COURT OF APPEALS
DECISION
DATED AND FILED

December 23, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2008AP1867 **Cir. Ct. No. 2005CV2590**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

KBS CONSTRUCTION, INC.,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

MCCULLOUGH PLUMBING, INC.,
N/K/A PIRATE PLUMBING, INC.,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Dane County: RICHARD G. NIESS, Judge. *Affirmed.*

Before Vergeront, Lundsten and Bridge, JJ.

¶1 BRIDGE, J. This case involves a contract dispute between KBS Construction, Inc., a general contractor, and McCullough Plumbing, Inc.

(McCullough), a subcontractor which KBS hired to design and install plumbing fixtures in a condominium construction project.[1] KBS brought suit against McCullough, alleging breach of contract, and McCullough counterclaimed, alleging mutual mistake and theft by contractor. McCullough also sought to recover its attorney fees and litigation costs from KBS. KBS's claims against McCullough were resolved by stipulation during a trial to the court, and the court subsequently ordered judgment in favor of McCullough on its mutual mistake claim. However, the court denied relief on McCullough's theft by contractor claim and further denied its claim for attorney fees and litigation costs. KBS appeals the circuit court's ruling regarding mutual mistake, and McCullough appeals the court's ruling on its theft by contractor claim and its claim for attorney fees and litigation costs. We affirm.

BACKGROUND

¶2 On March 12, 2002, KBS entered into a contract with McCullough for the design and installation of plumbing systems and fixtures for Phase I of the Metropolitan Place Condominiums in Madison (the Project). In 2005, KBS brought the present action against McCullough, alleging that McCullough performed its work on the Project negligently and deficiently, in breach of its contractual responsibilities.

¶3 McCullough counterclaimed, alleging mutual mistake and theft by contractor. McCullough alleged that, due to a mutual mistake of the parties, a sum

[1] McCullough changed its name to Pirate Plumbing, Inc., in 2006. Because the name was McCullough when the contractual issues involved in this matter arose, we refer to the business as McCullough for ease of understanding.

of money related to the cost of plumbing fixtures for the Project was improperly deducted from the contract price, and it sought to have the court reform the contract to correct the error. In addition, McCullough alleged that KBS's retention of funds owed to McCullough constituted theft by contractor under WIS. STAT. § 779.02(5) (2007-08).[2] Finally, it sought recovery of its attorney fees and litigation costs from KBS.

¶4 All of KBS's claims against McCullough were resolved by stipulation of the parties at trial. McCullough's counterclaims were then tried to the court, which ordered judgment in favor of McCullough on its mutual mistake claim and accordingly reformed the contract to correct the improper deduction for plumbing fixtures. However, the court denied relief on McCullough's theft by contractor claim and further denied its claim for attorney fees and litigation costs. KBS appeals the circuit court's ruling with respect to McCullough's mutual mistake claim, and McCullough cross-appeals the court's ruling with respect to its theft by contractor claim and its claim for attorney fees and litigation costs. We refer to additional facts as needed in the discussion below.

DISCUSSION

KBS APPEAL OF MUTUAL MISTAKE RULING

¶5 A court in equity may apply the doctrine of mutual mistake to reform a written agreement when the "writing that evidences or embodies an agreement in whole or in part fails to express the agreement because of a mistake

[2] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

of both parties as to the contents or effect of the writing." ***Vandenberg v. Continental Ins. Co.***, 2001 WI 85, ¶50, 244 Wis. 2d 802, 628 N.W.2d 876 (citation omitted). The party seeking reformation on grounds of mutual mistake must prove by clear and convincing evidence that through inadvertence, accident or mutual mistake, the written agreement does not set forth the intention of the parties. ***Williams v. State Farm Fire & Cas. Co.***, 180 Wis. 2d 221, 233, 509 N.W.2d 294 (Ct. App. 1993). Whether mutual mistake occurred is a question of fact, *see* ***State Bank of La Crosse v. Elsen***, 128 Wis. 2d 508, 517, 383 N.W.2d 916 (Ct. App. 1986), and we review the decision to grant equitable relief under the erroneous exercise of discretion standard. ***Pietrowski v. Dufrane***, 2001 WI App 175, ¶5, 247 Wis. 2d 232, 634 N.W.2d 109.

¶6 KBS contends that the circuit court erred in concluding that a mutual mistake of fact on the part of both KBS and McCullough resulted in the erroneous deduction of $281,294.69 from the contract, thus requiring reformation of the contract to reinstate that amount. Review of this claim first requires a brief review of the underlying facts.

¶7 The contract between KBS and McCullough provided for a lump sum payment to McCullough in return for labor and materials provided by McCullough. The contract also provided for the use of subsequent written agreements between KBS and McCullough, referred to as change orders, which, among other things, were to be employed to increase or reduce the amounts owed to McCullough as the Project progressed.

¶8 As the result of an agreement between McCullough's principal, Clint McCullough,[3] and the Project's owner and developer, Cliff Fischer,[4] McCullough agreed that KBS could purchase plumbing fixtures for the Project directly, and thus KBS would not pay McCullough for the wholesale cost of fixtures or the accompanying markup. It is undisputed that the lump sum contract between the parties included this cost, but that it would need to be "backed out" of the contract in some fashion. An attachment to the contract deducted the sum of $336,050 from the contract price with the following notation:

Item	Date	Description	Amount
3	21-Aug-00	Credit of Subcontractor markup for Direct Owner Purchases	(336,050.00)
		(Base level fixtures are still included in the contract amount)	357,186.00

¶9 Approximately a year after the contract was signed, KBS sent Change Order #8 to McCullough which deducted $281,294.69 from the contract amount for the cost of "'Base' plumbing fixtures." Clint executed Change Order #8 after receiving it from KBS. However, when McCullough's accountant reviewed the document, she concluded that Change Order #8 represented a second deduction (in addition to the $336,050) for the wholesale cost of the fixtures plus markup.

[3] For ease of understanding, we refer to Clint McCullough as Clint throughout the remainder of this opinion, and refer to McCullough Plumbing as McCullough.

[4] It is undisputed that Fischer was the owner of the Project, although in the context of McCullough's claim for attorney fees and litigation costs, McCullough argues that the word "owner" as used in a certain provision of the contract referred to KBS rather than to Fischer. *See infra* ¶¶25-31.

¶10 At McCullough's request, representatives from McCullough and KBS met shortly thereafter to discuss the issue. McCullough contends that during the meeting, KBS first listened to McCullough's concerns, but by the end of the meeting took the position that Change Order #8 had been executed by both parties and, therefore, McCullough was bound by its terms.

¶11 KBS argues that no mistake was made by either party, and that the initial $336,050 deduction in the contract represented only markup. Thus, the deduction of $281,294.69 accomplished by Change Order #8 represented the remaining wholesale cost of the fixtures without markup and was not a duplicate deduction.

¶12 Consistent with KBS's position, KBS's president, Thomas Schuchardt, testified at trial that the $336,050 figure represented McCullough's markup on the fixtures, and that no duplicate deduction from the contract had occurred. On cross-examination, Schuchardt agreed that this sum would represent an unusually high number for markup on plumbing fixtures. However, he stated that when he questioned Clint about it, Clint responded "that's where he makes a lot of his money."

¶13 McCullough's accountant testified that the typical markup on fixtures at McCullough was fifteen percent, and that during her five years of employment at McCullough, she never saw McCullough receive a 120 percent markup on anything.[5] Clint also testified that McCullough's markup on fixtures was fifteen percent at most, and that McCullough had never charged anyone a 120 percent markup. Further, he denied telling Schuchardt that $336,050 was

[5] This statement was apparently an approximation: a 120 percent markup on a $281,294.69 cost of the fixtures would be $337,552.80 rather than $336,050.

McCullough's markup on the fixtures and stated that Schuchardt is "smarter than that." Clint testified that he did not intend to give a double credit for fixtures and markup in the contract; that the $336,050 did not reflect markup; and that the double deduction was initially a mistake made by KBS which McCullough did not catch until after it processed Change Order #8.

¶14 The circuit court found that Schuchardt's testimony that KBS understood the $336,050 figure to be markup was not credible. In contrast, the court accepted as credible Clint's testimony as to the existence of a mutual mistake, made in the first instance by KBS, and not initially caught by McCullough. The court thus concluded that McCullough met its burden of establishing by clear, satisfactory, and convincing evidence that a mutual mistake of fact resulted in the erroneous deduction of $281,294.69, and it therefore exercised its equitable powers to reform the contract to reinstate the $281,294.69 to McCullough.[6]

¶15 "When the circuit court acts as the finder of fact, it is the ultimate arbiter of the credibility of the witnesses and the weight to be given to each witness's testimony." ***State v. Peppertree Resort Villas, Inc.,*** 2002 WI App 207, ¶19, 257 Wis. 2d 421, 651 N.W.2d 345. We conclude that the record supports the circuit court's finding that clear and convincing evidence exists to establish a mutual mistake of fact. Accordingly, we conclude that the circuit court properly exercised its equitable powers in reforming the contract.

[6] Although it is not clear from the parties' briefs or the court's order, it appears that the reformation to which the court refers would serve to reform Change Order #8 (which as described above in ¶7 was made part of the contract), by rendering it null and void.

MCCULLOUGH CROSS-APPEAL

¶16 McCullough argues that KBS violated the theft by contractor statute, WIS. STAT. § 779.02(5),[7] by not holding certain Project monies in trust, and McCullough is therefore entitled to damages under WIS. STAT. § 895.446. It also takes the position that the contract between it and KBS obligated KBS to pay McCullough's attorney fees and litigation costs in this matter. We address each in turn.

Theft by Contractor

¶17 McCullough contends that it is entitled to damages on its theft by contractor claim under WIS. STAT. § 779.02(5), and that the circuit court erred in ruling otherwise. Section 779.02(5) is the civil theft by contractor statute. *See* ***Tri-Tech Corp. of America v. Americomp Servs., Inc.***, 2002 WI 88, ¶22, 254 Wis. 2d 418, 646 N.W.2d 822. As it relates to this dispute, the statute provides that, subject to certain conditions, any monies paid by an owner to a prime contractor for improvements constitutes a trust fund in the hands of the prime contractor for the payment of subcontractors. Specifically, it provides in relevant part as follows:

> THEFT BY CONTRACTORS. The proceeds of any mortgage on land paid to any prime contractor or any subcontractor for improvements upon the mortgaged premises, and all moneys paid to any prime contractor or subcontractor by any owner for improvements, constitute a trust fund only in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor, services, materials, plans, and specifications used for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such moneys by any prime

[7] Amendments to WIS. STAT. § 779.02(5) not material to this case were enacted and became effective in 2006. *See* 2005 Wis. Act 204, § 24.

> contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of moneys so misappropriated and is punishable under s. 943.20….

Section 779.02(5).

¶18 A violation of WIS. STAT. § 779.02(5) is punishable under WIS. STAT. § 943.20, which sets out the criminal penalties for theft. In addition, pursuant to WIS. STAT. § 895.446, a victim of theft by contractor under § 779.02(5) may bring a civil action against the prime contractor and seek actual damages, investigation and litigation expenses, and treble damages. In such a civil action, the victim must prove, by a preponderance of the evidence, the elements of both civil theft by contractor under § 779.02(5) and criminal theft under § 943.20. *See* ***Americomp***, 254 Wis. 2d 418, ¶24. Section 895.446 provides in relevant part:

> **Property damage or loss caused by crime; action for. (1)** *Any person who suffers damage or loss by reason of intentional conduct* that occurs on or after November 1, 1995, and that is prohibited under s. … 943.20 … has a cause of action against the person who caused the damage or loss.
>
> **(2)** The burden of proof in a civil action under sub. (1) is with the person who suffers damage or loss to prove a violation of s. … 943.20 … by a preponderance of the credible evidence. A conviction under s. … 943.20 … is not required to bring an action, obtain a judgment, or collect on that judgment under this section.
>
> **(3)** If the plaintiff prevails in a civil action under sub. (1), he or she may recover all of the following:
>
> (a) Actual damages, including the retail or replacement value of damaged, used, or lost property, whichever is greater, for a violation of s. … 943.20.

> (b) All costs of investigation and litigation that were reasonably incurred, including the value of the time spent by any employee or agent of the victim.
>
> (c) Exemplary damages of not more than 3 times the amount awarded under par. (a). No additional proof is required under this section for an award of exemplary damages under this paragraph.

(Emphasis added.) The additional element which a victim of civil theft by contractor must prove for purposes of recovery under § 895.446(3) is criminal intent to defraud. *See* ***id.***

¶19 Because McCullough's cause of action arises under WIS. STAT. § 895.446, McCullough must prove by a preponderance of the evidence that KBS violated WIS. STAT. § 779.02(5), that KBS possessed the requisite intent to defraud as required by WIS. STAT. § 943.20, *and* that McCullough has suffered damage or loss by reason of KBS's intentional failure to comply with § 779.02(5). *See* § 895.446(1).

¶20 In denying McCullough's claim for damages under WIS. STAT. § 895.446(3), the circuit court assumed without deciding that KBS had violated WIS. STAT. § 779.02(5), but nevertheless ruled that McCullough was not entitled to any damages because "the record does not support a finding that McCullough has suffered any damage or loss 'by reason of' KBS' deliberate failure to follow §779.02(5)'s requirements." The court found that the reason KBS failed to pay McCullough was not due to its failure to hold the funds in trust, but was instead due to the fact that KBS disputed that it owed McCullough anything.

¶21 The circuit court's ruling was based on its factual finding regarding the reason why KBS had not made full payment of the contract price to McCullough. "Causation is a question of fact, and we will not overturn a trial

court's findings as to causation unless they are clearly erroneous." ***WTMJ, Inc. v. Sullivan,*** 204 Wis. 2d 452, 459, 555 N.W.2d 140 (Ct. App. 1996).

¶22 Schuchardt testified at trial that McCullough's performance was deficient in several respects and that McCullough did not complete the work it was contractually obligated to perform. Clint also admitted that portions of McCullough's work were not complete when it left the job site. Schuchardt testified that as a result, KBS was required to hire another plumbing subcontractor to remediate problems and complete the work. Evidence at trial demonstrated that the cost of remedying the problems was greater than the remaining contract price. In contrast, no evidence was presented to suggest that KBS agreed that McCullough was entitled to payment of any portion of the contract price withheld but failed to make payment for reasons in any way related to its trust account responsibilities under WIS. STAT. § 779.02(5). Moreover, the only evidence in the record with respect to whether KBS retained funds sufficient to pay McCullough any amounts determined by the circuit court to be due and owing was Schuchardt's testimony that KBS had adequate funds to do so.

¶23 McCullough argues on appeal that theft by contractor is akin to embezzlement, and, citing ***State ex rel. Kropf v. Gilbert***, 213 Wis. 196, 251 N.W 478 (1933), argues that embezzlement is complete upon the conversion of the funds. From this, McCullough argues that it sustained a loss at the time of the alleged conversion, and apparently takes the position that this is sufficient to prove causation. We reject this argument. While theft by contractor under WIS. STAT. § 779.02(5) occurs at the time the funds are misappropriated, *see, e.g.*, ***State v. Sobkowiak***, 173 Wis. 2d 327, 336, 496 N.W.2d 620 (Ct. App. 1992), a litigant seeking civil damages under WIS. STAT. § 895.446 must prove causation before recovery is allowed. Even assuming for the sake of argument that McCullough is

correct that KBS did not hold certain funds in trust as required by § 779.02(5), that KBS spent trust funds for purposes other than those required by § 779.02(5), and that KBS intentionally violated § 779.02(5), McCullough has not demonstrated that this conduct caused McCullough damage or loss.

¶24 We conclude that the circuit court's finding that McCullough has not proven causation is supported by the record and is thus not clearly erroneous.

Attorney Fees and Litigation Costs

¶25 McCullough argues that it is entitled to collect attorney fees and litigation costs from KBS under the terms of the contract. McCullough's argument requires that we construe the applicable terms of the parties' agreement, beginning with the language of the contract, which is the best evidence of the parties' intent. *See* ***Seitzinger v. Cmty. Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426.[8]

¶26 The interpretation of a written contract is a question of law subject to our de novo review. ***State v. Toliver***, 187 Wis. 2d 346, 355, 523 N.W.2d 113 (Ct. App. 1994). Contract language is to be construed to achieve the parties' intent. ***Goldstein v. Lindner***, 2002 WI App 122, ¶12, 254 Wis. 2d 673, 648 N.W.2d 892. "[O]bjective rather than subjective intent is the test." ***Shelley v. Moir***, 138 Wis. 2d 218, 222, 405 N.W.2d 737 (Ct. App. 1987). If the terms of the contract are plain and unambiguous, we will interpret it as it stands, even though the parties may have interpreted it differently. ***Campion v. Montgomery Elevator Co.***, 172 Wis.

[8] McCullough's legal expenses relating to its defense against KBS's lawsuit settled during trial and were waived as part of that settlement. Thus, only the legal expenses for prosecuting McCullough's counterclaims are at issue in this appeal.

2d 405, 416, 493 N.W.2d 244 (Ct. App. 1992). If, however, the terms of the contract are fairly susceptible to more than one interpretation, the terms are ambiguous and we will construe the ambiguity through the use of extrinsic evidence. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). Whether a contract is ambiguous is a question of law that we review de novo. ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis. 2d 315, 322, 417 N.W.2d 914 (Ct. App. 1987).

¶27 McCullough relies on section 4.7 of the contract, which Clint drafted and inserted into the document. It provides as follows: "4.7 Collection. Any legal expense(s) incurred in collection will be at the *Owner's* expense." (Emphasis added.) McCullough argues that the word "Owner" is ambiguous and should be interpreted to mean KBS. KBS, on the other hand, argues that the word is unambiguous and that Fischer,[9] not KBS, is the owner and developer of the Project. In support of its position, KBS points to the following definition of "Owner" contained in the contract: "'Owner' shall mean: (i) the Owner of the Project; and (ii) if KBS is not a prime contractor, then also the prime contractor which whom KBS has contracted for portions of the Work on the Project." KBS argues that this definition suggests that KBS is not the "Owner" within the meaning of section 4.7. It also points out that KBS is referred to as "KBS" in nearly every provision and that when the words "KBS" and "Owner" appear together in various provisions, they are used in such a way as to distinguish between the two.

[9] Fischer is not a party to the contract.

¶28 We agree that the way in which the words "KBS" and "Owner" are used in the contract make it clear that the contract treats KBS as an entity separate from the "Owner." For example:

> 2.10 Principal Contract Obligations. Except as otherwise expressly stated in this Agreement, *Subcontractor shall have the same obligations to KBS as KBS has to the Owner* under the Principal Contract with respect to the Work to be performed by Subcontractor. In addition to any other rights or remedies of KBS specified in the Agreement, *KBS shall also have the same rights and remedies against Subcontractor as the Owner has against KBS under the Principal Contract….*
>
> ….
>
> 3.2 Reports and Meetings. Subcontractor shall promptly submit all Reports required by any Governmental Authority or reasonably requested *by KBS or Owner* with respect to Subcontractor's Work ….
>
> 3.3 Permits. Subcontractor shall obtain, at its expense, all Permits for its Work to the extent required by Applicable Laws beyond any general building or construction permit for the project obtained *by Owner or KBS*.
>
> ….
>
> 4.2 Progress Payments. Payments to Subcontractor shall be payable monthly, unless otherwise required by the Contract Documents, within 35 days following the end of the period covered by the Draw Request based on the value of Subcontractor's Completed Work covered by the Draw Request as determined *by KBS and the Owner* or Architect. Payments to Subcontractor shall be due and paid by KBS within seven (7) days after *KBS has received from the Owner* its corresponding payment under the Principal Contract ….
>
> ….
>
> 7.4 Patents and Trademarks. Subcontractor shall indemnify and hold harmless *KBS and Owner* for

> any Liability either or both of them incur as a result of the violation or infringement of any patent, copyright, trademark, or tradename by virtue of any material or other Work furnished by Subcontractor and thereafter used *by KBS or Owner*.
>
> ….
>
> 8.1 Assignment and Subletting Work. Without KBS' prior written consent, Subcontractor shall not assign this Agreement nor any payments due or to become due hereunder nor sublet any portion of its Work. *KBS may assign this Agreement at any time to the Owner* without further consent of Subcontractor….

(Emphasis added.)

¶29 McCullough acknowledges that KBS was not in fact the Project owner, but takes the position that during the course of the negotiations between Clint and Schuchardt, both parties understood that "Owner" was meant to refer to KBS. As KBS notes, however, the contract contains an integration clause that reflects the parties' intent to make the contract the final written expression of the terms of their agreement. Section 8.4 of the contract provides, in relevant part, that the contract "is fully integrated and supersedes all other prior or contemporaneous oral and written statements and representations." Because the language of the contract unambiguously speaks for itself in referring to the owner of the Project, and the contract unambiguously identifies the owner as Fischer, it is unnecessary to refer to pre-contract negotiations in order to ascertain its meaning. *See* ***Huml v. Vlazny,*** 2006 WI 87, ¶52, 293 Wis. 2d 169, 716 N.W.2d 807 ("If the contract is unambiguous, our attempt to determine the parties' intent ends with the four corners of the contract, without consideration of extrinsic evidence.")

¶30 McCullough also argues that because Fischer was not a party to the contract, to construe "Owner" to mean Fischer "leaves the provisions of section 4.7 with no purpose or effect," and violates the rule that contracts are to be

interpreted to give meaning to each provision and without rendering any portion superfluous. *See* ***Sonday v. Dave Kohel Agency, Inc.,*** 2006 WI 92, ¶21, 293 Wis. 2d 458, 718 N.W.2d 631. This argument misses the mark. Although McCullough does not contend that KBS was in reality the owner of the Project, the gist of its position is that we should find the word "Owner" ambiguous and construe it to mean KBS in order to comport with Clint's own understanding of what he was bargaining for at the time he signed the contract. The problem with this argument is twofold: first, McCullough asks us to find ambiguity where none exists, and second, Clint obviously made a mistake when he utilized this language. The only reason that the reference in section 4.7 is without purpose or effect is as a result of McCullough's own error.[10] "[I]t is a fundamental principle of contract law that a person who signs a contract is presumed to know its terms and consents to be bound by them." ***Paper Express, Ltd. v. Pfankuch Maschinen GmbH,*** 972 F.2d 753, 757 (7th Cir. 1992). We conclude that the word "Owner" in section 4.7 of the contract is unambiguous in that it plainly refers to Fischer and not to KBS.

¶31 McCullough also seeks statutory fees and expenses. However, as the circuit court correctly ruled, because McCullough fails in its claim under WIS. STAT. § 895.446 and is thus not a prevailing party, there is no statutory basis for an award.

¶32 Accordingly, we conclude that McCullough is not entitled to collect its attorney fees and litigation costs in this matter from KBS.

[10] McCullough does not contend that the reference was a mutual mistake, and the record does not support such an inference. Instead, according to McCullough, Schuchardt "knew what Clint McCullough intended," but "made sarcastic fun of the language chosen by McCullough."

CONCLUSION

¶33 For the reasons discussed above, we conclude that the record supports the circuit court's finding that there was a mutual mistake of fact between the parties resulting in an unintended second deduction of the cost of plumbing fixtures from the contract. Thus, we conclude that the circuit court properly exercised its equitable powers in reforming the contract. We also conclude that KBS has no obligation to pay McCullough's legal expenses for prosecuting its theft by contractor claim against KBS.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.