

SUPREME COURT OF SOUTH DAKOTA

All Star Construction Company, Inc. v. Mark Koehn and Alicia Garcia

741 N.W.2d 736 (S.D. 2007) · No. Nos. 24405, 24413 · Decided October 31, 2007

SUMMARY

The Supreme Court of South Dakota reviewed a dispute between a construction company and homeowners concerning unpaid contract amounts, unfinished work, change orders, allowance overruns, and overhead markups. The court held that the trial court improperly ordered specific performance without adequate opportunity to litigate that remedy and improperly denied mandatory prejudgment interest. It affirmed rulings denying an eight percent markup on certain charges and held that the homeowners waived the written-change-order requirement for requested or known changes.

CASE DETAILS

COURT	Supreme Court of South Dakota
WRITING FOR THE COURT	Barnett, Circuit Judge, for Sabers, Justice; Barnett, Circuit Judge; Gilbertson, Chief Justice; Zinter, Justice; Meierhenry, Justice; Sabers, Justice, disqualified; Konenkamp, Justice, disqualified
JURISDICTION	South Dakota
DECIDED	October 31, 2007
DOCKET	Nos. 24405, 24413
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	All Star appealed a court-trial judgment that ordered it to complete punch-list work and repair a leaking shower, and ordered the homeowners to pay the reasonable value of work completed. All Star challenged the specific-performance order, denial of prejudgment interest, denial of an eight-percent markup on change order five, and denial of overhead on allowance overruns. The homeowners filed a notice of review concerning waiver of the written-change-order requirement.
STANDARD OF REVIEW	Findings of fact are reviewed for clear error; conclusions of law are reviewed de novo; specific performance and other equitable remedies are reviewed for abuse of discretion; and contract interpretation is reviewed de novo.

PRECEDENTIAL VALUE	published precedential opinion
PARTIES	All Star Construction Company, Inc. v. Mark Koehn, Alicia Garcia

TOPICS

construction law contracts specific performance damages appellate procedure

PRACTICE AREAS

construction law contracts remedies appellate procedure commercial litigation

QUESTIONS PRESENTED

1. Whether the circuit court could order specific performance when the remedy was not pleaded or tried by the parties.
2. Whether prejudgment interest was mandatory on the contract damages despite the circuit court's characterization of the award as specific performance.
3. Whether the homeowners stipulated to an eight-percent overhead markup on change order five.
4. Whether the contract's allowance provision entitled All Star to an eight-percent overhead markup on allowance overruns.
5. Whether the homeowners waived the contractual requirement that changes be documented in writing.

HOLDINGS

1. The circuit court abused its discretion by ordering specific performance because the remedy was first raised after the evidence had been submitted and was not tried by express or implied consent.
2. The circuit court erred by denying prejudgment interest; relabeling an award of contract damages as specific performance does not defeat the statutory entitlement to interest.
3. The homeowners did not stipulate to an eight-percent overhead markup on change order five, and the circuit court properly refused to award that markup.
4. The circuit court properly denied an eight-percent overhead markup on allowance overruns because the ambiguous phrase "actual costs" could not be construed to include overhead against the homeowners, the non-drafting parties.
5. The homeowners waived the contractual requirement that changes be made in writing when they requested or knew of the changes, failed to object to them or to the absence of written change orders, and accepted the additional work and materials.

KEY QUOTATIONS

"Where there has not been a fair opportunity for a party to be heard on the issue and/or additional evidence could have been offered, any implied amendment would be prejudicial and no trial by implied consent exists."
(741 N.W.2d at 742)

“Simply couching an award of damages in terms of specific performance cannot operate to defeat SDCL 21-1-13.1 and this Court's holdings in Bunkers and City of Aberdeen.” (741 N.W.2d at 743)

“Thus, the trial court correctly concluded that Homeowners waived the contract provision requiring written change orders when Homeowners requested or had knowledge of the changes, and failed to object to those changes or to the lack of a written change order.” (741 N.W.2d at 745)

FACTUAL BACKGROUND

The homeowners entered into a remodeling contract with All Star that included allowance amounts and required written orders for alterations or deviations involving extra costs. During construction, the homeowners requested or approved numerous changes, some documented by signed change orders and others performed without written change orders. Construction stopped after the homeowners fell behind on payments, leaving punch-list work unfinished and a leaking shower unrepaired. All Star sought payment, including an overhead markup, while the homeowners sought offsets for unfinished or defective work.

PROCEDURAL HISTORY

The homeowners hired All Star to remodel their home and construct an addition. After construction stopped amid payment arrearages and unfinished work, All Star sued for payment and the homeowners sought offsets. Following a bench trial, the circuit court ordered specific performance by both sides, denied prejudgment interest, rejected an eight-percent markup on specified charges, and found that the homeowners waived the written-change-order requirement. The Supreme Court of South Dakota affirmed in part, reversed in part, and remanded for calculation of both parties' damages.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Remand for calculation of both parties' damages in accordance with the opinion, including prejudgment interest owed to All Star.

CASES CITED

- City of Deadwood v. Summit, Inc., 2000 SD 29, ¶ 9, 607 N.W.2d 22, 25
- Stugelmayer v. Ulmer, 260 N.W.2d 236, 238 (S.D. 1977)
- Ziegler Furniture and Funeral Home, Inc. v. Cicmanec, 2006 SD 6, ¶ 14, 709 N.W.2d 350, 354
- American Property Services, Inc. v. Barringer, 256 N.W.2d 887, 891 (S.D. 1977)
- Oesterling v. Oesterling, 354 N.W.2d 735 (S.D. 1984)
- Bunkers v. Jacobson, 2002 SD 135, ¶ 44, 653 N.W.2d 732, 744
- City of Aberdeen v. Rich, 2003 SD 27, ¶ 19, 658 N.W.2d 775, 781
- Matter of Estate of Eberle, 505 N.W.2d 767, 770 (S.D. 1993)

- Singpiel v. Morris, 1998 SD 86, ¶ 16, 582 N.W.2d 715, 719
- Zochert v. National Farmers Union Property & Casualty Co., 1998 SD 34, ¶ 5, 576 N.W.2d 531, 532
- Reif v. Smith, 319 N.W.2d 815, 817 (S.D. 1982)
- Lomartira v. American Automobile Insurance Co., 371 F.2d 550 (2d Cir. 1967)
- Deitz v. Bowman, 403 F. Supp. 1111 (D.S.D. 1975)

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