

IN THE COURT OF APPEALS OF IOWA

No. 7-854 / 07-0156
Filed November 29, 2007

R & G ELECTRIC, INC.,
Plaintiff-Appellee,

vs.

HARLAN AND JULIE WEYDERT,
husband and wife,
Defendants-Appellants.

Appeal from the Iowa District Court for Kossuth County, Don E. Courtney,
(summary judgment) and Joseph J. Straub (trial), Judges.

Defendants contend district court erred when it dismissed their
counterclaim on summary judgment. **AFFIRMED.**

David M. Nelsen of Nelsen Law Office, Mason City, for appellant.

Kevin J. Driscoll and Eric G. Hoch of Finley, Alt, Smith, Scharnberg, Craig,
Hilmes & Gaffney, P.C., Des Moines, for appellee.

Considered by Huitink, P.J., and Miller and Eisenhauer, JJ.

HUITINK, P.J.

I. Background Facts and Prior Proceedings

On January 8, 2004, R & G Electric filed a mechanic's lien in the amount of \$52,346.55 against property owned by Harlan and Julie Weydert for materials and labor furnished pursuant to a contract to install one grain bin and to relocate two smaller grain bins on the Weyderts' property.

Shortly thereafter, R & G filed a petition to foreclose the lien, and then filed an amended petition asserting damages for breach of written contract, breach of oral contract, breach of implied contract, quantum meruit, and unjust enrichment.

The Weyderts answered by denying the existence of any written contract, oral contract, or implied contract and also denying the claims for quantum meruit and unjust enrichment. The Weyderts also noted the statute of frauds as an affirmative defense and set forth the following counterclaims or setoffs:

For Counterclaims or setoffs to the allegations of Plaintiff's Petition, Defendants . . . state:

48. Any work performed was inadequate and inferior thereby causing damages to the Defendants.

49. Any work performed was untimely and thereby causing damages to the Defendants.

R & G filed a motion for summary judgment requesting the court to enter an order establishing the mechanics lien and to enter an order that the Weyderts may not recover consequential damages in the form of alleged crop losses on their counterclaim.

The Weyderts filed a resistance to the motion for summary judgment and R & G filed a reply to the Weyderts' resistance stating, in pertinent part:

[T]he undisputed evidence established that Defendants have repeatedly denied and continue to deny the existence of any

contractual relationship whatsoever with plaintiff. They cannot now at the same time assert a counterclaim for breach of contract and consequential damages. And in fact, defendants' have not asserted a counterclaim based on breach of contract. Therefore, as a matter of law, there can be no recovery by defendants for any alleged consequential damages arising from a breach of contract. Further, defendants have no right to any recovery on a counterclaim based on a negligence theory as the economic loss doctrine bars defendants' counterclaim for economic damages based on negligence.

The court held an unrecorded hearing on the motion and entered a written ruling denying R & G summary judgment on its request to enter an order establishing the mechanic's lien. The court based this decision on the Weyderts' denial of the existence of any contract and their claims that the conversations surrounding the grain bins consisted of mere negotiations that never materialized into a contractual relationship. However, in light of the Weyderts' claim that there was no contract, the court proceeded to analyze the Weyderts' counterclaim as a negligence claim, rather than a contract claim. Because the Weyderts sought only economic losses on their counterclaim, the court found they were barred from recovering damages under a tort theory, and therefore dismissed the Weyderts' counterclaim for damages. See *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984) ("The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable."). The Weyderts did not file any post-ruling motion challenging the court's conclusion that their counterclaim was based on negligence, rather than contract. The Weyderts also did not seek to amend their

counterclaim after the summary judgment ruling to assert a claim for breach of contract.

The matter proceeded to a bench trial. The court found the parties had entered into an oral contract and then amended the original contract with a written amendment. The court determined that Harlan breached the contract by not making his final payment and that R & G also breached the contract when it performed some of the work in an unsatisfactory manner. The court entered an order entering judgment against Harlan Weydert in the amount of \$35,352.60 with an additional judgment of \$13,434.96 for R & G's attorney fees.

The Weyderts now appeal, claiming the court erred when it dismissed their counterclaim on summary judgment and erred when it did not further reduce the judgment for other problems associated with R & G's alleged failure to perform the work in a satisfactory manner.

II. Scope of Review

An action to enforce a mechanic's lien is in equity. Iowa Code § 572.26 (2005). Therefore our review is de novo. Iowa R. App. P. 6.4; *W.P. Barber Lumber Co. v. Celania*, 674 N.W.2d 62, 63-64 (Iowa 2003). However, even in an equity case, we do not find facts de novo in an appeal from a ruling on summary judgment. *Howard v. Schildberg Constr. Co.*, 528 N.W.2d 550, 552 (Iowa 1995). Accordingly, our review of the court's ruling on the motion for summary judgment is on error. *Id.*

III. Merits

A. Summary Judgment

In determining whether summary judgment was proper, we examine the record in the light most favorable to the nonmoving party and draw all legitimate inferences the evidence bears in order to establish the existence of questions of fact. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

At the time of the summary judgment hearing, Harlan Weydert denied that he had a contract with R & G. One of the issues before the court at the time of the unrecorded hearing was R & G's claim that the counterclaim should be dismissed because the Weyderts had denied the existence of any contract. Presumably, if the Weyderts disagreed with this assertion they would have challenged it at the time of the summary judgment hearing and told the court that there was some form of contract between the parties. However, the district court ruling does not indicate that the Weyderts ever challenged this statement or claimed that there was some form of contract between the parties. Instead, the court states on numerous occasions that the Weyderts deny the existence of any contract between the parties and that they "steadfastly adhere to the position that at no time was there a contract with R & G." The district court relied on this denial to reject R & G's motion to establish a valid mechanic's lien and also relied on this denial to bar the Weyderts' counterclaim.

Now, on appeal, the Weyderts claim there *were* contracts between the parties concerning all three bins. Therefore, the Weyderts contend their counterclaim was based on contract principles and the district court erred when it dismissed the counterclaim on summary judgment.

Upon our review of the record available to the court at the time of the summary judgment hearing, we agree with the court's conclusion that the Weyderts "consistently and unwaveringly" denied the existence of any contract at the time of the summary judgment hearing. Accordingly, we find the district court was correct when it concluded the Weyderts' ambiguous counterclaim was based in tort, not in contract, and dismissed their counterclaim on summary judgment. We find no error here.

B. Damage Issues

The Weyderts also contend the district court erred when it failed to rule on all damage issues. The Weyderts claim the district court should have further reduced the judgment for allegedly inferior electrical work and inferior workmanship on the various bins.

1. Damages for Electrical Work

In support of his damage claim for the electrical work, the Weyderts point to testimony from their expert witness describing how it would cost approximately \$15,473.78 to correct and repair all the electrical work violations involved with the bins. The record does not provide a list of what parts and costs added up to this general cost figure. A key fact in this case is that the work performed by R & G involved merging old electrical equipment with new electrical equipment. The expert witness was unable to explain what portion of his estimated costs related to updating the existing electrical components on the old bins and what portion related to repairing work improperly done by R & G. Because there is insufficient information in the record to describe with any specificity what costs were attributable to R & G's allegedly inferior work, as opposed to upgrading existing

electrical components, we find the court did not err when it chose not to offset the plaintiff's judgment for these claimed damages.

2. Inferior Workmanship

One expert witness set forth a laundry list of problems with the three bins allegedly attributable to R & G's poor workmanship. R & G refuted these allegations by pointing out that many of these problems came as a result of the Weyderts' decisions to cut costs by foregoing recommended measures to stabilize the bins. For example, the Weyderts opted to move the old bins to a location where they would rest on a pre-existing concrete pad. Because the pad was not designed to support bins of that size, the expert witness testified that one bin was beginning to bend and therefore must be moved to an appropriate concrete pad.

The court did not offset the judgment for all repair costs set forth by the Weyderts' expert witness. Instead, it only reduced the judgment by \$7626 for costs associated with fixing the stairs on the outside of one of the bins and associated with reinstalling proper bolts in the bins. Upon our review of the evidence pertaining to the other alleged damages, we agree with the court's decision not to reduce the judgment further. *See McDonald v. Welch*, 176 N.W.2d 846, 849 (Iowa 1970) ("In mechanics' lien cases, involving as they do numerous charges and counter charges which depend entirely on the credibility of the parties, we have frequently held the trial court is in a more advantageous position than we to put credence where it belongs.").

C. Extraneous Material in the Appendix

The supreme court has directed our court to consider the issue of the appendix costs on appeal. The Weyderts allege R & G's designation of appendix contained extraneous material. Under Iowa Rule of Appellate Procedure 6.15(3), costs may be assessed for appendix materials which are unnecessary or have no bearing on the issues appealed.

Upon our review of the disputed portions of the record, we conclude the disputed pages do not constitute extraneous material and therefore we do not shift any costs pursuant to rule 6.15(3).

IV. Conclusion

Having considered all issues raised on appeal, whether or not specifically addressed in this opinion, we affirm the district court on all issues.

AFFIRMED.