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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Richard A. Engwicht III, Plaintiff & Appellant,	)	Supreme Court No. 20040079
v.	)	Cass County Civil No. 09-02-C-00466
Alan J. Lako dba Lako Drilling, Defendant & Appellee.	)	

APPELLANT'S BRIEF

The Appellant Appeals from the
Judgment Dated January 14, 2004,
by the Honorable Cynthia A. Rothe-Seeger
District Court, Cass County
East Central Judicial District

APPELLANT'S ATTORNEY
Jay Schmitz (NDID # 05705)
511 Second Avenue Southeast
Jamestown, ND 58401
(701) 252-6688

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ISSUES PRESENTED

1. Should the award of $4,500 in damages to the defendant be reversed?

   A. Were the trial court's findings of fact that the plaintiff "has not performed under the contract" (#23) and "breached the contract" (#24), and that the defendant "is entitled to damages [for] the remaining drilling charges" (#24) clearly erroneous?

   B. Was the trial court's conclusion of law that the defendant should be awarded damages erroneous?

2. Is the plaintiff entitled to recover the $6,000 down payment because the defendant failed to substantially perform under the contract?

   A. Was the trial court's finding of fact (#16) that the contract merely obligated the defendant "to perform well drilling services", and that the plaintiff "agreed to pay [for those] services" without regard to the result, clearly erroneous?

   B. Did the defendant substantially perform its obligations under the contract?

STATEMENT OF THE CASE

Plaintiff Richard Engwicht filed a small claims action against "Dale Lako dba Lako Drilling" in September, 2001, in Dickey County, ND, seeking to recover $5,000 of the $6,000 down payment made to the defendant. Defendant's attorneys filed a response alleging improper venue, in that the defendant was and is a resident of Cass County; and that Dale Lako was not the proper defendant in that he was merely an employee of Lako Drilling, which was owned by his father, defendant Alan J. Lako.

The plaintiff stipulated to the objection to venue and to dismissal of the complaint against Dale Lako. He then filed the present action against defendant Alan J. Lako dba Lako Drilling in Cass County District Court in October, 2001, seeking recovery of the entire $6,000 down payment plus additional damages for breach of contract and negligence. The defendant answered, denying any liability on the complaint, and filed a cross-claim for additional sums allegedly due for the defendant's services.

A bench trial was held before the Hon. Cynthia A. Rothe-Seeger on October 17, 2003. The plaintiff withdrew the negligence claim at the close of the case-in-chief. The parties subsequently filed written briefs and proposed findings of fact and conclusions of law: the court adopted the defendant's proposed findings of fact and conclusions of law in their entirety. Judgment was entered on January 14, 2004, awarding damages and costs to the defendant on the cross-claim in the sum of $4,580. The plaintiff filed a timely notice of this appeal on March 24, 2004.

STATEMENT OF FACTS

This action arose out of an oral contract, or contracts, which the parties entered into in May-June, 1996. Plaintiff Rick Engwicht owns a farmstead 5 miles southwest of Oakes, ND. His existing artesian well was essentially ruined during the winter of 1995-96 when a cow stepped on the flow line to the water tank, preventing the well from flowing and causing it to freeze up. [Transcript, p. 16]. That spring, Mr. Engwicht called the defendant, a well driller located in Arthur, ND,[1] and a few other drillers listed in the Yellow Pages; the defendant was the first one to call back. [Tr., p. 18, at 1-3].

At that time, the parties discussed prices for drilling both ground (shallow) water and artesian wells. Although ground water is relatively rare in the area, they agreed that a test hole would be drilled first to see if any could be found, for which plaintiff would pay Lako's standard rates for test drilling; if unsuccessful, they would drill for artesian. [Tr., p. 18, at 18-23; p. 149, at 9-14]. The defendant's son, Dale Lako, drilled the test hole in late May 1996; no ground water was found. He told Mr. Engwicht that he could not begin drilling an artesian well until he got more drilling rod (Tr., p. 27, at 18-19); he also would have a price quote when he returned, of which ½ would be due when drilling commenced. Dale returned about 2 weeks later and asked for a down payment of $6,000, which Mr. Engwicht paid. [Tr., p. 27, at 5-12; p. 28, at 1-6].[2] Dale Lako testified that $12,000 was only an estimate derived by multiplying the approximate depth of plaintiff's

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[1] At that time, and when this lawsuit was filed, Lako Drilling was a sole proprietorship owned by defendant Alan J. Lako. Sometime prior to the trial in October 2003, the business apparently was incorporated. Tr., p.139, lines 1-13.

[2] Alan Lako testified Dale had authority to contract and set prices. Tr., p. 164, at 7-14.

old well, 1100 feet, times Lako's standard rate for a cased well of $10 / foot, plus $1000 for service casing.[3] [Tr., p. 88, at 9-18]. In any case, Dale Lako agreed the down payment was made toward installation of a cased artesian well. [Tr., p. 114, at 8-25].[4]

The entire process – pouring the cement for the service casing, drilling to the bedrock depth of 1,280 feet, and installing PVC pipe to that depth – took 2-3 weeks. The well produced only 2½ gallons per minute. [Tr., p. 28, at 10-21; p. 92]. Mr. Engwicht testified that Dale Lako said "[the well] should flow a lot better than that . . . 15, 20 gallons [per minute] at least" (Tr., p. 29, at 20-22); Mr. Lako also testified that he "[was] not satisfied with the flow." [Tr., p. 111, at 22-23]. He tried "cross-jetting" – blowing out the screen with a high-pressure jet of water – without success. [Tr., p. 93 at 8, to p. 94 at 7]. He then decided – without consulting Mr. Engwicht – to pull the 1200+ feet of PVC pipe out of the hole to see if there was a problem, but the pipe broke approximately 300 feet below ground level; Mr. Lako was unable to retrieve the remaining 900 feet, thus rendering the well unusable. [Tr., p. 31 at 20, to p. 33 at 14; p. 97, at 2-16; p. 113 at 11, to p. 115, at 7. See also Exh. 1].

A week or two later, Lako drilled another hole approximately 1,260 feet in depth. He did not try to case the hole, as he was certain that its flow would be no better than the previous one. [Tr., p. 35, at 18-23; p. 100]. He also said he had hit a ground water vein at

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[3] Plaintiff concedes the court could find that the final price would depend on the actual depth of the drilling. Since the actual depth was 1,280 feet, the final price would have been $13,800 – *if Lako had furnished plaintiff with a finished, cased artesian well.*

[4] Dale Lako testified that he had agreed to "write off" the cost of the ground water test hole. [Tr., p. 90, at 21-24].

about 140 feet, but had made a "judgment call" to continue drilling. Test pumping at that depth seemed to indicate a flow of 10-15 gallons per minute. [Tr., p. 37; p. 106, at 4-9]. Mr. Engwicht was "frustrated" by the decision to continue drilling, since the defendant knew ground water was the preferred option, and by the defendant's assertion that an artesian well with a flow greater than 2½ gallons per minute could not be found on his property. [Tr., p. 37 at 10, to p. 38, at 13]. Mr. Lako finished closing up the hole – he already had "mudded" it back in to the 140-foot level – and left; this was the last work he performed at the site. The plaintiff had discussions with both Dale and Alan Lako about a possible compromise involving installation of a ground water well, but the talks foundered on their insistence that he pay full price for drilling, casing and setting a pump on the well.[5] [Tr., p. 38 at 18, to p. 39 at 9; p. 106, at 1-15].

Lako Drilling's first demand for additional payment was made in February 2002 – in its cross-complaint in this action. In October 1996, when Mr. Engwicht asked for a receipt for his down payment, he received an invoice for "test drilling" with the notation "Paid / Thank you / Jo Lako" (defendant's secretary). [Exh. 2; Tr., p. 40-41]. Plaintiff was unable to get another well driller until July 1998 – his yard had been too wet in 1997 (Tr., p. 44, at 15-23) – who installed an artesian well producing 15 gallons per minute at a total price of $15,346.50. [See Exh. 3]. It took only one try, and was situated less than 100 feet away from both of the holes drilled by the defendant. [Tr., p. 49; see Exh. 1].

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[5] Actually, their inability to agree on terms for installing such a well was fortuitous, as it prevented another dispute. In 1997, plaintiff hired another contractor who drilled to 155 feet at the same location looking for ground water – and found none. [Tr., p. 51, at 4-11; and Exh. 4].

LAW AND ARGUMENT

I. Summary of Argument

The plaintiff appeals two distinct elements of the judgment in this action: The first is the award of $4,500 in damages on the defendant's cross complaint; second, the denial of the plaintiff's complaint for recovery of the $6,000 down payment made to the defendant.[6] Both of these questions depend on the validity of two essential findings of fact by the trial court: (i) That the plaintiff "agreed to pay [for Lako's] well drilling services" regardless of whether he received a cased artesian well in return (#16); and (ii) that the plaintiff "has not performed under" and "breached the contract" by failing to "pay . . . the remaining drilling charges" and apparently, by "not accept[ing] these wells" (#23 & #24). The finding(s) that Mr. Engwicht breached the contract are "clearly erroneous" because he and Dale Lako both testified that Lako Drilling's right to additional payments was conditioned on furnishing plaintiff with a cased well – which never occurred because defendant's agent, Dale Lako, decided to try pulling the well casing and ruined the well. Equally telling, all of the actions of defendant's agents prior to filing the cross-complaint clearly show they did not believe Mr. Engwicht owed any more money on the contract.

More fundamentally, in adopting findings of fact nos. 16 through 21, the trial court implicitly found that the contract obligated the plaintiff to pay for every bit of work

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[6] The plaintiff does not appeal a third element of the judgment – denial of his right to damages for the difference between Lako's price for a cased well ($13,800) and the price he ultimately paid ($15,346.50). The plaintiff submits that Lako did not substantially perform its contractual duties; however, the contract required no minimum flow (Tr., p. 59) and thus the defendant could have sought full payment had he not destroyed the cased well. The plaintiff therefore concedes it is unclear from the evidence on whether he would have had to hire another driller anyway given the low production of the defendant's well.

performed and material supplied by the defendant, at standard rates, regardless of the end result. Like the findings of breach, however, finding #16 is directly contradicted by the plaintiff's and Dale Lako's testimony, both of whom understood that Mr. Engwicht had made a down payment on the purchase price of a tangible *product* (a cased artesian well), not for whatever "well drilling *services*" the defendant happened to provide. Since each of these essential findings of fact is clearly erroneous, the plaintiff requests that the judgment be reversed and an order issued to enter judgment for plaintiff in the amount of $6,000, plus interests and costs.

II. Applicable Standards of Review

Findings of fact will not be set aside on appeal unless clearly erroneous, giving due regard to the trial court's opportunity to judge the credibility of witnesses. Rule 52(a), N.D.R.Civ.P. "A finding of fact is clearly erroneous if it has no support in the evidence or although there is some support in the evidence, [the reviewing court] is left with a definite and firm conviction that a mistake has been made, or if it was induced by an erroneous view of the law." Knudtson v. McLees, 443 N.W.2d 903, 904 (N.D. 1989). The appellant bears the burden of showing a finding was clearly erroneous. Ramsdell v. Ramsdell, 454 N.W.2d 522, 524 (N.D. 1990). However, to the extent that a finding of breach of contract is a mixed question of law and fact, i.e., it involves application of legal principles as well as factual determinations, a trial judge's (as opposed to a jury's) finding of breach may be "[un]protected by the 'clearly erroneous' rule and freely reviewable." Malarchick v. Pierce, 264 N.W.2d 478, 479 (N.D. 1978).

III. The Findings that Plaintiff Agreed to Pay For All 'Well Drilling Services' on a Time and Materials Basis, and that He Breached the Contract, Are Clearly Erroneous

As mentioned above, the findings that the plaintiff "ha[d] not performed" (#23) and thus "breached the contract" (#24) depend entirely on the trial court's earlier finding that the parties' contract required Mr. Engwicht to pay for any and all services and materials supplied by the defendant, even if though he never got any tangible result or benefit from it. That construction of the contract is implicit in finding #16, which says Lako Drilling merely "agreed to perform well drilling services" and the plaintiff "agreed to pay" for them. meaning, again by implication, "all of them." Implied findings are properly relied upon when they help the reviewing court to clearly understand the district court's factual determinations. Schmitz v. Schmitz, 1999 N.D. 203, ¶6, 586 N.W.2d 490 (N.D. 1999). These findings must be set aside as having no support in the evidence, or at best only some support – which is completely outweighed by the testimony of both parties that they did not understand or construe the contract in that way. Knudtson, 443 N.W.2d at 904.

Dale Lako gave the following testimony on his understanding of the contract's intent (Tr., p. 114, lines 8-11): "Q: And what [did] you expect to give Mr. Engwicht for that $12,000.00? A hole with a pipe in it?" "A: No. What I expect[ed] to get him was the best well available on the formation he has." Again. at lines 21-25: "Q: . . [Y]ou agreed that you would put in a test well with casing to the top of the ground from the bottom of the hole and then it's up to [Mr. Engwicht] whether to use it, correct?" "A: Correct."

At page 115, lines 12-22: "Q: He paid half up front as you asked?" "A: Yes." "Q: So if he'd had a hole, a pipe sticking out the top of the ground, a test well as you call it, that would have been what you contracted to do?" "A: The second hole, if he would have wanted us to put a casing into that second deep hole. 1255 feet deep, gravel pack it, finish the well, *it would have been done, contracted, he* ***would have*** *owed me $12,000.00 . .*[7] Finally, and most explicitly: "Q: What was your agreement?" "A: Agreement was to find him an artesian well, look for an artesian well, *and if we were successful . . . it* ***would*** *cost him* $10.00 a foot . . . plus a thousand dollars for the surface [sic] casing. **That was our agreement.**" [Tr., p. 131, at 11-16 (emphasis added)].

The plaintiff testified that he intended to make a down payment on the "purchase price" of an artesian well (Tr., p. 27, at 9-12), and that Dale Lako said he was sure the well would produce water (p. 25, at 8-15). Moreover, not only did the parties testify to having the same understanding of the contract, their subsequent conduct in performing it was completely consistent with that understanding. This Court has long recognized that when a contract has been partially executed, the parties' actions in performance of it are perhaps the best evidence in ascertaining their intentions and the construction they placed upon the contract. See, e.g., Battagler v. Dickson, 76 N.D. 641, 38 N.W.2d 720 (N.D. 1949); Beck v. Lind, 235 N.W.2d 239, 248 (N.D. 1975); Tobias v. Dept. of Human Services, 448 N.W.2d 175, 179 (N.D. 1989).

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[7] In fairness to Mr. Lako, he actually testified consistently that the price would have been $10 / foot (or $12,550) plus $1000 for service casing; he inadvertently bought into the premise of the questions in giving these answers.

For example, Mr. Engwicht testified that when the cased artesian well produced only 2½ gallons per minute, Dale Lako stated "it should flow a lot better than that." [Tr., p. 29, at 20]. Mr. Lako testified he was "not satisfied with the flow" (p. 111, at 22-24), that "we did not get the water . . . we thought we would get out of it." [p. 96, at 6-8]. The plaintiff testified that he got up one morning to find Mr. Lako in the process of pulling the well casing, and the plaintiff "didn't understand why." [Tr., p. 31 at 20, to p. 32 at 10]. Mr. Lako testified that he was not satisfied with the well, that he therefore tried to pull the casing, and when it broke some 300 feet below ground, "that made the hole unusable." [Tr., p. 115, at 1-7]. Moreover, the defendant then began work on a second well, making no demand for additional payment for work on the first one or for a down payment on the second – and the defendant later sent an invoice marked "paid / thank you". [Exh. 2].

IV. The Award of Damages to the Defendant Must be Reversed

In short, there simply is *no* evidence to support the findings that Mr. Engwicht had breached the contract by failing to pay for well drilling services, and thus the trial court's legal conclusion that the defendant was entitled to damages must be reversed. Indeed, the testimony of the defendant and his son shows the counterclaim was nothing more than a litigation tactic, and ultimately a mere subterfuge by which the defendant obtained an otherwise-impermissible award of attorney's fees.

Dale Lako explicitly testified that had the second artesian well been cased, i.e., finished, the total cost to Mr. Engwicht would have been $10 per foot times 1260 feet, plus $1,000 for a service casing, or a total of $13,600. [Tr., p. 130 at 16, to p. 131 at 16].

Alan Lako testified repeatedly that he "always" charges per drilled foot. [e.g., Tr., p. 143]. And yet, he made no demand on Mr. Engwicht for more money for almost six years (indeed, he acknowledged it was "paid / thank you"), then alleged a right to payment for *all* of the services in the cross-complaint that was filed in February 2002. Then the defendant "agreed" in its proposed findings of fact (#25) to "accept" $4,500 for its "services". It is unclear with whom the defendant had "agreed to accept" that amount, but it is clear that amount was not attributable to any breach of contract by the plaintiff. Therefore, the judgment must be reversed.

V. The Plaintiff is Entitled to Recover the Down Payment Because the Defendant Failed to Perform the Contract for Installation of an Artesian Well

Because of its erroneous finding that this was a "time and materials" contract, the trial court made no finding on whether the defendant substantially performed its admitted, actual obligation to install, as Dale Lako put it, the "best [artesian] well available on the formation [the plaintiff] has." [Tr., p. 114, at 10-11]. However, as it is clear from the record that the contract did require Lako Drilling to provide a "product", not just "services". Mr. Engwicht is entitled to recover his down payment if that product, a cased artesian well, was not provided to him. Absent an express agreement to the contrary, a seller is not entitled to any payment from the buyer unless the seller first tenders delivery of the object, and the object must substantially conform to the terms of the agreement. N.D.C.C. §§41-02-55, 41-02-56. Generally, the buyer also can recover any down

payment on the purchase price. See, e.g., N.D.C.C. §32-03-13 (breach of agreement to convey realty).

In this case, the defendant did not tender delivery of anything resembling a cased artesian well. True, Lako did drill and case a well – but, as discussed at length above, the well was then ruined because of decisions and actions taken by the defendant's own agent, without consulting the plaintiff and without ever having tendered the well to him. The second well was never even cased. Dale Lako claimed at trial that he would have cased the well if the plaintiff had asked – but Mr. Lako also made every effort to ensure that the plaintiff would not make such a request. Mr. Engwicht was told that the second well would have no more flow than the first; that Lako had already "mudded" the hole back in to the 140-foot level; and, most importantly, a vein of ground water producing 10-15 gallons per minute supposedly existed at a depth of 140 feet (and Mr. Lako knew the plaintiff would choose that option over an artesian well). In short, the defendant never even came close to meeting the legal standard of substantial performance. [See Odegaard v. Investors Oil, Inc., 118 N.W.2d 362, 375 (N.D. 1962)].

Thus, plaintiff submits that judgment should be entered for him as to the $6,000 down payment, plus interest on that amount since September 30, 1996, because Lako left the job for good sometime in late September (Tr., p. 35). [See, N.D.C.C. §32-03-04]. In the alternative, the plaintiff requests an order for a new trial on that issue.

CONCLUSION

For the foregoing reasons, plaintiff and appellant Richard Engwicht respectfully requests that the judgment in this action be reversed, and that an order be issued directing the trial court to enter a judgment awarding damages to the plaintiff in the amount of $6,000, plus interest thereon, and for its costs in the District Court. Appellant further requests that an award of costs as the prevailing party on this appeal.

RESPECTFULLY SUBMITTED this 16th day of August, 2004.

JAY A. SCHMITZ
Attorney for Appellant
511 2nd Avenue SE
Jamestown, ND 58401
(701) 252-6688

Jay A. Schmitz (NDID# 05705)

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

JAY A. SCHMITZ, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 16th day of August, 2004, the affiant deposited in the mailing department of the United States Post Office at Jamestown, North Dakota, the original and eight true and correct copies of the Appellant's Brief in the matter of Richard A. Engwicht III v. Alan J. Lako dba Lako Drilling

That the original and seven copies of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Penny Miller, Clerk
North Dakota Supreme Court
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

That one copy of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Christel M. Bender
Vogel Law Firm
P.O. Box 1389
Fargo, ND 58107-1389

That to the best of the affiant's knowledge, information and belief, such addresses as given above were the actual post office addresses of the parties intended to be served.

That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

JAY A. SCHMITZ

SUBSCRIBED and SWORN to before me this 16th day of August, 2004.

JONI FREDRICKSON
Notary Public
State of North Dakota
My Commission Expires March 20, 2007

Joni Fredrickson, NOTARY PUBLIC

20040179

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
SEPT 10 2004
STATE OF NORTH DAKOTA

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NORTH DAKOTA)
) :ss
COUNTY OF STUTSMAN)

JAY A. SCHMITZ, being first duly sworn on oath, does depose and say:

That he is a citizen of the United States, of legal age, and not a party to the above entitled action.

That on the 25th day of August, 2004, the affiant deposited in the mailing department of the United States Post Office at Jamestown, North Dakota, nine true and correct copies of the Appendix in the matter of Richard A. Engwicht III v. Alan J. Lako dba Lako Drilling

That eight copies of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

Penny Miller, Clerk
North Dakota Supreme Court
State Capitol
600 East Boulevard Avenue
Bismarck, ND 58505

That one copy of the above document was securely enclosed in an envelope with postage duly prepaid, and addressed as follows:

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That the above documents were duly mailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

Jay Schmitz
JAY A. SCHMITZ

SUBSCRIBED and SWORN to before me this 1st day of September, 2004.

Cynthia A. Holzkamm
Cindy Holzkamm, NOTARY PUBLIC

CYNTHIA A HOLZKAMM
Notary Public
State of North Dakota
My Commission Expires Feb. 17, 2010

CYNTHIA A HOLTZAMM
Notary Public
State of North Dakota
My Commission Expires Feb. 17, 2010