Case No. A-25-607

IN THE NEBRASKA COURT OF APPEALS

K2 REAL ESTATE DEVELOPMENT, LLC, Appellant,
v.
NEMAHA COUNTY, NEBRASKA, Appellee,

Appeal from the District Court of Nemaha County, Nebraska
Judge Julie D. Smith

Brief of Appellant K2 Real Estate Development, LLC

Respectfully Submitted:
Austin L. McKillip, #23212
Kimberly A. Duggan, #27573
CLINE WILLIAMS WRIGHT
JOHNSON & OLDFATHER, L.L.P.
Attorneys at Law
1900 U.S. Bank Building
233 South 13th Street
Lincoln, Nebraska 68508-2095
(402) 474-6900
amckillip@clinewilliams.com
kduggan@clinewilliams.com

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I. STATEMENT OF JURISDICTION

This Court has jurisdiction over this appeal pursuant to Neb. Rev. Stat. § 25-1902. On July 10, 2025, the District Court of Nemaha County, Nebraska, entered a final order adjudicating all issues before the trial court (the "Final Order"). (T246). K2 Real Estate Development, LLC filed a notice of appeal and deposited the requisite docket fees on August 7, 2025.

II. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a contract dispute involving a written contract ("Contract") for bridge repairs between K2 Real Estate Development, LLC ("K2") and Nemaha County, Nebraska (the "County").

B. Issues Tried in the Court Below

In its complaint, K2 asserted the County breached the written Contract between K2 and the County for bridge repairs when it wrongfully terminated and repudiated the Contract after K2 mobilized its labor, equipment, and materials to the project site. (T1-3). K2 claimed as damages the costs and expenses incurred as a result of attempting to fulfill its obligations under the Contract. (T2-3). K2 also alleged the County's failure to pay K2 was a violation of the Nebraska Construction Prompt Pay Act and K2 claimed interest on its damages under Neb. Rev. Stat. § 45-1205 and/or Neb. Rev. Stat. § 45-104 and attorneys' fees under Neb. Rev. Stat. § 45-1211. (T2-3). Alternatively, K2 pleaded that the County was unjustly enriched by K2's performance of its obligations before the County wrongfully terminated and repudiated the parties' written Contract. (T2). The County denied the validity of the Contract, alleged that the County had no authority to enter into the Contract, and denied that it breached the Contract. (T10-14).

C. How the Issues were Decided Below

The trial court granted partial summary judgment for K2, finding that an enforceable written contract existed between the parties. (T104-117). The trial court denied the County's arguments that the Contract was invalid or illegal and ruled that the County had breached the Contract when it wrongfully terminated the Contract. (T116). The order for summary judgment indicated that the only remaining genuine issue of material fact was whether and to what extent K2 had been damaged. (T116).

On the day trial on the issue of damages was to begin, the court found that K2 must show substantial performance of the Contract to recover contract damages. (T187-189). The court stated that if K2 had partially but not substantially performed on the Contract, it may be able to recover the reasonable cost of work performed and/or reasonable value of the benefits conferred but not the profit it would have received if it had been allowed to complete the job. (T187-189).

Following a trial on damages and on other additional issues raised by the County in response to K2's pretrial motion in *limine*, the trial court ruled (1) that K2 was not authorized to proceed with the project because K2 had not secured engineering plans for the project; (2) that K2 had not substantially performed its obligations under the Contract; (3) that K2 had conferred no benefit on the County; and (4) that K2 was therefore entitled to no damages and no attorneys' fees. (T249-252). The trial court did not address K2's remaining claim for unjust enrichment and dismissed K2's claims. The trial court ordered the County to return to K2 certain materials which K2 purchased for the project, and which were in the possession of the County. (T251-252).

D. Scope of Appellate Review

An action for breach of contract is an action at law. *Stauffer v. Benson*, 288 Neb. 683, 690 (2014). Factual findings made in a bench trial should not be disturbed on appeal unless clearly wrong. *Id.*; *City of Scottsbluff v. Waste Connections of Nebraska, Inc.*, 282 Neb. 848, 859 (2011). Questions of law are reviewed de novo. *City of Scottsbluff,* 282 Neb. at 859-60. Contract interpretation presents a question of law. *Id.* at 860. The proper measure of damages is a question of law. *Griffith v. Drew's, LLC*, 290 Neb. 508, 515 (2015). "The amount of damages to be awarded is a determination solely for the fact finder, and its action in this respect will not be disturbed on appeal if it is supported by the evidence and bears a reasonable relationship to the elements of the damages proved." *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 498 (2000).

III. ASSIGNMENTS OF ERROR

1. **The trial court erred in requiring K2 to prove it had substantially performed the Contract to recover damages and to prove that the County had retained a benefit of K2's performance.**

2. **The trial court erred in imposing a contract condition not included in the Contract.**

3. **The trial court erred in determining that K2 did not meet its burden of proof to show substantial performance up to the time the County terminated the Contract.**

4. **The trial court erred in not awarding K2 its damages in the amount of $62,256.89.**

5. **The trial court erred in ordering the County to return the materials to K2, which was not a form of relief sought by any party.**

6. The trial court erred in failing to award K2 attorneys' fees and interest.

IV. PROPOSITIONS OF LAW

1. "Generally, the measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed." *Third Party Software, Inc. v. Tesar Meats, Inc,* 226 Neb. 628, 631 (1987); *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 503 (2000).

2. "[T]he ultimate objective of a damages award is to put the injured party in the same position he or she would have occupied if the contract had been performed, that is, to make the injured party whole." *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 503 (2000).

3. The injured party is entitled to all damages "which are reasonably certain and which are naturally expected to follow the breach." *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 503 (2000).

4. "Where a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the job as provided in the contract." *Omaha Public Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 502-03 (1980).

5. "[T]he injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Anderson Excavating & Wrecking Co. v. Sanitary Imp. Dist. No. 177*, 265 Neb. 61, 67 (2002); *see also*

Restatement (Second) of Contracts § 349; Restatement (Third) of Restitution and Unjust Enrichment § 38.

6. "[I]n the situation where a contract has been terminated without fault on the contractor's part, a lien is preserved despite the failure of the contractor to complete the contract." *Tilt-Up Concrete, Inc. v. Star City/Federal, Inc.*, 255 Neb. 138, 151 (1998).

7. "The doctrine [of substantial performance] protects the rights of those who have performed in all material and substantive particulars and excuses contractual deviations or deficiencies that do not severely impair the purpose of the contract requirements." 17A Am. Jur. 2d Contracts § 604.

8. "The purpose of the doctrine [of substantial performance] is to protect a plaintiff who has performed its promises under the contract so substantially that the defendant has received essentially what it bargained for; if the contract has terminated before the plaintiff has performed at all, . . . the doctrine is simply inapplicable." 15 Williston on Contracts § 44:52 (4th ed.).

9. Where the breaching party has prevented a plaintiff contracting party from performing, the plaintiff contracting party is "entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the job as provided in the contract." *Omaha Public Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 502-03 (1980).

10. When substantial performance is at issue, performance must be measured against the phase of construction which can be delineated. *Freedom Specialty Contracting, Inc. v. Nichol Flats, LLC*, 28 Neb. App. 797 (2020).

11. Nebraska courts have held that a party can recover its partial performance if the contract is divisible. *Young v. Tate*, 232 Neb.

915, 919-20 (1989); *see also RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326 (2016).

12. "When a contractor has performed work in accordance with the provisions of a contract with an owner, the owner shall pay the contractor within thirty days after receipt by the owner or the owner's representative of a payment request made pursuant to the contract." Neb. Rev. Stat. § 45-1203.

13. "Any individual, partnership, firm, limited liability company, corporation, or company may bring an action to recover any damages caused to such person or entity by a violation of the Nebraska Construction Prompt Pay Act. In addition to an award of damages, the court may award a plaintiff reasonable attorney's fees and costs as the court determines is appropriate." Neb. Rev. Stat. § 45-1211.

14. "[I]f a periodic or final payment to (1) a contractor is delayed by more than thirty days after receipt of a properly submitted periodic or final payment request by the owner or owner's representative . . . then the remitting owner, contractor, or subcontractor shall pay the contractor or subcontractor interest due until such amount is paid, beginning on the day following the payment due date at the rate of one percent per month or a pro rata fraction thereof on the unpaid balance. Interest is due under this section only after the person charged the interest has been notified of the provisions of this section by the contractor or subcontractor." Neb. Rev. Stat. § 45-1205.

V. STATEMENT OF FACTS

At the request of Nemaha County, on February 15, 2022, Thomas Schwab, Bridge Project Manager for K2 Real Estate Development, LLC ("K2"), attended a meeting with Nemaha County Commissioner Larry Holtzman at the Piper Creek Bridge in Nemaha County, Nebraska, to discuss the scope of repairs needed for the bridge. (E2, p.1). The meeting was also attended by Dan Alexander, an engineer retained by Nemaha County (the "County"). (E2, p.1; 441:24-442:6). In addition to the scope of repairs, "[i]t was also discussed that the County, through its retained engineer, would provide the necessary engineering." (E2, p.1-2). The next day, Mr. Schwab emailed a proposal for bridge work to Commissioner Holzman and Mr. Alexander. (E2, p.5-6). The County, at the March 2, 2022, board meeting, approved by a 3-0 vote to "sign an agreement with K2 Construction for Bridge #C006410950 repair work total of $85,580.00." (E2, p. 9).

The same day, the County, through its commissioner, Bryan Mellage, executed the written Contract for the bridge repairs. (E12; 399:7-17). The Contract included a provision indicating "Acceptance of Proposal – The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above." (E12). Engineering was expressly excluded from K2's obligations under the Agreement. (E12). Nothing in the Contract further addresses engineering requirements for the project. (E12). Nothing in the Contract required K2 to obtain engineering plans before proceeding with its work on the project. (E12).

Following the execution of the Agreement, K2 mobilized to the project site. (159:10-25; 400:8-10; E20). Mobilization refers to the movement of equipment and labor to and from the site of a project, as well as the setup and tear down of that equipment. (133:7-21). The specific equipment mobilized to the site included a 30-ton excavator for unloading steel (157:3-9); an APE Vibratory Power Unit for driving steel pile (157:12-20); a Terex HC110 Crawler Crane (157:21-158:12); a Delmag D19x42 diesel hammer also for driving pile (158:13-19); and a Load King crane trailer, which transported equipment to the site (158:20-159:1; E20). The Terex Crawler Crane is so large that it was delivered to the site in five separate semi loads and was assembled—and later disassembled—by K2 personnel on site. This equipment was delivered to the project site by trucks driven by employees of K2. (207:12-21). K2 employees expended 240 labor hours to mobilize and demobilize to the project site. (192:3-21; E20).

The County sent K2 a Form 13 tax exempt form, and K2 ordered over $9,000 worth of steel H-pile for the bridge repairs, which was delivered to the project site and remains in possession of the County. (209:3-210:1; 400:11-14; 517:8-17; E16). The County did not dispute that the mobilization and delivery of H-pile occurred, or that the County retained the H-pile without payment. (397:19-398-19).

On March 10, 2022, Thomas Schwab emailed Commissioner Holtzman asking "Larry, Do you have an update from the engineer on the county bridge? Does he have a drawing we are working off of yet?" (E48; 427:3-25). Commissioner Holtzman did not forward the email to the engineer who attended the project site meeting with K2 or take any other action. (428:1-12). The next day, Mr. Schwab received an email from the Nemaha County Clerk, Diane Johnson, providing the "form 13" tax exempt form that K2 used to purchase materials for the County project. (E2, p.15-16; 474:10-19). On March 15, 2022, Mr. Schwab again emailed Commissioner Holtzman and attached a proposed drawing for the engineer's consideration. (E2, p.17-18). That same afternoon, Mr. Schwab sent an additional email to Commissioner Holtzman providing further grounds for the request for engineered plans in order for K2 to proceed with its work. (E2, p.19).

On March 15, 2022, Mark Mainelli, the County highway superintendent and an engineer, found out for the first time about the County's Contract with K2. (566:2-568:20). That afternoon, Mr. Mainelli called Mr. Schwab and directed K2 to stop work on the project and to demobilize from the project site. (240:9-19, 576:3-578:2). Having reviewed the situation, Mr. Mainelli had determined that a number of necessary tasks had not been performed and because of "all of these other items [that] would have to be addressed, including the overall condition of the bridge, so from a public standpoint of public funds, this was a complete disaster." (578:3-17; 577:2-578:2). Mr. Mainelli then suggested K2 submit an invoice to the County to compensate K2 for mobilizing to and from the site. (577:23-578:2). K2 demobilized as directed and Mr. Schwab submitted to the County a request for payment in the amount of $62,256.89. (E18). The County has not paid K2 for the amounts expended by K2 for the labor, materials, or equipment mobilized to and from the project site. (400:15-16).

K2 sued the County for breach of contract claiming damages in the amount of $62,256.89, and alternatively for unjust enrichment. (T1-3). K2 claimed damages only for the costs incurred by K2 on the project together with a markup for overhead and profit associated with such costs. (150:4-234:15; E15, 16, 17, 18, 19, 20, 21, 22). K2 also claimed that the County violated the Nebraska Construction Prompt Pay Act and that K2 is entitled to attorneys' fees and statutory interest pursuant to Neb. Rev. Stat. § 45-1205 and/or Neb. Rev. Stat. § 45-104. (T1-3).

The County denied the allegations and claimed in its affirmative defenses that the Contract was illegal. (T14). In its answer, the County did not allege as an affirmative defense that a condition precedent existed to K2's authorization to perform its obligations under the Contract. (T10-15). The County's answer similarly did not include non-performance, lack of substantial performance, or breach of contract in its affirmative defenses. (T10-15).

Following discovery, K2 moved for summary judgment on all its claims. (T17-18). The trial court determined that the parties had a valid written contract, that the Contract was not illegal, that the County had breached the Contract, and that a genuine issue of material fact remained as to whether and to what extent K2 was damaged. (T104-17.)

K2 filed a motion in *limine* on February 11, 2025, in advance of the February 20, 2025 trial date. (T136, T123). K2's motion in *limine* requested the court limit testimony to 1) whether and to what extent K2 suffered damages by reason of Defendant's breach of the Contract; and 2) K2's right to recover attorneys' fees under the Nebraska Construction Prompt Pay Act. (T137). K2 further requested the court specifically exclude testimony concerning: 1) legality of the subject Contract; 2) bridge engineering; and 3) the benefit (or lack thereof) bestowed upon the Defendant by reason of K2's work. (T137).

On February 18, 2025, the County responded to the motion in *limine* claiming that K2 did not substantially perform its obligations under the Contract and that there remained an issue for the court as to whether K2 substantially performed and whether K2 could maintain an action for breach of contract. (T162). The County also disputed that K2 was authorized to proceed with its work on the Project without stamped engineering plans. (T164). Despite the County not having raised the issue of substantial performance prior to February 18, 2025, on February 20, 2025, the trial court issued a Journal Entry and Order agreeing with the County that there remained an issue related to substantial performance. (T187-190). The trial court also agreed with the County that K2 was obligated to prove that it had conferred a benefit on the County in order to recover its damages in the case of partial performance. (T187-190). K2 promptly filed a motion to reconsider to no avail. (T191-202).

The trial court received evidence of K2's damages in the amount of $62,256.89, which represented the costs incurred by K2 on the project together with a markup for overhead and profit. (150:4-234:15; E15, 16, 17, 18, 19, 20, 21, 22). The County offered no evidence contradicting K2's evidence of the costs incurred. The County's witnesses, when asked, did not dispute that K2 incurred costs for its performance of the Contract, and confirmed that K2 mobilized equipment, materials, and labor to the Project site. (397:13-398:23; 400:8-16; 432:13-19; 486:9-24; 488:10-24; 495:7-15; 517:8-17; 520:8-14; 520:21-522:12; 596:5-20). Instead, the County offered the testimony of several witnesses to the effect that the County received no benefit from the work performed by K2. (485:14-486:8; 498:15-23; 595:17-596:3).

The trial court determined, after hearing the parties' evidence, that K2 failed to meet its burden of proof to maintain a breach of contract action, dismissed K2's claims, and ordered the County to return the steel K2 delivered to the site. (T246-253). K2 respectfully appeals.

V. SUMMARY OF ARGUMENT

K2 is entitled to recovery on its breach of contract claim against the County because the County breached the Contract by unilaterally terminating the Contract after K2 began performance of the Contract. Prior to termination, and in reliance on the County's actions and the Contract language expressly authorizing K2 to proceed, K2 incurred expenses in mobilizing to the site and procuring materials. Until the Contract was terminated, K2 had fully complied with the terms of the Contract and performed all its duties to the extent possible. The evidence at trial confirms that K2 was damaged in the amount of $62,256.89 and is entitled to complete recovery. Because the County failed to pay K2 for the work performed under the Contract, the County violated the Nebraska Construction Prompt Pay Act, entitling K2 to its attorneys' fees. K2 is also entitled to interest on its claim in accordance with Neb. Rev. Stat. § 45-1205 and/or Neb. Rev. Stat. § 45-104. Under Nebraska law, K2 is entitled to (1) a reversal based upon each of its assignments of error, (2) a judgment for damages in the amount of $62,256.89 plus interest, and (3) a remand for further proceedings as to the amount of K2's attorneys' fees.

VI. ARGUMENT

A. The trial court erred in requiring K2 to prove it had substantially performed the Contract to recover damages and to prove that the County had retained a benefit of K2's performance.

Without the knowledge of the County highway superintendent, the County Board of Commissioners decided they wanted to fix a bridge. (E2, p.9; E12; 399:7-17; 566:2-568:20). They requested that K2 meet at the site with County representatives and an engineer retained by the County to discuss repairs. (144:22-147:23; 414:17-417:4). They requested that K2 provide the County with an itemized proposed contract to repair the bridge. (144:4-147:23). Following discussion and unanimous approval at a County board meeting, the County signed the Contract on March 2, 2022. (473:20-474:9; E12) The Contract stated: "**Acceptance of Proposal** - The above prices, specifications and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above." (E12 (emphasis in original)).

K2 mobilized to the project site. On March 11, 2022, the County sent K2 a sales tax exemption certificate so K2 could acquire materials needed for the project using the County's sales tax exemption. (E2, p. 15-16; 474:10-19). On March 15, 2022, Mark Mainelli, the highway superintendent and an engineer found out about the County's Contract with K2. (566:2-568:20). That same day, Mr. Mainelli, on behalf of the County, terminated K2's Contract. (240:9-19; 576:3-578:2).

The County's failure to communicate and coordinate internally before entering into the Contract with K2 directly led to real damages incurred by K2. The court correctly entered summary judgment in K2's favor on liability, finding that the County had breached the Contract. However, following a trial that was supposed to be focused on damages, the court entered an order contrary to the law in holding that K2 did not prove entitlement to damages. The court ruled (over K2's objection) that K2 had the burden of proving it had substantially performed its obligations under the Contract in order for K2 to recover damages. The court's holding effectively means that Party A can enter into a contract authorizing Party B to begin performing, Party B can expend effort and incur expenses in preparation for performance with the knowledge and participation of Party A, Party A can breach the contract by terminating it before any benefit is conferred to Party A, and Party B has no remedy. Such a holding is contrary to the law. K2 should not be financially responsible for the County's internal communication failures.

1. Nebraska law permits K2 to recover for its efforts in preparing to perform the contracted bridge repair.

The trial court found that the County breached its Contract with K2. The remaining question, then, was whether K2 had been damaged and the amount of those damages. (T116). On the eve of trial, the court adopted the County's argument that K2 had to prove it had substantially performed under the Contract before K2 would be entitled to recovery of damages under the Contract. (T187-188). Substantial performance is not an element of the measure of damages under Nebraska law. "Generally, the measure of damages in a case of breach of contract is the amount which will compensate the injured person for the loss which a fulfillment of the contract would have prevented or the breach of it has entailed." *Third Party Software, Inc. v. Tesar Meats, Inc,* 226 Neb. 628, 631 (1987); *Phipps v. Skyview Farms, Inc.*, 259 Neb. 492, 503 (2000) ("[T]he ultimate objective of a damages award is to put the injured party in the same position he or she would have occupied if the contract had been performed, that is, to make the injured party whole."). The injured party is entitled to all damages "which are reasonably certain and which are naturally expected to follow the breach." *Phipps v. Skyview Farms, Inc.*, 259 Neb. at 503.

The Nebraska Supreme Court has held that "[w]here a contractor is not allowed to complete the performance of a contract, he is entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the job as provided in the contract." *Omaha Public Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 502-03 (1980).

The Nebraska Supreme Court has also recognized a party's reliance interest as a measure of contract damages, adopting Restatement (Second) of Contracts § 349, which provides that "the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed." *Anderson Excavating & Wrecking Co. v. Sanitary Imp. Dist. No. 177*, 265 Neb. 61, 67 (2002); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 38 (recognizing that a plaintiff who is entitled to a remedy for material breach or repudiation may recover damages measured by the cost or value of the plaintiff's performance, which may include expenditures made in reliance on the contract in preparation for performance or performance or the market value of the plaintiff's uncompensated performance).

That Nebraska law recognizes the right of a non-breaching contractor to payment for work performed under a terminated contract is shown in *Tilt-Up Concrete, Inc. v. Star City/Federal, Inc.*, 255 Neb. 138, 151 (1998). In that case, the Nebraska Supreme Court rejected the argument that Tilt-Up was not entitled to a construction lien because it had not substantially performed. *Tilt-Up*, 255 Neb. at 151. The Court ruled that "in the situation where a contract has been terminated without fault on the contractor's part, a lien is preserved despite the failure of the contractor to complete the contract." *Id.* The Court further stated: "To rule otherwise would allow an owner to terminate a construction contract prior to substantial performance by the contractor, whether in good faith or not, and escape construction lien liability." *Id.* The same rationale applies in this case, and the County should not be able to escape liability for expenses K2 incurred in reliance on its Contract with the County.

After the County initiated a request for a bridge repair proposal and signed the Contract, K2 began performing, including mobilizing to the site and acquiring materials using a tax exempt form sent to it by the County. Mobilization included the delivery of a crane so large that it had to be delivered in five semi loads and assembled (and disassembled, upon departure) by K2's personnel at project sites. Because of the equipment needed for the County's project, the mobilization costs constituted the most substantial part of the project price. (E12; 132:4-133:21; 245:1-8).

The trial court rejected K2's claim for payment related to mobilization using an analogy involving a contract to build a hospital where the cost of opening a fuel cap to fuel the first piece of equipment was $24,999,999 and the remaining cost to build the hospital was $1. (T250). That is simply not this situation. The allocation of the costs to the component parts of the Project is factual. The most time and laborintensive portion of the Contract performance was delivering, assembling, and disassembling the equipment required to drive the pilings for the bridge repair. The Contract itself gave the County notice of this.

K2 was authorized to proceed under the Contract with the County, and K2 was authorized to acquire materials, consistent with the tax exempt form sent to K2 by the County. K2 proceeded as authorized. At trial, K2 submitted evidence regarding its damages incurred as a result of that work preparing to do the actual bridge repair. K2 is entitled to those damages and the overhead and profit associated with the costs incurred.

2. K2 was not required to prove that it had substantially performed.

The doctrine of substantial performance is intended to apply in a situation where a contracting party has performed the contract but has not strictly complied with the contract. "The doctrine protects the rights of those who have performed in all material and substantive particulars and excuses contractual deviations or deficiencies that do not severely impair the purpose of the contract requirements." 17A Am. Jur. 2d Contracts § 604. "The purpose of the doctrine is to protect a plaintiff who has performed its promises under the contract so substantially that the defendant has received essentially what it bargained for; if the contract has terminated before the plaintiff has performed at all, . . . the doctrine is simply inapplicable." 15 Williston on Contracts § 44:52 (4th ed.).

Nebraska courts have not explicitly addressed when the doctrine of substantial performance applies. As argued by the County at trial, multiple Nebraska courts have generally stated that a plaintiff cannot maintain an action for breach of contract if the plaintiff has not substantially performed. *See generally VRT, Inc. v. Dutton-Laison Co.*, 247 Neb. 845 (1995); *ADC-I, Ltd. v. Pan American Fuels*, 247 Neb. 71 (1994); *First Data Resources, Inc. v. Omaha Steaks Int. Inc.*, 209 Neb. 327 (1981); *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722 (2018);

Phipps v. Skyview Farms, Inc., 259 Neb. 492 (2000). A cursory reading of the above cases may lead practitioners to believe that all contract cases require the plaintiff to show substantial performance to avoid dismissal of its contract claims even though substantial performance is not an element of claim for breach of contract. As the treatises cited above demonstrate, the County's claimed broad application of the doctrine of substantial performance is not a correct application of the law.

A more thorough reading of the cases relied on by the County reveals that substantial performance becomes an issue for the court when a plaintiff attempts to enforce an agreement which the plaintiff has been alleged to have breached or failed to perform, despite having the opportunity to perform. *See VRT, Inc. v. Dutton-Laison Co.*, 247 Neb. 845 (1995) (determining that plaintiff's own fraud precluded its recovery under the doctrine of substantial performance in a declaratory judgment action in which plaintiff attempted to recover payment from defendant despite plaintiff's fraud on the contract); *ADC-I, Ltd. v. Pan American Fuels*, 247 Neb. 71 (1994) (affirming dismissal of a buyer's claim for specific performance of a purchase contract because buyer failed to obtain financing in accordance with the contract, a condition precedent to closing); *First Data Resources, Inc. v. Omaha Steaks Int. Inc.*, 209 Neb. 327 (1981) (reversing trial court's grant of directed verdict in favor of plaintiff because defendant had pleaded sufficient facts to warrant an opportunity to put on evidence of plaintiff's nonperformance); *Bloedorn Lumber Co. v. Nielson*, 300 Neb. 722 (2018) (discussing substantial performance in the context of unjust enrichment because plaintiff installed the wrong countertops in defendant's home and was precluded from recovery under a breach of contract claim).

The trial court's reliance on the doctrine of substantial performance was in error. K2 was not at fault for failing to complete the project. K2 had no opportunity in this case to fully perform the Contract—substantially or otherwise—due to the County's termination of the Contract. K2 was not accused of breaching the Contract. Not until the eve of trial was the issue of substantial performance even raised. The County terminated the Contract, which the trial court correctly held was a breach of the Contract. By terminating the Contract, the County repudiated the Contract and relieved K2 of any obligation to further perform. *Anderson Excavating & Wrecking Co. v. Sanitary Imp. Dist. No. 177*, 265 Neb. 61, 68 (2002); Restatement (Second) of Contracts § 253(2).

3. K2 was not required to prove a benefit to the County.

The trial court held that where there is a lack of substantial performance but there has been a part performance "and it has been of substantial benefit to the other party and that party has accepted and retained the benefits thereof," the partially performing party may recover the reasonable or fair value of the performance. (T249). The trial court also determined that the County had not retained any benefit from K2's performance. (T251). The trial court misapplied the law.

As discussed above, Nebraska law recognizes that where a plaintiff contracting party has acted in reliance on the breaching party and has incurred costs in preparing to perform, the plaintiff is entitled to recover the costs of that preparation to perform. *Anderson Excavating & Wrecking Co. v. Sanitary Imp. Dist. No. 177*, 265 Neb. 61, 67 (2002). Similarly, where the breaching party has prevented a plaintiff contracting party from performing, the plaintiff contracting party is "entitled to recover the value of the work performed, plus the profit he would have received if he had been allowed to complete the job as provided in the contract." *Omaha Public Power Dist. v. Darin & Armstrong, Inc.*, 205 Neb. 484, 502-03 (1980). No obligation to prove a benefit or value to the breaching party exists under those circumstances.

Because the trial court had granted summary judgment on K2's breach of contract claim, K2 did not argue its alternative unjust enrichment claim at trial. Benefit to the County may have been at issue under an unjust enrichment theory, but the alternative unjust enrichment claim was not before the trial court for decision. In requiring K2 to prove a benefit to the County, the trial court imposed an obligation that Nebraska law does not require. The trial court's decision was in error.

B. The trial court erred in imposing a contract condition not included in the Contract.

The trial court found that K2 "mobilized without any request to do so and without securing the stamped engineering plans Plaintiff required before beginning work." (T250-251). The trial court's finding is contrary to the face of the Contract.

The Contract expressly authorized K2 to do the work, stating "[y]ou are authorized to do the work" immediately adjacent to the signature of County's Board Chairman. (E12). That work included (1) mobilization, (2) removal and salvage of timber decking, (3) installation "HP 10x42 piling at 60'-0" lengths at the North Abutment of the Nemaha County Bridge, per engineer's request" and (4) welding of existing substructure steel to the new substructure steel and piling. (E12). The Contract required no engineer involvement prior to mobilization. The Contract contemplates engineer involvement, albeit not as an obligation of K2, prior to installation of the pilings, and it was K2's request for those engineering plans from the County that resulted in the highway superintendent becoming aware of the Contract and terminating the Contract.

The Contract authorized K2 to commence work, and the County's signature on the Contract constituted the County's request to commence the work. The County further participated in K2's commencement of work by providing it with the documentation necessary for K2 to obtain materials tax free. Nothing in the Contract required any further action prior to mobilization, and the Court's imposition of a contract condition where none existed is error.

C. The trial court erred in determining that K2 did not meet its burden of proof to show substantial performance up to the time the County terminated the Contract.

Even if K2 had to prove substantial performance, that performance would have to be measured against the phase of construction delineated to the time of termination. *Freedom Specialty Contracting, Inc. v. Nichol Flats, LLC*, 28 Neb. App. 797 (2020). Nebraska courts have similarly held that a party can recover its partial performance if the contract is divisible. *Young v. Tate*, 232 Neb. 915, 919-20 (1989); *see also RM Campbell Indus. v. Midwest Renewable Energy*, 294 Neb. 326 (2016).

In *Freedom Specialty Contracting, Inc. v. Nichol Flats*, a framing contractor sued a project owner for foreclosure of a construction lien and breach of contract after the owner wrongfully terminated the contract. 28 Neb. App. 797, 798 (2020). The Nebraska Court of Appeals held that the contractor was in compliance with the terms of the contract at the time the contract was terminated and therefore had substantially performed. *Id.* at 815 (rejecting defendant owner's argument that the contractor had completed only 75% of the project and therefore had not substantially performed). The Court of Appeals went on to hold that:

> substantial performance should be measured against the contract durations of each floor, not against the contract as a whole, which the 75-percent-complete finding of the district court measures. Because we have already determined that [contractor/plaintiff] was not in breach of the contract durations and, therefore, had substantially performed work on the fourth and fifth floors by August 18, 2016, as the contract required, this argument also fails.

Id. at 815-16 (adjusting the award of damages to the portion of work completed by contractor prior to the breach of contract by owner).

The evidence adduced at trial shows that K2 was in compliance with the terms of the agreement at the time the County terminated the

Contract. (397:19-398-19). K2 was therefore not in breach and had substantially (and in fact fully performed) performed the Contract to the extent it was able up until the point of termination. *Freedom Specialty Contracting, Inc. v. Nichol Flats, LLC*, 28 Neb. App. 797 (2020). K2 is entitled to payment for the obligations it performed pursuant to the terms of the Contract. *Id.*

D. The trial court erred in not awarding K2 damages in the amount of $62,256.89.

The trial court received evidence of K2's damages in the amount of $62,256.89, which represented the costs incurred by K2 on the project together with a markup for overhead and profit. (150:4-234:15; E15, 16, 17, 18, 19, 20, 21, 22). The County offered no evidence contradicting K2's evidence of the costs incurred. The County's witnesses, when asked, did not dispute that K2 incurred costs for its performance of the Contract, and confirmed that K2 mobilized equipment, materials, and labor to the Project site. (397:13-398:23; 400:8-16; 432:13-19; 486:9-24; 488:10-24; 495:7-15; 517:8-17; 520:8-14; 520:21-522:12; 596:5-20). Instead, the County offered the testimony of several witnesses to the effect that the County received no benefit from the work performed by K2. (485:14-486:8; 498:15-23; 595:17-596:3). The benefit, or lack thereof, received by the County is not relevant for the reasons discussed in Section A above. Accordingly, it was error for the trial court not to award damages in the amount of costs incurred, together with overhead and profit, in the amount of $62,256.89.

E. The trial court erred in failing to compensate K2 for materials procured on the County's behalf for this specific Project.

In its Order, the court stated that the County was in possession of "Plaintiff's H-pile which Plaintiff left at the site." (T251-252). K2 purchased the H-pile for this specific Project pursuant to the Form 13 tax exempt certificate provided by the County for purposes of purchasing materials on a tax-exempt basis on the County's behalf. K2 did not request return of the H-pile in its Complaint but rather sought reimbursement for the amount expended on the steel H-pile. The County did not request that it be ordered to return the H-pile. This remedy was invented out of whole cloth, and is in every way inadequate. There is no evidence that the steel purchased pursuant to a specific Contract with the County can be returned for a refund years after its delivery (it cannot). The trial court's attempt to award to K2 weather-worn steel of little to no value is legally unsupportable and does nothing to remedy K2's out-of-pocket loss for the purchase of the H-pile, which K2 procured in reliance on the Contract. *Anderson Excavating & Wrecking Co. v. Sanitary Imp. Dist. No. 177*, 265 Neb. 61, 67 (2002) (recognizing that an injured party has a right to damages based on its reliance interest, including expenditures made in preparation for performance or in performance).

F. The trial court erred in failing to award K2 its attorneys' fees and interest.

The County violated the Nebraska Construction Prompt Pay Act (the "Act") and is liable for K2's attorneys' fees for all district court proceedings and this appeal. The Act states, "[w]hen a contractor has performed work in accordance with the provisions of a contract with an owner, the owner shall pay the contractor within thirty days after receipt by the owner or the owner's representative of a payment request made pursuant to the contract." Neb. Rev. Stat. § 45-1203. Section 45-1211 of the Act permits the award of attorneys' fees for violation of the Act. Neb. Rev. Stat. § 45-1211. The Act further provides for the recovery of interest at the rate of one percent (1%) per month. Neb. Rev. Stat. § 45-1205. Pursuant to section 45-1205, "[i]nterest is due under this section only after the person charged the interest has been notified of the provisions of this section by the contractor." *Id.*

The evidence adduced at trial demonstrates on March 24, 2022, K2 submitted its invoice requesting payment to Diane Johnson, the

Nemaha County Clerk. (E18). No payment was made within thirty days thereof as required by the Act, nor at any time thereafter. (400:15-16). In its Complaint, K2 sought an award of attorneys' fees and costs in accordance with this provision of the Act. (T2-3). At trial, the issue of the award of attorneys' fees and costs was reserved for later determination.

K2 commenced this lawsuit on September 23, 2022, and the Complaint was served upon the County on September 28, 2022. (T1-3; T7). The Complaint provided notice to the County of interest due under the Act, stating "[i]n accordance with Neb. Rev. Stat. § 45-1205, notice is hereby given to the Defendant that interest shall be due and owing at the rate of one percent per month under said statute until the same is paid." (T1-3). Accordingly, K2 is entitled to interest at the rate of 1% per month from September 28, 2022, until paid. As of November 28, 2025, thirty-eight (38) months elapsed since the County was put on notice of interest accrual, equating to accrued interest totaling $23,657.66. For each additional month thereafter, interest in the amount of $622.57 will continue to accrue until K2 is paid.

VII. CONCLUSION

The Parties in this case had a valid contract. The County breached the Contract by terminating it and failing to pay K2 for expenses incurred in preparing to perform and for the work performed. K2 performed its duties under the Contract to the extent it was able before the County terminated the Contract.

K2 is therefore entitled to damages in the amount of $62,256.89, together with interest and its attorneys' fees. K2 was not at fault and should not bear the burden of the County's execution of the Contract without being properly prepared.

K2 respectfully requests this Court reverse the trial court's order and order the trial court to enter judgment in K2's favor finding the following:

1. K2 is entitled to damages for work performed in preparation for performance and performance of the Contract in the

amount of $62,256.89, together with interest accruing at a rate of $622.57 per month from and after September 28, 2022, until the judgment is paid in full; and

2. K2 is entitled to reasonable attorneys' fees.

K2 respectfully requests this Court reverse and remand for further proceedings on the issue of the amount of K2's attorneys' fees.

Dated this 8th day of December, 2025.

K2 REAL ESTATE DEVELOPMENT, LLC, Plaintiff

s/ Austin L. McKillip
Austin L. McKillip, #23212
Kimberly A. Duggan, #27573
CLINE WILLIAMS WRIGHT JOHNSON & OLDFATHER, L.L.P.
Attorneys at Law
1900 U.S. Bank Building
233 South 13th Street
Lincoln, Nebraska 68508-2095
(402) 474-6900
amckillip@clinewilliams.com
kduggan@clinewilliams.com

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief complies with the word count and typeface requirements of NEB. CT. R. § 2-103. This Brief contains 7,845 words excluding this Certificate of Compliance. This Brief was prepared using Microsoft® Word for Microsoft 365 MSO (Version 2510). The electronic version of this Brief was generated by converting to PDF from the original word processing file.

s/ Austin L. McKillip

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Certificate of Service

I hereby certify that on Monday, December 08, 2025 I provided a true and correct copy of this *Brief of Appt K2 Real Estate Development* to the following:

Nemaha County represented by Louie M Ligouri (16708) service method: Electronic Service to **ligourilaw@hotmail.com**

Signature: /s/ McKillip,Austin Lamoine (23212)