NEBRASKA SUPREME COURT

Goes v. Vogler

304 Neb. 848 (2020) · No. Nos. S-18-1201, S-18-1203 · Decided January 17, 2020

SUMMARY

The Nebraska Supreme Court affirmed judgments arising from the construction of the Voglers' home. The court held that the parties' agreement was a cost-plus contract, that the Voglers breached the contract by failing to make required draw payments, and that the contractor and subcontractors were entitled to recover unpaid amounts. The court also declined to impose additional fiduciary duties on a contractor under a cost-plus contract absent contractual language or other legal requirements.

CASE DETAILS

COURT	Nebraska Supreme Court
WRITING FOR THE COURT	Miller-Lerman, J.; Heavican, C.J.; Cassel, J.; Stacy, J.; Funke, J.; Papik, J.; Freudenberg, J.
JURISDICTION	Nebraska
DECIDED	January 17, 2020
DOCKET	Nos. S-18-1201, S-18-1203
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Voglers appealed consolidated district court judgments awarding damages to the general contractor and subcontractors on contract claims and construction-lien claims arising from construction of a residence.
STANDARD OF REVIEW	Construction-lien foreclosure is an equitable action reviewed de novo on the record, with possible weight given to the trial judge's credibility determinations when credible evidence conflicts on a material issue. A suit for damages arising from breach of contract is an action at law.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Eric Vogler, Destini Vogler v. Tanner Goes, doing business as Goes Construction, Franklin Drywall, Inc., Shelton Brothers Construction, LLC

TOPICS

construction law · mechanics liens · breach of contract · contract interpretation · appellate procedure

PRACTICE AREAS

construction law · contracts · real estate · mechanics liens · appellate procedure · remedies

QUESTIONS PRESENTED

1. Whether the construction agreement was a cost-plus contract or a fixed-price contract.
2. Whether the Voglers or Shelton committed the first material breach of the construction contract.
3. Whether Shelton had a fiduciary or other additional legal duty under the cost-plus contract to provide extensive accounting information or to prevent cost overruns.
4. Whether Goes was entitled to recover under its construction lien and contract claim despite the Voglers' assertion that they had paid the prime contract price.

HOLDINGS

1. The agreement was a cost-plus contract, not a fixed-price contract.
2. The Voglers committed the first material breach by failing to make the draw payments required by the contract; Shelton did not first breach the agreement.
3. A contractor does not have a fiduciary duty under a cost-plus contract as a matter of law beyond obligations imposed by law and the parties' contract.
4. Goes was entitled to recover the unpaid amount awarded by the district court because the Voglers had not established that they had paid the applicable prime contract price.

KEY QUOTATIONS

> *"However, other than those already required by law and by the parties' contracts, we decline to impose further fiduciary duties on contractors as a matter of law."* (856)

> *"We determine that the district court did not err when it found that the contract was a cost-plus contract and that the Voglers breached their contract with Shelton when they failed to pay draws required under the contract."* (859)

FACTUAL BACKGROUND

The Voglers hired Shelton Brothers Construction to build a replacement home after their prior home was destroyed by fire. Their written agreement described the arrangement as a cost-plus contract, specified builder fees, and required monthly draws for materials and services, although it also stated an agreed price of $282,000. During construction, the parties waived the written-change-order requirement and made various changes and upgrades. The Voglers became dissatisfied with progress, communication, workmanship, and accounting, withheld most of a requested draw, and ultimately stopped making payments; Shelton terminated the contract, and the contractors filed liens and contract claims.

PROCEDURAL HISTORY

After the Voglers stopped making requested progress payments, Shelton terminated the construction contract. Shelton and subcontractors Goes and Franklin filed construction liens and asserted contract claims, which were consolidated for trial. The Cass County District Court found that the agreement was a cost-plus contract, that Shelton had not breached, that the Voglers committed the first material breach by withholding payment, and that damages were owed to the contractor and subcontractors. The Nebraska Supreme Court consolidated the appeals and affirmed all orders and judgments.

DISPOSITION

affirmed

CASES CITED

- Robison v. Madsen, 246 Neb. 22, 516 N.W.2d 594 (1994)
- Bloedorn Lumber Co. v. Nielson, 300 Neb. 722, 915 N.W.2d 786 (2018)
- Tilt-Up Concrete v. State City/Federal, 261 Neb. 64, 621 N.W.2d 502 (2001)
- Grothe v. Erickson, 157 Neb. 248, 59 N.W.2d 368 (1953)
- Jones v. J.H. Hiser Construction Co., 60 Md. App. 671, 484 A.2d 302 (1984)
- Forrest Construction Co., LLC v. Laughlin, 337 S.W.3d 211 (Tenn. App. 2010)
- Kerner v. Gilt, 296 So. 2d 428 (La. App. 1974)

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