COURT OF APPEALS
DECISION
DATED AND FILED

September 29, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP2665 **Cir. Ct. No. 2008CV4272**

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

SHARON L. POST,

PLAINTIFF-RESPONDENT,

V.

THE WINTERS GROUP, LLC AND ROBERT J. SCHULZ,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Waukesha County: RALPH M. RAMIREZ, Judge. *Affirmed*.

Before Brown, C.J., Neubauer, P.J., and Anderson, J.

¶1 PER CURIAM. The Winters Group, LLC (TWG) and Robert J. Schulz appeal from a judgment in favor of Sharon L. Post for the $9500 she paid TWG for a bathroom and sunroom addition to her home. They argue that under a written contract Post is required to arbitrate her dispute with TWG and that Post

cannot recover double damages and attorney fees under WIS. STAT. § 100.20(5) (2007-08).[1] We affirm the judgment on the circuit court's finding that despite Post's signature on the written agreement, no contract was formed which requires arbitration and TWG's admission, by default, of the allegations in the complaint.

¶2 Post commenced this action alleging that she met with a salesman from TWG to discuss a bathroom and sunroom addition to her home, that she was presented with a Remodeling Construction Agreement to which she made a counteroffer, and that she gave the salesman a check for $9500, representing a ten percent deposit on the total project cost. She further alleged that she never received an accepted counteroffer on the contract nor any completed plans for the addition to her home. TWG refused to return Post's money when she withdrew her counteroffer. Post alleged that TWG had engaged in unfair trade practices prohibited by WIS. STAT. § 100.20 and WIS. ADMIN. CODE § ATCP 110, by making a claim of a binding contract when no final agreement had been reached, by accepting payment for home improvement services which TWG did not intend to provide, by failing to give notice of delay in the performance of services, by using Post's payment for purposes other than providing materials or services in her home improvement project, and by failing to provide Post with a copy of the contract before performing any work or accepting payment. Post also stated a theft cause of action.

¶3 TWG did not file an answer to the complaint. Rather, it filed a motion to compel arbitration under a Design/Development Agreement signed by

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

Post.[2] Pursuant to WIS. STAT. § 788.03, trial to the court was had on whether the parties had an agreement to arbitrate. At trial Post testified that she made handwritten revisions to the agreement both on the face of the document and on separate pieces of paper.[3] TWG's salesman confirmed that Post had requested modification of the contract and he told her he would have to get the changes approved by his boss, Robert J. Schulz, TWG's business manager. Post testified that the salesman returned a few days later to collect Post's deposit and indicated that Post would receive the final, typed, clean version of the agreement the next day. She never received the written contract. The circuit court found that there had been no meeting of the minds between Post and TWG on the terms of the written agreement and, consequently, no contract for arbitration had been formed.

¶4 TWG relies on the parol evidence rule and argues that, because there was no ambiguity in the signed written contract, no extrinsic evidence outside the four corners of the document is admissible. It points to the integration clause in the contract as barring the same type of evidence. Although the parol evidence rule excludes evidence to alter or vary the terms of contracts reduced to writings and intended to embody the final expression of an agreement between parties, it is always admissible to determine whether the parties intended a writing to be a final and complete expression of their agreement. ***Brevig v. Webster***, 88 Wis. 2d 165, 172-73, 277 N.W.2d 321 (Ct. App. 1979). Here, the evidence TWG seeks to

[2] Just days after the motion to compel arbitration was filed, Post moved to strike the motion and for default judgment. The circuit court held both the motion to compel arbitration and motion for default judgment in abeyance pending the outcome of the trial under WIS. STAT. § 788.03.

[3] Post wanted to strike the arbitration clause and wanted to add language requiring TWG to obtain city zoning approval.

exclude was offered on the issue of whether the parties had formed a contract and satisfied the essential element of a meeting of minds. This was not a contract interpretation question. The parol evidence rule is not implicated on the question of whether a contract was formed. *See* ***Bunbury v. Krauss***, 41 Wis. 2d 522, 529, 164 N.W.2d 473 (1969). All relevant evidence, whether parol or otherwise, is admissible in determining whether a contract was made. ***Id.***

¶5 TWG highlights certain evidence it believes confirms Post's execution of the written agreement. It points out that the written agreement did not include most of the handwritten notations Post testified that she made or wanted to the agreement. At best this is a challenge to circuit court's findings. Where, as here,

> there is the assertion that a writing offered as a completely integrated contract was not assented to as an accurate or complete statement of agreed terms, the assertion may or may not be worthy of belief. Under the rules of this court, whether the evidence is credible is a question to be determined by the trier of the facts, in this case the circuit judge. In the event the trial judge gives credence to the testimony, as he did here, that the written contract was not assented to, and the testimony to that effect is not contrary to the great weight and clear preponderance of the evidence, the court's finding will be sustained….

Id. at 530. *See also* WIS. STAT. § 805.17(2) (a circuit court's findings of fact shall not be set aside unless clearly erroneous). The testimony of Post and TWG's salesman was accepted as credible by the circuit court. The circuit court's findings are not clearly erroneous, and the conclusion that the written contract was not enforceable is affirmed.[4]

[4] Because no contract was formed, we need not address TWG's additional argument that the Wisconsin Arbitration Act requires broad enforcement of the arbitration clause in the contract.

¶6 TWG argues that if no contract was formed, it would be impossible to have a violation of WIS. ADMIN. CODE § ATCP 110, which by definition, is dependent on a contract for home improvement services. *See* § ATCP 110.01(4) ("[h]ome improvement contract" means "an oral or written agreement between a seller and an owner … of residential … property to perform labor or render services for home improvements"). It also argues that at most there was an agreement for design services only and not physical work performed upon the home as required by the definition of "home improvement" in § ATCP 110.01(2). TWG defaulted in answering the complaint and thereby the allegations of the complaint are deemed admitted. *See* ***Estate of Otto v. Physicians Ins. Co. of Wis., Inc.***, 2008 WI 78, ¶55, 311 Wis. 2d 84, 751 N.W.2d 805; WIS. STAT. § 802.02(4). Consequently, TWG admitted it was retained for a home improvement service and that it engaged in conduct which violated WIS. STAT. § 100.20 and § ATCP 110. TWG cannot now claim otherwise. The award of double damages and attorney fees is affirmed.

¶7 The appellant's brief contains the required certification by counsel, Attorney Everett Wood, that the appendix contains the "findings or opinion of the circuit court" and "portions of the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues." *See* WIS. STAT. RULE 809.19(2)(a). However, the appellant's appendix fails to include the final judgment and the transcript of the circuit court's oral findings and ruling on which the judgment is based. At a minimum the transcript of the oral ruling is essential to understand the issues. Consequently, we conclude that Wood filed a false certification. Counsel's false certification and omission of essential record documents in the appendix places an unwarranted burden on the court and "is grounds for

imposition of a penalty." ***State v. Bons***, 2007 WI App 124, ¶25, 301 Wis. 2d 227, 731 N.W.2d 367 (quoting WIS. STAT. RULE 809.83(2)). Accordingly, we sanction Wood and direct that he pay $150 to the clerk of this court within thirty days of the release of this opinion.

By the Court.—Judgment affirmed.

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