COURT OF APPEALS DECISION DATED AND RELEASED

November 21, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0396

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

NEIL H. CAFLISCH, D/B/A CAFLISCH BUILDING AND REMODELING,

Plaintiff-Respondent,

v.

RICHARD W. CROSS and CARLA M. CROSS,

Defendants-Appellants.

APPEAL from a judgment of the circuit court for Sauk County: THOMAS T. FLUGAUR, Judge. *Affirmed*.

Before Eich, C.J., Vergeront and Roggensack, JJ.

ROGGENSACK, J. Richard and Carla Cross appeal from a $19,530.89 judgment in favor of Neil Caflisch, who constructed their home. The Crosses raise the following issues on appeal: (1) whether each detail of their contract was "of the essence," thereby precluding the application of the

substantial performance doctrine; (2) whether Caflisch proved his claims for contract additions under oral modification, *quantum meruit* or unjust enrichment theories; (3) whether Caflisch's summary of damages was properly admitted into evidence; and (4) whether the diminished value of the house was the correct measure of damages for portions of the counterclaim.

We conclude that the terms of the written contract permitted Caflisch to assert he had substantially performed. The trial court's findings that the contract had been orally modified through the words and conduct of the parties and that the Crosses were fully credited for a chimney enclosure, have adequate support in the record. Additionally, the trial court properly exercised its discretion when it admitted Caflisch's summary of damages. And, because we hold that diminution in value was the proper measure of damages for the fully installed pine trim and steel siding, even though the Crosses contracted for oak trim and a different pattern of steel siding, we affirm.

BACKGROUND

On May 5, 1994, Neil Caflisch, doing business as Caflisch Building and Remodeling, signed a contract to build a 5,400 square foot home for Richard and Carla Cross, for $263,623.00. The contract was a pre-printed form which stated, "All materials and workmanship are guaranteed to be as specified." Caflisch built the house. During construction there were add-ons for items that were not covered by the initial contract price, and reductions, when contractual allowances were not fully used. The Crosses paid for most of the work, but they objected to $21,189.23, the final amount Caflisch claimed was due. When payment was not forthcoming, Caflisch filed a construction lien.

On May 8, 1995, Caflisch commenced a foreclosure action, alleging the Crosses owed him the balance of the orally modified contract price, plus interest. In the alternative, Caflisch claimed the same amount under *quantum meruit* or *quantum valebant* theories. The Crosses counterclaimed for alleged breaches of the contract. They admitted requesting extra work from Caflisch, but denied that they had agreed to pay $9,315.58 for it.

At trial, Mary Mistel, a Caflisch employee who kept track of the time and materials used on the Crosses' house, testified about the preparation of Exhibit 2, Caflisch's three-page damage summary. The Crosses objected to its admission. They presented testimony of the cost to redo certain parts of the house, which they said were not constructed according to their instructions. They presented no evidence that any of these deviations reduced the value of the house.

After the evidentiary presentation was concluded and the court had reviewed the briefs of the parties, it ruled that Caflisch had substantially performed the contract, and was entitled to the balance of the contract price, as well as $8,919.65 in oral modifications. The court credited the Crosses $9,362.23 for unused contract allowances and set-off most of what they requested for a defective sidewalk, a squeaky living room floor board and delays in construction. The court also found that Caflisch had installed the wrong style siding, had used pine rather than oak trim, and had failed to install a chimney enclosure for the fireplace. It awarded no damages for the siding or trim because it found removal would have caused economic waste and the Crosses failed to offer evidence of the difference in value between the house as contracted for and as completed. Additionally, the court found they had already been credited for the omission of the chimney enclosure. The court added $1,041.00 in prejudgment interest, and entered a final judgment of $19,530.89.

DISCUSSION

Scope of Review.

The construction of a written contract is a question of law, which we review without deference to the trial court. ***M & I First Nat. Bank v. Episcopal Homes Management, Inc.***, 195 Wis.2d 485, 498, 536 N.W.2d 175, 182 (Ct. App. 1995). However, a trial court's finding that a contract has been orally modified will be sustained unless it is clearly erroneous. *See* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). We review the trial court's evidentiary decisions under the erroneous exercise of discretion standard. ***State v. Chambers***, 173 Wis.2d 237, 255, 496 N.W.2d 191, 198 (Ct. App. 1992); *see also* ***City of Brookfield v. Milwaukee Metropolitan Sewerage Dist.***, 171 Wis.2d 400, 423, 491 N.W.2d 484, 493 (1992). A trial court properly exercises its discretion when it acts in accordance with accepted legal standards and in accordance with the facts of record. ***Lievrouw v. Roth***, 157 Wis.2d 332, 348, 459 N.W.2d 850, 855 (Ct. App. 1990). And finally, determining the correct measure of damages is a question of law which we decide without deference to the trial court. ***Schrubbe v. Peninsula Veterinary Service, Inc.***, 204 Wis.2d 37, 41, 552 N.W. 2d 634, 635 (Ct. App. 1996).

Substantial Performance.

The trial court found Caflisch had substantially performed the contract. Substantial performance is an equitable doctrine which acts as an exception to complete performance. ***Klug & Smith Co. v. Sommer***, 83 Wis.2d 378, 386, 265 N.W.2d 269, 272 (1978). The doctrine allows a builder who meets the essential purposes of the contract to claim the contract price, despite minor performance deficiencies. His claim is subject to an offset to remedy any defects and any diminution in the value of the building, as completed. Because the amount due usually can be ascertained prior to judicial determination, pre-judgment interest is appropriate. ***Id***.

The test for substantial performance is "whether the performance meets the essential purpose of the contract." ***Plante v. Jacobs***, 10 Wis.2d 567, 570, 103 N.W.2d 296, 298 (1960). Thus, not every detail must be in strict compliance with the specifications for a new building, "unless all details are made the essence of the contract." ***Id.*** at 571, 103 N.W.2d at 298. Applying this rule in ***Plante v Jacobs***, the Wisconsin Supreme Court held that a builder had substantially performed a contract to build a house, despite misplacing a living room wall. ***Id.*** at 572, 103 N.W.2d at 298.

The Crosses assert that all contract details were made of the essence by the pre-printed statement: "All materials and workmanship are guaranteed to be as specified." They interpret "guaranteed to be as specified" to mean that all materials provided and all tasks performed in building the house were made "of the essence," as a matter of law. We decline to construe the contract in that manner.

Plante v. Jacobs refers to "situations in which features or details of construction of special or of great personal importance, if not performed, would prevent a finding of substantial performance of the contract." ***Plante*** at 571, 103 N.W.2d at 298. However, that was not the case here. We note that many of the details of the contract were not specified at all. Rather, certain materials, such as the pattern of the siding, were to be chosen at a later date. The Crosses singled out no specific features as especially important, and gave absolutely no indication that they communicated to Caflisch that all details were of such importance.

"Of the essence" in contract parlance is defined as "any condition or stipulation in a contract which is mutually understood and agreed by the parties to be of such vital importance that a sufficient performance of the contract cannot be had without exact compliance with it." BLACK'S LAW DICTIONARY 546 (6th Ed. 1990). A general guarantee of materials and workmanship does not rise to a sufficient level of specificity to cause every act required under the contract to be "of the essence." Therefore, we conclude that the broad language used here was no bar to Caflisch's claim that he had substantially performed.

Contract Modifications.

The parties were in dispute over items that were added to the contract during the course of construction. While the Crosses agreed that extra work had been done, generally they disputed the charges levied by Caflisch either because they thought the $263,623.00 contract should have covered them or because Caflisch charged too much. At trial, Caflisch sought recovery under theories of oral modification, *quantum meruit* and unjust enrichment. The trial court found oral modification.

It is widely accepted that a contract can be orally modified, even though it provides that all modifications must be in writing. 6 CORBIN ON CONTRACTS § 1295 (1962). When the parties evidence by their words or conduct an intent to waive the contract provision requiring change orders to be in writing, the court will avoid these provisions in the construction of the contract. ***Wiggins Constr. Co. v. Joint School Dist. No. 3 of Village of Hales Corners, Cities of Franklin and Greenfield***, 35 Wis.2d 632, 638, 151 N.W.2d 642, 645 (1967). The party seeking to avoid a written change order requirement must show that the provision was waived by the words or conduct of the parties. ***S & M Rotogravure Service, Inc. v. Baer***, 77 Wis.2d 454, 468-69, 252 N.W.2d 913, 920 (1977). Whether the contractual requirement has been waived, modified or abrogated is a question of fact. ***Id***. at 472, 252 N.W.2d at 921.

Additionally, "price is an essential ingredient of every contract … for the rendering of services." ***Goebel v. National Exchangors, Inc.***, 88 Wis.2d 596, 615, 277 N.W.2d 755, 765 (1979) (quoting 12 AM. JUR., *Contracts*, § 70). To create a valid oral contract, "the price must be certain or capable of being

ascertained from the agreement itself." ***Id***. While a specific figure need not be specified, an oral contract or modification requires at least agreement over the proper measure of the value of the services contracted for. *See* ***Harper, Drake & Associates, Inc. v. Jewett & Sherman Co.***, 49 Wis.2d 330, 339, 182 N.W.2d 551, 556 (1967).

The Crosses did not dispute the additional charges for the window wells, the heat, the closet maid shelves, or the sound proofing, even though there were not written agreements to support all of these changes. Caflisch testified Crosses typically said, "Just do it and bill me." Thereafter, the requested work was completed, without protest by the Crosses. This is sufficient support for the trial court's finding that the parties had waived the requirement that all changes be in writing and that Caflisch's normal billing procedure for labor and materials would be the proper measure of the price for the additional work.

The Crosses allege that some of the items Caflisch claimed as additions were actually included in the original contract price, *e.g.*, the glass block windows in the mud room, the construction of a furnace and utility room, and excavation costs. However, the contract provisions which described this work are unclear[1] as to exactly what was included. The testimony of the parties was in conflict. The trial court was in the best position to determine the credibility of the witnesses. ***Gehr v. City of Sheboygan***, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). It determined the Crosses had ordered and agreed to pay for work in addition to that contemplated by the contract provisions. These factual findings are not clearly erroneous.

Admission of Summary.

Summary statements may be admitted as evidence under § 910.06, STATS. However, before tabulations or summarized statements are admitted,

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[1] An example of the imprecise contract specifications is shown by the provision in the contract which states that Caflisch "will build a Furnace and Utility Room. [Note** A Change Order — EXTRA — will be presented.]" Because of the apparent ambiguity in the quoted statement, the court took testimony from the parties about what work they thought it included.

the books or records upon which they are based must be in evidence, or in court, or available to the opposite party. ***Tri-Motor Sales, Inc. v. Travelers Indem. Co.***, 19 Wis.2d 99, 107, 119 N.W.2d 327, 331-32 (1963). The trial court admitted the summary statement contained within Exhibit 2.

Exhibit 2 was presented by Mistel, who did the bookkeeping on Crosses' house. She testified that in regard to contract additions, labor was charged at $25.00 per hour and materials at cost plus 10%. She said these were Caflisch's standard charges. The exhibit included invoices for materials, but not the time sheets for the workers' hours. However, Mistel testified how many hours of labor were spent on each item. Exhibit 2 was relevant to Caflisch's claim for damages, supporting documentation was available, and it had been prepared by one with personal knowledge, who was available for cross examination. The trial court acted in accord with evidentiary legal standards and with the facts of record.

Damages for Deficient Performance.

A party is entitled to have what he contracts for, or its equivalent in monetary damages. ***DeSombre v. Bickel***, 18 Wis.2d 390, 398, 118 N.W.2d 868, 872 (1963). Wisconsin courts measure damages in construction defect cases either by (1) the cost of repairing the defect, or (2) the difference between the value of the structure as contracted for and its value as built. ***Plante***, 10 Wis.2d at 573, 103 N.W.2d at 299. Whether to apply the cost-of-replacement rule or the diminished-value rule "depends upon the nature and magnitude of the defect." ***Id***. When the cost of repairing a defect would result in economic waste, damages are limited to the diminished-value measurement. ***W. G. Slugg Seed & Fertilizer, Inc. v. Paulsen Lumber, Inc.***, 62 Wis.2d 220, 225-26, 214 N.W.2d 413, 416 (1974). Economic waste occurs when "in order to conform the work to the contract requirements, a substantial part of what has already been done must be undone," ***DeSombre***, 18 Wis.2d at 398, 118 N.W.2d at 872-73, or when repair would require "the reconstruction of a substantial part of the building or a great sacrifice of work or material already wrought." ***Plante***, 10 Wis.2d at 573, 103 N.W.2d at 299. These determinations are not subject to mathematical calculation, but rather, must be made on a case by case basis. ***Id.*** at 572, 103 N.W.2d at 298.

The Crosses contracted to have oak trim around their windows and doors and a particular style of siding on the rear of their house, as well as a chimney enclosure. They received pine trim, a different style of siding and no chimney enclosure. The trial court found that tearing out the pine trim and replacing it with oak and replacing the steel siding with a different pattern of steel siding would result in economic waste. That factual finding is not clearly erroneous. Therefore, we conclude the trial court correctly held that damages were to be measured by the difference between the value of the Crosses' house as contracted for and as completed. ***W. G. Slugg***, 62 Wis.2d at 225-26, 214 N.W. 2d at 416.

While damages do not need to be proved with mathematical certainty, it is the burden of the party claiming damages to put into evidence a reasonable basis for their computation that is consistent with the law. ***DeSombre***, 18 Wis.2d at 398-99, 118 N.W.2d at 873. The Crosses failed to prove any diminution in the value of their home as contracted for, when compared with it as constructed. They already had been credited with the $500.00 difference in the cost of oak over pine. There was no difference in the cost of the siding used, as compared with the style the Crosses wanted. And finally, the trial court found Caflisch did credit the Crosses $3,190.91 for the omitted chimney enclosure. We cannot say the trial court's findings were clearly erroneous.

CONCLUSION

The statement, "All materials and workmanship are guaranteed to be as specified" is insufficient to show the parties agreed that each term was made "of the essence" in this contract, where many details were not stated with any degree of specificity but left for the owner to choose at a later date. Therefore, the trial court's conclusion that Caflisch substantially performed the contract has a sound legal basis and a factual basis adequately supported by the record. The trial court properly exercised its discretion when it admitted Caflisch's damage exhibit. And its findings that the parties had modified or waived the contract provision which required additions to be in writing and that the Crosses had been fully credited for the chimney enclosure have sufficient support in the record. Finally, the trial court correctly determined that, for the siding and the interior trim, diminution in value was the correct measure of damage. Therefore, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.