COURT OF APPEALS
DECISION
DATED AND FILED

June 22, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP2267 **Cir. Ct. No. 2005SC285**

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

NEAL D. LOEHRKE D/B/A VALLEY WELL DRILLING,

PLAINTIFF-APPELLANT,

V.

MATT PRAXMARER,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waupaca County: JOHN P. HOFFMANN, Judge. *Reversed and cause remanded with directions.*

¶1 LUNDSTEN, P.J.[1] This is a small claims action. Matt Praxmarer hired Neal Loehrke to drill a well at Praxmarer's home. After the well was drilled,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

Praxmarer paid all but $500 of the price Loehrke had estimated the job would cost. Loehrke subsequently sent Praxmarer a bill for the service, asking approximately $2000 more than Loehrke's estimate had quoted. Praxmarer refused to pay the additional cost, and Loehrke instituted this action. The trial court found for Loehrke, but ordered Praxmarer to pay only $500, the amount he was deficient with respect to the original estimate. Loehrke appeals the judgment of the trial court. On appeal, Loehrke argues the court failed to consider that it could grant relief to Loehrke on the basis of *quantum meruit*. We agree and reverse.

Background

¶2 On or about October 26, 2004, Matt Praxmarer contacted Neal Loehrke of Valley Well Drilling about drilling a well on Praxmarer's property in Iola. Loehrke visited the property and subsequently delivered to Praxmarer an estimate of the cost to drill the well and install a pump. Among other listed costs, the estimate indicated that the well would be drilled to a depth of 60 feet or less, at a cost of $22 per foot, and would require one stainless steel screen, at a cost of $800.[2]

¶3 After Praxmarer received the initial estimate, Praxmarer and Loehrke had an additional conversation during which they discussed discounts Loehrke had listed at the bottom of the estimate. Following that conversation, Loehrke sent Praxmarer a document entitled "agreement/understanding." That document listed dollar amounts for the "well estimate," for various discounts, and

[2] Loehrke testified that wells in this area draw water from sand below the surface. The screens are used to filter the sand and ensure adequate water flow.

for the "expected bottom line." The cost for drilling the well minus the discount was $2500.[3]

¶4 On November 8 or 9, 2004, Loehrke began drilling the well. At trial, Praxmarer and Loehrke offered conflicting testimony about conversations they had during the drilling. Loehrke claimed he told Praxmarer that he needed to drill beyond the estimated 60 feet and that the extra drilling would entail greater costs. Loehrke testified that Praxmarer told him "[y]ou need to do what we have to do." Praxmarer, conversely, testified that Loehrke only told him that Loehrke was frustrated with the progress of the well drilling, and that "it was not going well." Praxmarer testified there were no conversations regarding the need to exceed 60 feet.

¶5 Loehrke ended up drilling to a depth of 70 feet. Loehrke testified, without contradiction, that the sand at the level where he ultimately installed the screening was "dirty, muddy sand" and that he needed to install a total of three stainless steel screens to ensure the well would draw "enough water to satisfy a house."

¶6 Loehrke completed the drilling and screen installation on November 24, 2004. At that point, Praxmarer gave Loehrke a check for $2000. Loehrke then sent Praxmarer a document entitled "invoice," dated December 6, 2004. That invoice indicated that Loehrke was seeking payment for the ten

[3] The parties both testified that Loehrke was originally hired to drill the well and install a pump. After Praxmarer refused to pay the costs exceeding the estimate for the well, however, Loehrke did not complete the pump installation. Neither party argues that these facts matter for purposes of this opinion.

additional feet of drilling, at a cost of $22 per foot, and reimbursement for the two additional stainless steel screens, at a cost of $800 each.[4]

¶7 Praxmarer refused to pay the amount on the invoice, and Loehrke instituted this small claims action seeking the balance due per the invoice. The trial court found for Loehrke, but ordered Praxmarer to pay only $500 plus statutory costs and fees. That amount represents the original estimate minus the "well discount" and minus the $2000 that Praxmarer already paid. Loehrke appeals.

Discussion

¶8 Both parties to this appeal dispute whether WIS. ADMIN. CODE § ATCP 110.05 applies to this transaction. Section ATCP 110.05 requires, among other things, that certain home improvement contracts, and changes to them, be in writing. We do not decide whether § ATCP 110.05 applies to this transaction, however, because we conclude that the remedies for a violation of that section do not apply here.

¶9 The remedies available for a violation of WIS. ADMIN. CODE § ATCP 110.05 include, as relevant here, contract cancellation, *see* WIS. ADMIN. CODE § ATCP 110.07(2)(a), and double damages and costs, *see* WIS. STAT. § 100.20(5). However, the remedy of cancellation is available only under the

[4] The invoice did not deduct for the "well discount" that Loehrke had previously offered Praxmarer. On appeal, Loehrke concedes that the well discount was improperly omitted from the invoice.

circumstances listed at § ATCP 110.07(1), none of which apply here.[5] And a prerequisite to recovering damages under § 100.20(5) is proof of pecuniary loss. The trial court in this case found Praxmarer did not suffer pecuniary loss, and Praxmarer does not appeal that finding. Thus, we conclude that whether § ATCP 110.05 applies to this transaction is irrelevant, and we examine this case under traditional contract law.

¶10 Loehrke argues that the trial court erred by not determining damages based on a theory of *quantum meruit*.[6] Loehrke argues that Praxmarer requested the well-drilling service, the service was performed, and the service was valuable to Praxmarer. Loehrke argues, therefore, that under ***Theuerkauf v. Sutton***, 102 Wis. 2d 176, 185, 306 N.W.2d 651 (1981), he has made out a prima facie case for *quantum meruit* recovery. Loehrke in effect argues that the agreement was for

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[5] WISCONSIN ADMIN. CODE § ATCP 110.07(1) (Oct. 2004) provides:

> (1) CONDITIONS WARRANTING EXERCISE OF BUYER'S REMEDIES. If, under a home improvement contract, a buyer pays a seller for any home improvement materials or services before the seller provides those materials or services to the buyer, the buyer may proceed under sub. (2) if any of the following occurs:
>
> (a) The seller fails to provide the materials or services by a deadline specified in the home improvement contract.
>
> (b) The seller fails to give buyer notice of an impending delay as required under s. ATCP 110.02(7)(c), or fails to obtain the buyer's agreement to a new performance deadline.
>
> (c) The buyer believes that the seller has failed to provide the materials or services in a timely manner, and the home improvement contract specifies no deadline for the seller to provide the materials or services.

[6] The doctrine of *quantum meruit* is also known as implied-in-fact contract in Wisconsin. *See* ***W.H. Fuller Co. v. Seater***, 226 Wis. 2d 381, 386 n.2, 595 N.W.2d 96 (Ct. App. 1999). We use *quantum meruit* here solely for consistency.

drilling the well, not for drilling the well *at the estimated price*. Loehrke made this argument before the trial court, and we agree with him that the court should have applied *quantum meruit*.

¶11 "*Quantum meruit*" means "[t]he reasonable value of services." BLACK'S LAW DICTIONARY 1276 (8th ed. 2004). "'The general rule is that if a person performs valuable services for another at that other's request, the law implies, as matter of fact, the making of a promise by the latter and acceptance thereof by the former to pay the one performing the service the reasonable value thereof.'" ***Theuerkauf***, 102 Wis. 2d at 184 (quoting ***Wojahn v. National Union Bank***, 144 Wis. 646, 667, 129 N.W. 1068 (1911)). Where a plaintiff establishes "(1) the defendant requested him to perform services, (2) he complied with the request, and (3) the services were valuable to the defendant, the plaintiff has established a *prima facie* case" for *quantum meruit* recovery. ***Theuerkauf***, 102 Wis. 2d at 185.

¶12 We note that, in reading the trial court's oral order, it is difficult to determine what the court actually found. The court seems to have concluded that Loehrke's drilling to 70 feet and the use of two extra screens constituted a modification of the original agreement, which Praxmarer did not consent to verbally or in writing.

¶13 The two documents the court interpreted as a contract here, however, clearly indicate that the quoted price is an "estimate." The first document, Loehrke's initial estimate, contains an asterisk by the cost for drilling. Under the asterisk is printed "ADDITIONAL DEPTH NEEDED CHARGED AT THE PRICE PER FOOT QUOTED." The second document, Loehrke's

"agreement/understanding," lists each of the costs as "estimates," and lists the total cost as the "*expected* bottom line" (emphasis added).

¶14 Praxmarer testified that, after the work had begun, there were no discussions regarding the need to drill ten extra feet or the need to install more screens. Praxmarer did not testify, however, that both parties agreed that the estimate would not be exceeded. In fact, Praxmarer refers to the two documents as spelling out the "expected costs."

¶15 Where there is no agreement for a "definite price," the court is "compelled to allow recovery on the basis of *quantum meruit*." ***Central Refrigeration, Inc. v. Monroe***, 259 Wis. 23, 25, 47 N.W.2d 438 (1951). We find no evidence in the record that supports the conclusion that the estimate was a definite price. To "estimate" means "to arrive at [] a value judgment that is often valid but incomplete, approximate, or tentative." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 778 (unabr. ed. 1993). No evidence was introduced that the "estimate" here could not be exceeded.

¶16 In sum, the trial court should have considered whether Loehrke was entitled to recovery under a *quantum meruit* theory. The court seems to have assumed that the extra drilling and additional screens were modifications of an original contract. However, if there was no definite price, and only an estimate, *quantum meruit* recovery is still available. We therefore remand for the trial court to consider Loehrke's recovery on the basis of *quantum meruit*.

By the Court.—Judgment reversed and cause remanded with directions.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)4.