STANLEY MILLER (*Defendant*) ..... APPELLANT;

AND

ADVANCED FARMING SYSTEMS LIMITED (*Plaintiff*) ..... RESPONDENT.

1969

*Mar. 21, 24

May 16

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Mechanics' liens—Enforcement action—Contract for erection of dairy barn complex—Substantial deficiencies—Measure of damages—Amount to which lienor entitled—The Mechanics' Lien Act, R.S.O. 1960, c. 233.

In a mechanics' lien action in which the plaintiff's claim was for the sum of $25,984.60, being the cost of services and materials supplied in building certain farm buildings for the defendant under a written agreement between the parties, the trial judge gave judgment for the plaintiff in the sum of $22,654.60 together with interest and costs. On appeal, the Court of Appeal affirmed the trial judgment and the defendant then appealed to this Court.

Having held that the concrete work generally was substandard, the trial judge concluded that although the work had not been done as called for in the contract that there had been substantial performance and that the plaintiff was entitled to be paid under the contract the amount provided for therein, giving credit for any deficiencies that he found to exist in the work. He thereupon proceeded to make what he called reasonable allowances for a number of so-called deficiencies which were, in fact, very serious defects in the whole of the concrete work and in other areas.

Held: The appeal should be allowed and the judgment at trial varied.

The correct measure of the defendant's damages was the cost of making good the defects and omissions in the work the plaintiff contracted to do. Applying this principle, the Court found that the total of the amounts which the defendant was entitled to was $13,423. Deducting this amount from the plaintiff's net claim of $25,984.60 left a balance of $12,561.60 that the plaintiff was entitled to recover under its lien.

Hoenig v. Isaacs, [1952] 2 All E.R. 176; *H. Dakin & Co., Ltd.,* [1916] 1 K.B. 566, applied.

APPEAL from a judgment of the Court of Appeal for Ontario, affirming a judgment of Robinson D.C.J., sitting as Local Judge, in an action for enforcement of a mechanics' lien. Appeal allowed; judgment at trial varied.

Joseph A. Mahon, Q.C., for the defendant, appellant.

G. W. Cameron, for the plaintiff, respondent.

The judgment of the Court was delivered by

HALL J.:—This is an appeal in an action for enforcement of a mechanics' lien filed on the appellant Miller's farm

*PRESENT: Cartwright C.J. and Martland, Judson, Hall and Spence JJ.

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property in the District of Temiskaming. The action was tried by His Honour J. B. Robinson, sitting as Local Judge of the Supreme Court, who declared that the respondent was entitled to a lien under *The Mechanics' Lien Act*, R.S.O. 1960, c. 233, on the lands of the appellant for the sum of $22,654.60 and interest at 7 per cent from February 8, 1966, together with costs to be taxed on the Supreme Court scale. The appellant Miller appealed to the Court of Appeal for Ontario, and that Court, on January 19, 1968, affirmed, without written reasons, the judgment of His Honour Judge Robinson. The appellant now appeals to this Court.

The validity of the mechanics' lien was disputed at the trial, but the respondent's right to a lien was upheld by his Honour Judge Robinson. This issue was not argued before us, and I will deal with the matter on the basis that the lien was properly filed.

The parties entered into a contract in writing dated October 5, 1965, whereby the respondent agreed to erect for the appellant a dairy barn complex on the appellant's farm. The contract contained specific plans and specifications for the buildings and equipment to be installed therein. The contract called for four buildings as follows:

(a) Cattle Feeding Building, 50′ x 40′ x 19′ eave height called the feed barn;

(b) Free Stall Barn, 75′ x 50′ x 9′ eave height (the loafing area);

(c) Milking Parlour, 40′ x 15′ x 9′ eave height;

(d) Milkhouse, 20′ x 20′ x 9′ eave height.

The appellant who had limited experience as a dairy farmer relied on the respondent to build him a barn complex of good quality and in accordance with the regulations of *The Milk Industry Act* of Ontario, R.S.O. 1960, c. 239. The specifications provided that all the concrete work was to be 3,000 p.s.i. The respondent did not do the work itself but employed a subcontractor. On the completion of the work, the appellant took the position that the contract had not been fulfilled and that the work had not been done in accordance with the plans and specifications, and, in particular, the concrete work was very deficient and that the whole job had been done in a negligent manner.

The learned trial judge, after a relatively long trial and having heard evidence on behalf of the appellant and the respondent, held as follows:

> A careful review of the evidence has impelled me to the conclusion that the concrete work generally was substandard in that the psi rating was below specifications, the porosity of the floors was too high as indicated by the absorption factor and the finish upon the floors in the milk parlour and milk house was inadequate.
>
> It appears that these defects were contributed to by the use of pit run gravel to begin with, by the failure to increase the strength by compensating for this by using more cement (*e.g.* three to one instead of four to one), by inconsistent batching and lack of control over the concrete mix, by failure to remove large stones from the gravel and by pouring the cement in cold frosty weather with inadequate precautions to keep it from freezing.
>
> Indeed of four holes drilled for cores in the two outside slabs only one hole permitted the recovery of a core and that one was not suitable for a compression test.
>
> The tests indicated that the concrete in the outside slabs were very weak ranging from below 1,000 psi for three holes, to below 1,590 psi for one hole.
>
> The natural inference from the evidence as to the outside concrete slabs was that they had been poured upon frozen ground and that the frost had affected the curing of the cement.

Having so held, he concluded that although the work had not been done as called for in the contract that there had been substantial performance and that the respondent was entitled to be paid under the contract the amount provided for therein, giving credit for any deficiencies that he found to exist in the work. He thereupon proceeded to make what he called reasonable allowances for a number of so-called deficiencies which were, in fact, very serious defects in the whole of the concrete work and in other areas. In my view this is a case in which the learned trial judge might well have found that the contract had not been substantially performed, but he did not do so, and, as stated, found that he could apply the doctrine of substantial performance. That position was accepted by the appellant in this Court and the case remains to be determined on the basis that the finding of substantial performance is valid. However, having found that there were substantial deficiencies, the learned trial judge proceeded to allow deductions from the contract price therefor on a completely erroneous principle. Having found that the concrete work was wholly unsatisfactory, he went on to say that in lieu of having it replaced that it would be made serviceable by the application of

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some surface treatments by patching up and coating over and that that was all that the circumstances required.

The correct measure of damage in a case such as the present one was stated by Lord Denning in *Hoenig v. Isaacs*[1], where from the principles laid down in *H. Dakin & Co., Ltd. v. Lee*[2] he stated:

> The measure is the amount which the work is worth less by reason of the defects and omissions, and is usually calculated by the cost of making them good.

or as Pickford L.J. said in *Dakin v. Lee*, at p. 582:

> ...the case must go back...in order that it may be ascertained what is the expenditure necessary, first, to put this underpinning right and make it accord with the contract both in regard to quality and quantity, and, secondly, to do the work which ought to have been done...

Further, Ridley J., quoting Parke J. said in the same case at p. 571:

> "What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction; and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification."

In my view the measure of the appellant's damage is the cost of making good the defects and omissions in the work which the respondent contracted to do.

The learned trial judge found that the area of concrete which was in the milk parlour, platform, free stall area, outside slabs, curbs and gutters was 5,300 square feet. The evidence of Helmer Pedersen, a masonry contractor of 18 years' experience, was that it would cost 50¢ per square foot to remove the deficient concrete and $1 per square foot to put in new concrete. The appellant is accordingly entitled to an award of $7,950 under this heading in lieu of the $2,285 allowed him by the learned trial judge.

In addition to the deficient concrete work, the learned trial judge found that the walls of the milk house did not meet contract specifications in that they were not impervious to liquids up to three feet from the floor. The area to be altered in this respect was 133 square feet. He allowed $1.20 per square foot as a reasonable estimate to remedy the defect for a total of $160 and that amount should stand.

The learned trial judge also found that the contract had not been performed as to the exterior door, the screen door

[1] [1952] 2 All E.R. 176 at 181. [2] [1916] 1 K.B. 566.

and the ceiling of the milk house and he allowed $75 for these items. However, Lorne M. Jelly, a local carpenter and contractor, whose evidence would appear to be credible, estimated it would cost $620 to alter the building and put in five windows and a proper door in accordance with the plans. I think that this is the amount which should be allowed which, with the $160 to make the walls of the milk house impervious to liquid, comes to $780.

The taking out of the concrete flooring in the milk parlour will necessitate the replacement of the floor heating coil at a cost of $358, according to the evidence of John A. Brown, the electrician who installed the electric cable originally. A claim for loss of heat and additional cost of electrical energy would be eliminated by placing the floor heating coil where it was intended to be placed by the specifications, and the appellant would, therefore, suffer no loss of heat or incur any additional expense for electrical energy. He is, however, entitled to the cost of replacing the floor heating coil at the figure of $358.

Replacing the concrete also involves removing, storing and reinstalling the stalls and equipment in the milk room and milk parlour. The witness Albert Cooper, a dairy farm equipment dealer, testified that it would cost $2,645 to dismantle and store the equipment, to set up the stalls, to reinstall the milking equipment, and to take out and put back the auto-feed system as well as the electrical controls.

The learned trial judge made certain minor allowances as follows which should not be disturbed:

(a) Reinstalling the stalls in the free stall area	$ 65.00
(b) Deficiency in insulation in the ceiling of the free stall barn	35.00
(c) Defects in the construction of the feed barn and manger being short posts and other minor matters ..	75.00
(d) For a defective beam and rafters in the feed barn ..	15.00

The learned trial judge also found that the gutters in which the barn cleaner operated were of such poor quality that the barn cleaner was constantly breaking down and could not run properly. He allowed $160 under this heading. The witness, Jean Trudel, a farm machinery and equipment dealer who supplied the barn cleaner, testified that the chain which should have lasted 15 years was almost worn out at the end of two years and required replacing.

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The cost of the chain was $1,232 and with installation would come to $1,500. This amount should be allowed in lieu of the $160 fixed by the learned trial judge.

If is manifest that when all of the work has been redone, the appellant will not have the kind of modern dairy barn complex that he contracted for, but there was no evidence as to whether there was any actual loss in this regard or how it could be estimated, and I do not find it possible in the circumstances to make an award under this heading.

The total of the amounts which I find the appellant is entitled to is $13,423 and he is entitled to have this amount deducted from the respondent's net claim of $25,984.60 as found by the learned trial judge which leaves a balance of $12,561.60 that the respondent is entitled to recover under its lien. The judgment of the learned trial judge should be varied by substituting the sum of $12,561.60 for the sum of $22,654.60 where this figure appears in the formal judgment of the Court. The respondent will also be entitled to interest on the sum of $12,561.60 at the rate of 5 per cent per annum from the date of the judgment, namely, March 1, 1967.

As success at the trial was divided, I would direct that there be no costs to either party at the trial. The appellant is entitled to his costs in the Court of Appeal and in this Court, the amount thereof to be set off against the amount which the respondent is entitled to recover.

Appeal allowed; trial judgment varied.

Solicitor for the defendant, appellant: Joseph A. Mahon, Toronto.

Solicitors for the plaintiff, respondent: Clement, Eastman, Dreger, Martin & Meunier, Kitchener.