to any additional sums based upon the price of the contract because it breached the building contract when its president canceled the builder's risk insurance.

Palmer Homes concedes the building contract required it to carry builder's risk insurance. Jerry Palmer deliberately canceled the insurance on May 15, 1998. He claimed he thought he had been fired after the May 13 meeting, so he told his secretary, "Let's try this out, tell them we're going to cancel the insurance and see if we get any response." The record reveals Palmer intentionally left the Simpsons' property uninsured for approximately three weeks before faxing the homeowners a notice on June 2 informing them the insurance had lapsed. Clearly, Palmer's cancellation of the builder's risk insurance constituted a breach of contract, and we agree with the district court's conclusion that Palmer Homes is not entitled to further recovery under the construction contract.

When a contract has been breached, the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed; this type of damage is the injured party's "expectation interest" or "benefit of the bargain" damages. *Midland Mut. Life Ins.*

⁵ The total amount due Palmer Homes under the construction contract was \$353,000. The Simpsons paid Palmer Homes \$312,410.18 and executed the promissory note discussed above. Palmer Homes claims it is entitled to an additional \$20,410.18, which represents the profit Palmer Homes would have realized if it had been given the opportunity to complete the project.

Co. v. Mercy Clinics, Inc., 579 N.W.2d 823, 831 (Iowa 1998). The nonbreaching party's recovery under this theory of damages is limited to the loss he or she actually suffered by reason of the breach, and the party is not entitled to be placed in a better position than he or she would have occupied if the contract had not been breached. *Id.*

In this case, we believe substantial evidence supports the conclusion that both parties materially breached the construction contract. Moreover, after their respective breaches occurred, it does not appear that either party initiated any communication in an effort to resolve issues relating to access to the property. Under the circumstances presented here, we do not believe that either party qualifies as a nonbreaching party entitled to damages to place it in as good a position as it would have occupied had the contract been performed. We conclude the district court did not err in finding the Simpsons were not entitled to an offset for claimed deficiencies, and Palmer Homes was not entitled to additional sums based on its benefit of the bargain theory.

B. Continuances

The Simpsons contend the court abused its discretion by granting two continuances to Palmer Homes. We review a court's decision to grant or deny a motion for continuance for abuse of discretion, and we only interfere with that decision on appeal if injustice has been done to the party seeking the continuance. *In re Estate of Lovell*, 344 N.W.2d 576, 578 (Iowa Ct. App. 1983). To prove an abuse of discretion, the Simpsons must show the court exercised its discretion for clearly unreasonable or untenable reasons. *In re Estate of Olson*, 479 N.W.2d 610, 613 (Iowa Ct. App. 1991).

The Simpsons maintain the court abused its discretion on two occasions by granting Palmer Homes' motion to continue trial over their objections.⁶ On the first occasion, a continuance was granted because Palmer Homes changed attorneys shortly before trial. On the second occasion, a continuance was granted because Jerry Palmer was on vacation when trial was scheduled.

The record reveals the trial of this case was continued on a number of occasions for a variety of reasons. The Simpsons concede they requested and were granted several of those continuances. On one occasion, the court granted the Simpsons a continuance when their expert was unavailable for a trial date. On another occasion, the trial was continued because the Simpsons filed a motion to amend their pleadings.

On appeal, the Simpsons contend the continuances granted to Palmer Homes worked an injustice on them because the continuances caused them to incur additional interest expense. The Simpsons do not contend they were prejudiced in any other manner. It is not appropriate for us to address the "interest expense" argument because it does not appear that this argument was presented to the district court.⁷ See *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995) (holding that issues must ordinarily be presented to and ruled upon by the trial court before they may be raised and adjudicated on appeal). We reject this assignment of error.

⁶ The continuances were granted by two different judges. The judge who ultimately heard the parties' case did not grant either continuance.

⁷ In their pleadings resisting the motions to continue, the Simpsons did not contend continuances would prejudice them by causing them to incur additional interest expense. The appellate record does not reveal whether or not a reported hearing was held regarding the motions.

C. Interest Award Issues

The trial court awarded interest to Palmer Homes at the rate of eight percent on the promissory note. The Simpsons first claim the interest award should not stand because it was the result of delays caused by Palmer Homes. The parties agree the proper scope of review is for the correction of errors at law. *Flom v. Stahly*, 569 N.W.2d 135, 139 (Iowa 1997).

The Simpsons concede “there is no precedent for denying interest to a prevailing claimant, and in fact the cases indicate the opposite is the rule.” Our supreme court has held the award of interest is mandatory even when interest is not requested. *Iowa State Commerce Comm'n v. Manilla Grain Terminal, Inc.*, 362 N.W.2d 562, 565 (Iowa 1985). We find the court did not err in granting interest to Palmer Homes on the promissory note, and we reject this assignment of error.

The Simpsons have proffered the alternative argument that if interest must be awarded, it should be set at five percent instead of eight percent as awarded by the court. The Simpsons claim that because the promissory note which they executed in December of 1997 does not explicitly state the percent of interest, the court should have applied Iowa Code section 535.2(1) (2003)⁸ to set the

⁸ Iowa Code section 535.2(1) states:

Except as provided in subsection 2 hereof, the rate of interest shall be five cents on the hundred by the year in the following cases, unless the parties shall agree in writing for the payment of interest at a rate not exceeding the rate permitted by subsection 3:

- a. Money due by express contract.
- b. Money after the same becomes due.
- c. Money loaned
- d. Money received to the use of another and retained beyond a reasonable time, without the owner's consent, express or implied.

interest at five percent. Palmer concedes the promissory note is silent regarding an interest rate, but suggests a rate of eight percent on the note is appropriate in view of a letter dated May 13, 1998, from Pat Sheppard, Palmer Homes' secretary, to the Simpsons. The letter states "[i]nterest is at 8% per annum" on the promissory note. We believe the Simpsons have the better argument.

The promissory note states that interest is "to be accrued on amount as of November 19, 1997," but the note is silent as to the interest rate. The parties did not agree orally or in writing to a specific interest rate, and we do not believe Palmer's letter to the Simpsons claiming an eight-percent interest rate establishes any binding agreement between the parties. Iowa Code section 535.2(1)(g) dictates that the court should have set the interest at five percent because there is a contract to pay interest, but no rate is stipulated.

VI. Conclusion

We affirm the district court's judgment except for the rate of interest awarded on the promissory note. We reverse the award of eight percent interest on the note and remand to the district court so that interest may be calculated at the proper rate.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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- e. Money due on the settlement of accounts from the day the balance is ascertained.
 - f. Money due upon open accounts after six months from the date of the last item.
 - g. Money due, or to become due, where there is a contract to pay interest, and no rate is stipulated.