COURT OF APPEALS
DECISION
DATED AND FILED

September 19, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2006AP1205 **Cir. Ct. No. 2005SC853**

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

HUGO BRAMSCHREIBER ASPHALT CO., INC.,

PLAINTIFF-RESPONDENT,

V.

MIDWEST AMUSEMENT PARK, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Shawano County: JAMES R. HABECK, Judge. *Affirmed.*

¶1 PETERSON, J.[1] Midwest Amusement Park, LLC appeals a small claims judgment awarding damages to Hugo Bramschreiber Asphalt Co., Inc. The

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

case arises out of a contract to pave a portion of a racetrack owned by Midwest. On appeal, the parties assert conflicting theories regarding whether Bramschreiber breached the contract.[2]

¶2 The parties' arguments are based on a mistaken interpretation of the trial court's holding. The record shows the court held that the contract was unenforceable due to changed circumstances, and awarded Bramschreiber the value of services it actually performed under an equitable theory. Because evidence in the record supports the trial court's holding, we affirm the judgment.

BACKGROUND

¶3 Midwest and Bramschreiber entered into a contract for Bramschreiber to add a pit lane to Midwest's racetrack in Shawano, Wisconsin. The contract stated that Bramschreiber would provide gravel and asphalt for the project. After entering into the contract, Midwest requested a high quality blacktop mix design, not specified by the contract. Bramschreiber attempted to obtain the blacktop mix from the local asphalt company, Northeast Asphalt. Northeast refused to supply the material due to other litigation between Northeast and Midwest. There were no other local asphalt companies. The closest alternative asphalt company mentioned by either party was in Wausau. When Bramschreiber attempted to renegotiate the terms of its payment to reflect these new difficulties, Midwest refused. Bramschreiber then quit the Midwest job.

¶4 Bramschreiber brought suit in small claims court to recover for material and services it provided to Midwest. On May, 3 2006, the court found in

[2] The parties briefs in this case fail to conform to WIS. STAT. RULE 809.19. For example, neither brief includes a proper issue statement. *See* WIS. STAT. RULE 809.19(1)(b).

favor of Bramschreiber and awarded $2,790 as damages against Midwest. Midwest appeals from the judgment.

DISCUSSION

¶5 Both parties in this case assert conflicting theories regarding whether Bramschreiber breached the contract with Midwest. The parties base their arguments on the assumption that the trial court held Bramschreiber did not breach the contract with Midwest. This is an incorrect interpretation of the trial court's holding.

¶6 The record shows the trial court held the contract was unenforceable due to changed circumstances, and awarded Bramschreiber the value of services it actually performed under an equitable theory. The court stated, "essentially they couldn't complete the action, and it was not due to something they did, but due to the other situation that was outside their control."

¶7 We will not reverse a court's factual findings unless they are clearly erroneous. ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141. However, whether the facts found by the trial court support a specific theory of law regarding the contract is a legal issue we review without deference. *See* ***id.*** A contract is unenforceable if performance is impossible because of facts which the promisor did not know and had no reason to know. ***In re Zellmer's Estate***, 1 Wis. 2d 46, 49, 82 N.W.2d 891 (1957).

¶8 In this case, the asphalt company refused to supply Bramschreiber with the blacktop material. Bramschreiber had no reason to suspect it would not be able to obtain blacktop material before entering into the contract. There were no other local asphalt companies, and Midwest provides no evidence that

Bramschreiber could have obtained the material elsewhere let alone at the contract price contemplated by the parties. The evidence supports the trial court's finding that it was impossible for Bramschreiber to perform.

¶9 Midwest also argues the trial court erred in awarding damages to Bramschreiber, and that even if the trial court did not err, the case must be remanded to determine the proper amount of damages. Midwest argues Bramschreiber should not be allowed to recover under quantum meruit because there was no substantial performance. Case law does not support this argument. The cases Midwest cited show substantial performance is a doctrine applied when a contractor tries to collect for a project that through its own fault it did not complete or completed improperly. *See* ***Jansen v. Vils***, 34 Wis. 2d 332, 340, 149 N.W.2d 551 (1967). That is not the case here. Bramschreiber could not complete the project, through no fault of its own.

¶10 Where a party provides services to another party under an unenforceable contract, the party may recover the value of the services upon quantum meruit. ***Mead v. Ringling***, 266 Wis. 523, 528, 64 N.W.2d 222 (1954). "The measure of damages for one seeking the reasonable value of services in *quantum meruit* is defined in terms of the 'rate of pay for such work in the community at the time the work was performed.'" ***Barnes v. Lozoff***, 20 Wis. 2d 644, 652, 123 N.W.2d 543 (1963) (citing ***Mead***, 266 Wis. at 529). Quantum meruit is an equitable remedy. ***Baierl v. McTaggart***, 2001 WI 107, ¶42 n.1, 245 Wis. 2d 632, 629 N.W.2d 277 (Crooks, J., concurring) (citing BLACK'S LAW DICTIONARY 1255 (7th ed. 1999). The decision to grant equitable relief is a discretionary decision of the trial court. ***Zinda v. Krause***, 191 Wis. 2d 154, 175, 528 N.W.2d 55 (Ct. App. 1995). Therefore, we look to the record to determine whether the trial court made a reasonable inquiry and whether the record discloses

a reasonable basis for the trial court's decision. ***Hedtcke v. Sentry Ins. Co.***, 109 Wis. 2d 461, 471, 326 N.W.2d 727 (1982).

¶11 There is evidence in the record that Bramschreiber and Midwest had worked together in the past. Midwest did not provide any evidence that it had any past or present problems with Bramschreiber's pricing practices. Midwest did not dispute the numbers Bramschreiber provided at trial. There is no evidence on the record or in the appeal that the amount Bramschreiber asked for is outside the normal rates charged in the community. Rather, Midwest cites an unpublished opinion to support its theory that this issue should be remanded to the trial court to properly determine damages.[3] Midwest believes Bramschreiber did not adequately prove the reasonable value of services and materials. Published case law supports the position that uncontradicted testimony on the value of services is adequate. *See* ***Barnes***, 20 Wis. 2d at 652. The court made a reasonable inquiry into the value of Bramschreiber's services and the facts on the record support the court's finding. *See* ***Hedtcke***, 109 Wis. 2d at 471. Therefore, the award of damages is upheld.

By the Court.—Judgment affirmed.

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

[3] Midwest blatantly fails to conform to the rules of this court by citing unpublished opinions in violation of WIS. STAT. RULE 809.23(3). Counsel is admonished that citation of unpublished opinions may be subject to sanction. ***Tamminen v. Aetna Cas. & Surety Co.***, 109 Wis. 2d 536, 563-64, 327 N.W.2d 55 (1982).