COURT OF APPEALS
DECISION
DATED AND FILED

NOVEMBER 4, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-3612

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

WILDECK, INC.,

PLAINTIFF-RESPONDENT,

V.

PALMER BUILDING SYSTEMS CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. Palmer Building Systems Corporation appeals from a judgment in favor of Wildeck, Inc. for the fabrication cost of two steel mezzanines. Palmer argues that usage of trade applicable to the parties' contract required Wildeck to wait until Palmer had obtained a building permit or finally approved the plans before commencing fabrication of the mezzanines. We

conclude the evidence supports the trial court's finding that Wildeck properly went forth with fabrication and that Palmer is responsible for the cost despite cancellation of the order. We affirm the judgment.

Palmer is a general contractor located in the State of California. It contacted Wildeck for the fabrication of two steel mezzanines for a project in Los Angeles. On November 1, 1995, Wildeck sent Palmer a quote which had its standard "terms and conditions" attached. A revised quote was sent on November 8, 1995. Palmer submitted a purchase order for the mezzanines. In January 1996, Wildeck submitted plans to Palmer with a place for Palmer to check whether the plans were "approved," "approved as noted," or "not approved." The plans were returned to Wildeck on or about February 14, 1996, with two pages marked "approved" and two marked "approved as noted." Wildeck then sent a letter to Palmer confirming shipping dates. Palmer responded on March 1 with information concerning the place of delivery and requesting the shipping date be moved from March 9 to March 15. A building permit for installation of the mezzanines was denied. On April 1, 1996, Palmer canceled the order. The mezzanines had already been fabricated.

The parties disagree about the applicable standard of review. Palmer suggests that all the issues are questions of law which we may review de novo. The issues raise mixed questions of fact and law.

> In reviewing mixed questions, the trial court's factual determinations relevant to the issue are reviewed under a clearly erroneous standard. We accept all factual determinations made unless no reasonable finder of fact could have reached the conclusions reached by the trial court. Propositions of law applied to the factual determinations made by the court, however, are applied without deference to the trial court's determination.

State v. Suchocki, 208 Wis.2d 509, 515, 561 N.W.2d 332, 335 (Ct. App. 1997) (citation omitted). This case was tried to the court so we closely examine the findings gleaned from the trial court's oral decision.

Palmer argues that Wildeck is bound by a "usage of trade"[1] that fabrication should not commence until there is notice that the building permit had been obtained. Even assuming this to be a usage of trade, express terms of the parties' contract and a course of dealing control over usage of trade. *See* § 401.205(4), STATS. Thus, the trial court needed to look first to the language of the contract.

The trial court found that that the "terms and conditions" attached to the initial quote provided by Wildeck was part of the parties' agreement.[2] The "terms and conditions" state that the quote "does not include obtaining a building permit for the structure" and explains that obtaining the permit is the builder or owner's responsibility. The trial court found that this provision was a specific abdication by Wildeck of any responsibility for the building permit. Palmer's attempt to supply an additional term—that obtaining the permit is a condition precedent to fabrication—by usage of trade fails as directly contradictory to Wildeck's disavowal of involvement in the permit procedure.

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[1] Section 401.205(2), STATS., provides in part: "A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question."

[2] Palmer claims that the parties' contract consists only of its purchase order. What constitutes the terms of the contract is a question of fact. *See* ***Spensley Feeds, Inc. v. Livingston Feed & Lumber, Inc.***, 128 Wis.2d 279, 286, 381 N.W.2d 601, 604 (Ct. App. 1985). The trial court's finding that the terms and conditions were incorporated into the parties' contract is not clearly erroneous.

Additionally, the quotations from Wildeck indicated that shipment is four to six weeks from receipt of approved drawings. There was no other contingency attached to shipment. A cover letter to the transmittal of plans for approval indicated that the plans needed to be returned approved by January 12, 1996, "in order to hold the committed ship date." Nothing in the contract or in any of the papers and correspondence exchanged by the parties suggests that obtaining the permit was a condition precedent to fabrication.

Palmer suggests that the trial court interpreted the contract based on a "course of dealing" between the parties.[3] Palmer claims that one prior purchase from Wildeck does not constitute a course of dealing. *See* ***Novelly Oil Co. v. Mathy Constr. Co.,*** 147 Wis.2d 613, 618 n., 433 N.W.2d 628, 630 (Ct. App. 1988) (a single incident does not constitute a course of dealing within § 402.208(1), STATS.). Even if we agree that there were insufficient prior dealings to constitute a course of dealing, we do not deem the trial court to have relied on the evidence of the prior purchase. The trial court mentioned the prior transaction but did not make findings that a course of dealing existed or controlled.

Palmer's final contention is that by usage of trade, the returning of plans marked "approved as noted" did not constitute final approval for the purpose of authorizing fabrication. Palmer argues that when two of the plan pages were returned to Wildeck marked "approved as noted," Wildeck was required to revise

[3] Section 401.205(1), STATS., provides: "A course of dealing is a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."

Earlier in 1995, Palmer ordered a mezzanine from Wildeck. With respect to that order, Palmer made a written direction to Wildeck to "hold fabrication pending authorization from Palmer."

the plans and resubmit them to Palmer for final approval. However, the evidence supports the trial court's conclusion that Palmer's conduct belies its belief, even if supported by trade usage, that the plans would be resubmitted to it before fabrication.

The plans were returned by Palmer to Wildeck on or about February 14, 1996. On February 19, 1996, Wildeck's vice president sent a confirmation letter to Palmer indicating that Wildeck "received approved drawings" on the project on February 14, 1996. The confirmation letter indicated that shipment would occur the week ending March 9, 1996. Palmer's only response to this letter was to request that the scheduled ship date be moved to March 15, 1996. There was no outcry that the plans had not been approved or, notably, that the building permit had not yet been obtained. In short, Wildeck was never told to hold up fabrication.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.