DAVID BERTRAM, Plaintiff-Appellant, vs. JAMES HARBERTS d/b/a EXCLUSIVE CONTRACTING L.L

IN THE COURT OF APPEALS OF IOWA

No. 16-0919 Filed July 19, 2017

DAVID BERTRAM, Plaintiff-Appellant,

vs.

JAMES HARBERTS d/b/a EXCLUSIVE CONTRACTING L.L.C., Defendant-Appellee.

Appeal from the Iowa District Court for Grundy County, David P. Odekirk,

Judge.

The plaintiff

contract case. AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

Michael McDonough, Jacob W. Nelson, and Crystal R. Pound of Simmons

Perrine Moyer Bergmann PLC, Cedar Rapids, for appellant.

Chad A. Swanson (until withdrawal) and Nathan J. Schroeder (until

withdrawal), Waterloo, for appellee.

Considered by Vogel, P.J., Doyle, J., and Blane, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2017). 2

BLANE, Senior Judge.

involving

claims and counterclaims for breach of contract. Bertram challenges the district

the defendant, James Harberts, d/b/a/ Exclusive Contract, L.L.C., entered.

ruling regarding damages.

I. Background Facts and Proceedings.

Bertram, a farmer, wanted a pole barn constructed on his land. Sometime

in 2012, he contacted Harberts, 1 an experienced builder.

After some back and forth regarding proposals and estimates, Harberts

, and submitted it to

Bertram. The parties signed the agreement on June 25. The agreement

provided Harberts would build an 80 foot by 105 foot pole barn, complete with

concrete floors, spray-foam insulation, and the framing for a number of interior

walls and doorways. The total cost $265,210.00 included the necessary

supplies and labor. Bertram, by the terms of the agreement, was to initially pay

After assembly and construction of [the] building[], a predetermined amount of

$66,302.50 (reflecting 25% of total cost) [was to] be paid to the Contractor. After

interior floor installation ha[d] been completed, a predetermined amount of

contract also specified what Harberts was not responsible for, including the large

1 We refer to both the defendant and his business as Harberts throughout. 3

Bertram maintained he and Harberts had also agreed orally, before

the

project in a separate account. Harberts agreed he gave Bertram a projected

completion date and that he hoped to have the project completed by winter, but

he disagreed that the completion date was a contractual term. Additionally,

Harberts testified he never told Bertram his money would be kept separate from

business was receiving for other projects. Bank records

business account, along with the funds for other projects.

Bertram made the first payment to Harberts of $172,386.50 on or about

the day the contract was signed. Harberts began construction at some point in

early July. The building itself was up by October 21, 2013, at which time

Harberts requested the second installment payment. Bertram made the second

payment of $66,302.50.

Around the same time the building was finished, Harberts and Bertram

had a discussion about the large overhead doors. Bertram had yet to pick or

order the doors, and he had neither hired someone to complete nor personally

completed the work that had to be done before the doors could be installed tasks that were his to undertake and were not within the contract. Harberts

advised Bertram he would not complete the insulation or concrete work until after

the doors were installed.

After the second payment was made, Harberts and Bertram agreed

4 installing the liner panel and doing some work that had to be completed for the

overhead doors to be installed.

Bertram chose the overhead doors on November 1; he was told it would

take seven to eight weeks for the doors to be delivered. On November 4,

Harberts paid the $7051 deposit on the doors.

Bertram wanted Harberts to work on completing the insulation and

concrete floor while they waited for the doors to be installed, but Harberts refused

to do so. Harberts later testified that he always did flooring last, stating he did

not want to drive his heavy equipment over the newly poured floors and wanted

to make sure the doors were in place first so he could use the cement work to

make sure they sealed tightly.

Bertram does not want any more work performed this winter. You are currently

holding $123,490 t

amounts that you expended for the ceiling steelwork and forward the balance of

berts did not respond to the letter.

company was sent an invoice for the rest of the bill by the door company, totaling

$14,452.

3, 2014. It

t 5

days to respond to the letter before Bertram commenced litigation.

The parties then scheduled a meeting, which took place on January 10 at

the lending bank. At the meeting, Bertram demanded Harberts immediately

resume construction. Harberts testified he agreed he would get back on the job

site as soon as the weather allowed. At trial, Bertram expressed that he believed

Harberts did not immediately return to the job site. He did submit an amount owed to the door company, totaling $48,153. $21,503 of the balance was for the doors both the $7051 Harberts had paid in deposit and the remaining balance after installation.

On January 16, both Bertram and his attorney sent Harberts letters. Harberts responded in kind on January 29. No more work was completed on the project before February 18, wh terminating the contract.

Bertram and neglected to complete the construction of the building, ha[d] constructed portions in a defective and unworkmanlike manner, . . . [and had] failed to return the unearned funds paid to [him] despite demand for return of them by

ed and filed a counterclaim, maintaining it was Bertram who had breached the contract.

The matter proceeded to a bench trial in June 2015. At trial, Bertram and his witnesses testified that the roof of the pole barn was leaking in several areas. 6 Evidence was introduced that Harberts and his employees had incorrectly placed nails, which had left holes in the roof. Additionally, the overlap of the metal panels was less than recommended by the manufacturer. The cost for the replacement of the roof would be $32,486.70.

The court issued its written ruling on January 8, 2016. The court found that neither the winter completion date nor the segregation of funds from other business monies were terms that had been integrated into the contract. The

court then concluded Harberts had materially breached the contract by failing to

complete the building in contract payment. The court awarded Bertram the following damages: $1905 to

replace gutters; $2400 to fix problems with the installation of the side paneling;

$32,486.70 to replace the roof. However, the court determined Bertram did owe

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Additionally, the court found that it was the fault of Bertram, not Harberts, that the

project was never completed. The court ruled:

The Court finds [Bertram] should not receive damages for the installation of the concrete floors, insulation, or interior walls, and he will also not receive damages to fix the drip cap, replace the ceiling panels, or to regrade the floors. The work on the barn was not complete at the time [Bertram] terminated the contract, nor was it required to be complete because the reasonable time for completion had not yet passed. As a result, [Harberts] was excused from further performance on these portions of the project.

2 paid the balance directly. Thus, the total was comprised of the deposit Harberts paid to

the door company, the fur and coil around the door, the liner panel ceiling, the extra footing required after Bertram changed the plans for the interior framing, and the grade and compact for plumbing. 7

The court offset the damages owed to Bertram for the construction issues

with the extras still owed and entered judgment in favor of Bertram in the amount

of $4090.70.

Bertram filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2),

modify the judgment accordingly to award [Bertram] a money judgment for either

the return of unearned funds prepaid to [Harberts] or for the additional costs of

Harberts was entitled to only the reasonable value of the work he actually

performed not payments for the insulation, concrete flooring, or interior framing.

Bertram claimed the value of the completed work was only $145,300 and asked

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In its written ruling on the motion, the court amended its pre clarify [Bertram] not only partially breached when he failed to pay for the contract

extras, but also materially breached on the contract when he frustrated the

construction process and wrongfully terminated the contract on February 18,

201 have been able to com altered its ruling on Har findings to find that this constituted a partial breach of the warranty of

workmanlike construction, not a materia 8

Bertram appeals. 3

II. Standard of Review.

-of-contract claim tried at law to the district court is reviewed by

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783 N.W.2d 459, 465 (Iowa Id.

Id.

III. Discussion.

The district court found that there was no contractual term regarding the

completion date of the project and determined a reasonable time for completion

would have been the spring of 2014, rather than the winter of 2013. See Fausel

v. JRJ Enters., Inc., 603 N.W.2d 612, 619 (Iowa 1999 When a contract fails to

specify time for performance, the parties must perform within a reasonable

Thus, the court determined Harberts was not yet in breach of the

contract when Bertram cancelled the agreement in February 2014.

Bertram maintains the district court erred in its determination; he asserts

regarding the number of workers he had, the court faulting Bertram for the delay

3 Harberts did not enlist another attorney to file an appearance on his behalf, and

Harberts as a non-attorney was not allowed to represent a corporation. See Timberline Builders, Inc. v. Donald D. Jayne Trust, No. 09-0168, 2010 WL 2383916, at *1 4 (Iowa Ct. App. June 16, 2010). Thus, his cross-appeal was dismissed, and he has filed no appellate brief in this matter. 9

because of his failure to order the overhead doors created an implied condition

What constitute s upon the nature of the act to

be done, the nature of the contract, and all the circumstances relating to the

R.P. Andreas & Son v. Hempy, 276 N.W. 791, 796 (Iowa 1937). Here,

based on the circumstances agreement, we agree pring 2014 was a

reasonable time. attribute some of the delay in finishing the project to him. Bertram failed to order

the overhead doors in a timely fashion, which prevented them from being

installed until December 21, 2013. The contract was silent as to whether the

overhead doors needed to be installed before Harberts would complete the

insulation and concrete floor, but Harberts testified he always left flooring for last

in his construction projects because of possible issues with or damage to the

floor that could occur during other parts of construction. Furthermore, own constru that controls the sequencing of the erection of the building through means and

a written contract between or supplement the written terms. See Iowa Code § 554.1303(3) (defining a 10

observance in a place, vocation, or trade as to justify an expectation that it will be

Because Harberts had the authority to decide the insulation and flooring

would not be completed until the doors were installed and Bertram s delay in

ordering the doors prevented them from being installed until December 21, it

would not be reasonable to determine the project should have been finished

before that date. And on December 17, Bertram had sent Harberts a letter telling

Following a January 10 meeting,

Harberts expected to return to work on the project, so it could be completed by

spring 2014, but the weather in the days directly following the meeting interfered,

and Bertram sent Harberts another letter with new demands on January 16. In

4 We

agree with the district court that Bertram materially breached the contract when

he cancelled it before the reasonable time for the project to be completed had

passed.

4 alleged error involving , in a chart, of a reasonable completion date.

While we agree that we could simply move the start date on the chart back to match the actual date construction started, we believe there are other issues with the chart. First,

Ho For example, his chart states the concrete can be laid in two days, but the expert admitted at trial that was based on a nine-person crew. chart also showed that construction work would continue in the barn two days after the concrete was poured, but he testified the flooring required a seven-day cure time. In contrast, Harberts testified, - or 80-degree weather during the summertime, six inches of concrete can take 28 days to 11

Iowa law, 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

Midland Mut. Life Ins. v. Mercy

Clinics, Inc., 579 N.W.2d 823, 831 (Iowa 1998). While this allows the non-

breaching party t placed in a better position than he would have been in if the contract had not

Id. Here, the district court concluded Bertram was not entitled to

receive any of his money back because Harberts had pre-paid for materials and

labor before the termination of the contract. We are not convinced the record

supports such broad findings, and insofar as they are supported, Harberts is

required to at least give Bertram the materials that were purchased for the

completion of his project or, if such materials were used by Harberts on other

projects, reimburse Bertram their cost.

Harberts is entitled to keep his expected profits. Ritam Corp. v. Applied

Concepts, Inc., 387 N.W.2d 619, 622 (Iowa Ct. App. 1986). He is not required to

reimburse Bertram for any - on the project. Id. is entitled to recover profits from the breach equal to the net pecuniary gain

But Harberts is not allowed to keep more than he would have received if the

contract had been completed. Harberts testified he had purchased interior doors

for the project and still had them; those should be given to Bertram, or if Harberts

no longer has them, then Harberts should pay Bertram the purchase price.

Additionally, while Harberts told Bertram at various times before the contract was 12

cancelled that he had already purchased certain materials, Harberts testified

should not be able to recover the value for the 30% of insulation Bertram had not yet purchased. Harberts also cannot be benefitted by the cancellation of the contract such that he is allowed to use jobs. Similarly, Harberts testified he had used $12,000 to $14,000 of the

the concrete, and whether he used that concrete on other jobs, in which case Bertram should be refunded the cost. If Harberts did not prepay, Bertram is to receive the money he prepaid that was not spent to install the concrete floor. However, such amount for concrete work may be reduced by the amount Harberts was required to expend to change the concrete footings due to Bertram changing the design of the pole barn after construction had been started.

The trial court erred in determining that Harberts was not required to return money and materials he had as a result of the job not being finished. Because we are unable to determine from the record before us what materials were actually pre-purchased, what materials Harberts had for the job when the contract was cancelled, and whether they have since been used by Harberts, we remand to the district court to modify the judgment award for Bertram as 13 necessary in accord with the holding in Midland Mututal Life Insurance v. Mercy Clinics, Inc., 579 N.W.2d at 831. 5

IV. Conclusion.

contract when he cancelled it in February 2014. However, we find the district court erred in its determination of damages; we reverse the award and remand

for further proceedings.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

5 hat Bertram owed Harberts $32,701 ruling that Harberts was responsible for the repair or replacement of the gutters, the

damages to side paneling, and the roof worth $32,486.70.