

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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

Appeal No. 2011AP701

Cir. Ct. No. 2009CV1018

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**BADGER STATE, INC., NEI, NORTHERN ELECTRICIANS, INC.
AND W. ZINTL CONSTRUCTION, INC.,**

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

v.

KELLER CONSTRUCTION COMPANY,

DEFENDANT-APPELLANT-CROSS-RESPONDENT,

ST. CROIX REGIONAL MEDICAL CENTER, INC.,

DEFENDANT.

APPEAL and CROSS-APPEAL from orders of the circuit court for Polk County: MOLLY E. GALEWYRICK, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 SHERMAN, J. Keller Construction Company appeals from an order of the circuit court granting summary judgment in favor of Badger State, Inc., NEI, Northern Electricians, Inc. and W. Zintl Construction, Inc. (collectively, the subcontractors) and awarding each of those parties money damages, as well as an order denying Keller's motion for reconsideration. The subcontractors cross-appeal from an order of the court denying their motion for leave to amend their pleadings and for other relief. We affirm.

BACKGROUND

¶2 St. Croix Regional Medical Center, Inc. (St. Croix) contracted with Keller Construction to serve as the general contractor on a remodeling and expansion project at St. Croix's facility. Keller Construction in turn subcontracted with Badger State, NEI and W. Zintl Construction to provide labor and materials for the project. For reasons unknown to us, the subcontractors were never paid in full.

¶3 A dispute arose between Keller and St. Croix, which was submitted to arbitration under the construction industry arbitration rules of the American Arbitration Association. Although the subcontractors were not parties to the arbitration, the arbitration award allocated to Keller the responsibility of indemnifying St. Croix against any claims filed by Keller's subcontractors. An exhibit to the arbitration award set forth the amount of each of the subcontractors' lien claims. Keller stipulated to the confirmation of the award.

¶4 When Keller thereafter failed to pay the subcontractors' liens, the subcontractors brought the present action seeking a money judgment against Keller in the amount of their separate claims. Keller moved the court for judgment on the pleadings, claiming that the subcontractors' claims were time

barred, that the subcontractors were contractually obligated to “defend, indemnify and otherwise hold Keller harmless” from those claims, and apparently that the subcontractors were obligated to seek payment from St. Croix for their liens. Keller also moved the court, in the alternative, for an order compelling the subcontractors to mediate and arbitrate their claims, which Keller claimed the subcontractors agreed to do under their subcontracts. The subcontractors, in turn, moved the court for summary judgment and for permission to amend their pleadings.

¶5 The circuit court denied Keller’s motion and entered summary judgment in favor of the subcontractors. The court held that the subcontractors were “third[-]party beneficiaries” of the arbitration award, which directed Keller to pay the subcontractors. The circuit court also dismissed as moot the subcontractors’ motion for leave to amend their pleadings. Keller appeals and the subcontractors cross-appeal.

DISCUSSION

¶6 Keller contends that the circuit court erred in: granting summary judgment in favor of the subcontractors because the subcontractors were not third-party beneficiaries of the arbitration award, the subcontractors’ claims are time barred and, even if their claims are not time barred, the subcontractors agreed to the mediation and arbitration of their claims. The subcontractors contend that the court erred when it denied their motion to amend their pleadings.

A. Summary Judgment

¶7 Summary Judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS.

STAT. § 802.08(2) (2009-10).¹ We review summary judgment de novo, utilizing the same methodology as the circuit court. *Hardy v. Hoefflerle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843.

¶8 The circuit court held that the subcontractors are third-party beneficiaries of, and thus entitled to the benefit of, the award in arbitration. The third-party beneficiary doctrine is a contract doctrine that is well established in Wisconsin. See *Severson v. Milwaukee Auto. Ins. Co.*, 265 Wis. 488, 61 N.W.2d 872 (1953).² The doctrine provides an exception to the general rule of privity of contract that only individuals who are parties to a contract may enforce it. Under third-party beneficiary doctrine, a person who is not a party to a contract “may enforce a contract as third-party beneficiary if the contract indicates that he or she

¹ All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

² The supreme court explained the doctrine of third-party beneficiary in *Severson v. Milwaukee Auto. Ins. Co.*, 265 Wis. 488, 494, 61 N.W.2d 872 (1953):

Without further discussion of the matter we adhere to the doctrine that where one person, for a consideration moving to him from another, promises to pay to a third person a sum of money, the law immediately operates upon the acts of the parties, establishing the essential of privity between the promisor and the third person requisite to binding contractual relations between them, resulting in the immediate establishment of a new relation of debtor and creditor, regardless of the relations of the third person to the immediate promisee in the transaction; that the liability is as binding between the promisor and the third person as it would be if the consideration for the promise moved from the latter to the former and such promisor made the promise directly to such third person, regardless of whether the latter has any knowledge of the transaction at the time of its occurrence; that the liability being once created by the acts of the immediate parties to the transaction and the operation of the law thereon, neither one nor both of such parties can thereafter change the situation as regards the third person without his consent.

was either specifically intended by the contracting parties to benefit from the contract or is a member of a class the parties intended to benefit.” *Milwaukee Area Technical College v. Frontier Adjusters of Milwaukee*, 2008 WI App 76, ¶20, 312 Wis. 2d 360, 752 N.W.2d 396.

¶9 The circuit court held that although the subcontractors were not parties to the arbitration, they were “member[s] of a class that the [arbitration] award intended to benefit” and were therefore third-party beneficiaries of the arbitration award. The court based its reasoning on the fact that the award was specific in determining the amounts due to each subcontractor and required that Keller be responsible for payment.

¶10 Keller and the subcontractors dispute whether the third-party beneficiary doctrine supports the view that the subcontractors may be treated as beneficiaries of the arbitration between Keller and St. Croix, such that the subcontractors may rely on the arbitration award to compel payments from Keller. However, neither Keller nor the subcontractors have directed us to any legal authority applying the third-party beneficiary doctrine to an arbitration award. We have not found any such authority in our own research.

¶11 Keller cites to *Jones v. Poole*, 217 Wis. 2d 116, 121, 579 N.W.2d 739 (Ct. App.1998), where we held that a third-party beneficiary to a contract is subject to the arbitration provisions of that contract. We explained that “[w]hen a right has been created by a contract, the third party claiming the benefit of the contract takes the right subject to all the terms and conditions of the contract creating the right.” *Id.* Keller cites *Jones* in its brief for the proposition that the subcontractors would have to be third-party beneficiaries of the contract for arbitration in order to benefit from the arbitration.

¶12 Keller misreads *Jones*. While *Jones* holds that third-party beneficiaries are subject to the arbitration provisions of a contract of which they are such beneficiaries, it does not specifically hold that it is not possible to be a third-party beneficiary of an arbitration award. Nonetheless, having found no authority which applies the third-party beneficiary doctrine to arbitration awards, we assume, without deciding, that, at a minimum, the subcontractors would have to be third-party beneficiaries of the contract under which arbitration took place in order to be able to enforce the award.

¶13 Keller attempts to establish that the subcontractors are not third-party beneficiaries of the underlying contract. In the following paragraphs, we address and reject each of Keller’s third-party beneficiary arguments.

1. The Contract Documents and Relevant Provisions

¶14 The contract documents that governed the work performed by Keller for St. Croix are an interlocking collection of documents involving several parties. Nowhere in the record on appeal is the entire collection of contract documents set out in one place, and one important part of the contract documents is not included in its entirety anywhere in the record.³ Nevertheless, from affidavits offered in support of summary judgment and reconsideration,⁴ it is possible to piece together the overall scheme of the contract documents and most of the contents. We

³ Keller asserts in its brief-in-chief: “Upon a motion for reconsideration the entirety of the Construction Contract executed by [St. Croix] and Keller was filed with the circuit court.” There is no citation to the record for this claim and, as explained above, a major portion of the contract does not appear in the record on appeal.

⁴ The authenticity of the copies of contract documents set forth in affidavits is undisputed.

describe the overall scheme and some of the documents' contents with specificity below.

¶15 The principal contract document is an agreement dated June 19, 2007, between St. Croix as owner, and Keller as contractor, for "Improvements to and Expansion of St. Croix Regional Medical Center, St. Croix Falls, Wisconsin." The June 19 agreement, which utilizes the American Institute of Architects (AIA) "Standard Form of Agreement Between Owner and Contractor where the basis of payment is a STIPULATED SUM," incorporates by reference a number of other documents that, together with the June 19 agreement, comprise St. Croix's and Keller's contract documents.⁵ Incorporated in the June 19 agreement, is a separate AIA form entitled *General Conditions of the Contract for Construction*, and a list of drawings and specifications.⁶ However, nowhere in the record is there an entire copy of these general conditions.

⁵ Photocopies of parts of the June 19, 2007 agreement are provided in several affidavits. The only complete copy is in the affidavit of Christopher S. Hayhoe, the attorney for St. Croix, which was offered in support of its motion for summary judgment on its cross-claim against Keller. The Standard Form utilized states on its cover that it is copyrighted by the American Institute of Architects and approved by the Associated General Contractors of America.

⁶ ARTICLE 8 ENUMERATION OF CONTRACT DOCUMENTS:

8.1 The Contract Documents, except for Modifications issued after execution of this Agreement, are enumerated as follows:

8.1.1 The Agreement is this executed 1997 edition of the Standard Form of Agreement Between Owner and Contractor, AIA Document A101-1997.

8.1.2 The General Conditions are the 1997 edition of the General Conditions of the Contract for Construction, AIA Document A201-1997.

¶16 In addition, the June 19 agreement incorporates the following three documents into the contract documents: “Contract for Professional Architectural Engineering and Pre-Construction Consulting Services between Owner and Contractor dated September 1, 2006”; “A/E Contract between Contractor and Architect dated November 15, 2006, with Addendum to extend scope of Architect’s duties to include Administration of this Contract”; and an Addendum to the June 19 agreement, which contains only terms that bear no relevance to this appeal.

¶17 The subcontractors were not parties to the June 19, 2007 agreement, nor any of the documents made part of the contract documents by that agreement. The subcontractors are, rather, parties to individual written subcontracts between Keller and the individual subcontractors, Badger State, NEI, Northern Electricians, and W. Zintl Construction.

2. The Contract Documents Contain Provisions Intended to Benefit the Subcontractors as a Class

¶18 As we stated above, the appellate record does not contain all of the contract documents. Missing from the record is a complete copy of the AIA form “General Conditions of the Contract for Construction.” The affidavit of Christopher Hayhoe, referred to in footnote 5, contains excerpts from the General Conditions form, from which we can obtain valuable information, and also see that very important information has been omitted from the appellate record.

¶19 Two different parts of the General Conditions form are included in Hayhoe’s affidavit. First, there is the cover page, which includes a Table of

Articles listing the topics covered within the General Conditions.⁷ Second, there is a part of Article 9, which discusses “payments and completion.” Among the parts of the general conditions revealed by the Table of Articles to not be included in the record is Article 5, which covers subcontractors.

¶20 Notwithstanding its incompleteness, the record demonstrates that the contract between Keller and St. Croix was intended to benefit subcontractors. The portion of Article 9 of the General Conditions form that is included in the record contains specific provisions that are intended to benefit the subcontractors.

¶21 For example, Section 9.6.2 of Article 9 of the General Conditions form provides: “The Contractor shall promptly pay each Subcontractor, upon receipt of payment from the Owner, out of the amount paid to the Contractor on account of such Subcontractor’s portion of the Work, the amount to which said Subcontractor is entitled” Section 9.6.7 of the same article adds:

Unless the Contractor provides the Owner with a payment bond in the full penal sum of the Contract Sum, payments

⁷ TABLE OF ARTICLES:

1. GENERAL PROVISIONS
2. OWNER
3. CONTRACTOR
4. ADMINISTRATION OF THE CONTRACT
5. SUBCONTRACTORS
6. CONSTRUCTION BY OWNER OR BY SEPARATE CONTRACTORS
7. CHANGES IN THE WORK
8. TIME
9. PAYMENTS AND COMPLETIONS
10. PROTECTION OF PERSONS AND PROPERTY
11. INSURANCE AND BONDS
12. UNCOVERING AND CORRECTION OF WORK
13. MISCELLANEOUS PROVISIONS
14. TERMINATION OR SUSPENSION OF THE CONTRACT

received by the Contractor for Work properly performed by Subcontractors and suppliers shall be held by the Contractor for those Subcontractors or suppliers who performed Work under contract with the Contractor for which payment was made by the Owner.

Further, Section 9.6.3 of Article 9 of the General Conditions form provides: “The Architect will, on request, furnish to a Subcontractor, if practicable, information regarding percentages of completion or amounts applied for by the Contractor and action taken thereon by the Architect and Owner on account of portions of the Work done by such Subcontractor.”

¶22 These provisions protect the owner at the same time that they protect the subcontractors. Under the construction lien law, WIS. STAT. §§ 779.01 – 779.17, the owner could be forced to pay subcontractors and material suppliers even though they already had paid the prime contractor for the labor and materials. The provisions cited in the previous paragraph limit the owner’s exposure to such an undesirable event. It is not unusual for a contract to benefit a party to the contract at the same time that it benefits a non-contracting third party.

¶23 In a typical insurance situation, the insurance company has a contract with an insured for payment of claims made by non-insured injured parties. Wisconsin courts have found that non-insured parties can be third-party beneficiaries of insurance contracts, even though the contract is for the benefit of insureds. Insureds receive protection from the claims of non-insured third parties and, at the same time, insurance contracts require insurers to pay valid covered claims of non-insured third parties. *See, e.g., Severson*, 265 Wis. at 494-95. The situation in Article 9 of the General Conditions form is comparable. Here the owner is protected from exposure to claims under the lien law, while at the same time the subcontractors’ right to be paid is protected.

¶24 Keller argues in its brief-in-chief that the subcontractors are specifically excluded as parties. In support of this argument, Keller relies entirely on language in the architect's contract and in an addendum to that contract. He refers to the addendum to the architect's contract as though it were an addendum to the June 19 agreement itself. Not only is this untrue, but, as we have noted in paragraph 16 above, there is a separate document which is an addendum to the June 19 agreement, which contains no provisions relevant to this appeal. Further, Keller makes no reference to the general conditions, which, as we have shown, do contain language indicating that the subcontractors are beneficiaries of the June 19 agreement. Keller's argument on this topic has no merit.

¶25 Therefore, taking into consideration the provisions of Article 9 of the general conditions that provide protection for subcontractors, we conclude that the contract documents created a contract that intended to benefit subcontractors on that job as a class. Because the subcontractors that are party to this matter are members of that class, we conclude that the contract between Keller and St. Croix is intended to benefit the subcontractors here.

3. Arbitration Under the Contract

¶26 The next issue we address is whether the arbitration that took place here was pursuant to the contract between Keller and St. Croix.

¶27 Arbitration under the construction industry rules of the American Arbitration Association took place, an award following arbitration was made, and Keller and St. Croix stipulated to judgment on the award in the circuit court in a separate court proceeding, *Keller Constr. Co. v. St. Croix Reg'l Med. Ctr.*, Polk County Case No. 2009CV284. In the arbitration award, the arbitrator set forth the

amount owing to each subcontractor and stated that Keller “is responsible for and must pay or otherwise satisfy” those listed amounts.

¶28 Keller argues that two other agreements, which are referred to in the contract documents, both contain arbitration clauses of their own and are the basis for the arbitration and that the subcontractors are specifically excluded as third-party beneficiaries in those documents.⁸

¶29 The portion of the contract between St. Croix and Keller that is part of the appellate record does not contain an arbitration clause. As shall be shown, the only reasonable conclusion that can be drawn, despite the absence of this provision in the record, is that such a provision exists and is part of the contract between Keller and St. Croix.

¶30 In the appellate record before us are copies of the two written demands for arbitration that initiated the arbitration proceeding. In each of those written demands, Keller demanded arbitration of its dispute with St. Croix based upon an arbitration clause contained in a June 19, 2007 agreement. The June 19 agreement, which forms the framework of the contract documents, is an AIA contract, form A101-1997. The June 19 agreement does not itself contain an arbitration clause; however, it expressly incorporates by reference the General Conditions form, AIA Form A201-1997, as part of the printed terms on the form. The combination of the June 19 agreement and the General Conditions form to

⁸ The contracts referred to by Keller are the “Contract for Professional Architectural Engineering and Pre-Construction Consulting Services between Owner and Contractor dated September 1, 2006,” and “A/E Contract between Contractor and Architect dated November 15, 2006, with Addendum to extend scope of Architect’s duties to include Administration of this Contract.”

that agreement, though separate forms, are essentially a single document in two parts.

¶31 Neither of the two agreements that Keller seeks to rely upon is dated June 19, 2007, and neither is an AIA document. We conclude that the arbitration demands and the arbitration were not based upon these provisions. Keller's attempt to argue that the arbitration was based upon these two documents is contradicted by the express terms of its arbitration demands.

¶32 We conclude, therefore, that the arbitration that took place between Keller and St. Croix was based upon an arbitration clause in the June 19 contract and that the subcontractors were third-party beneficiaries of that contract.

¶33 Keller offers no other developed arguments that the subcontractors are not entitled to enforce the arbitration award as third-party beneficiaries of the contract. We, therefore, affirm the circuit court's decision on this issue.⁹

⁹ We note that Keller does not present a developed argument that the amounts the subcontractors are entitled to under their contracts with Keller were not arbitrated. Accordingly, we do not address the matter. Keller does make the following argument:

[T]he Arbitration Award clearly and unequivocally addressed Keller's liability to [St. Croix] for Keller's sub-subcontractor or suppliers' valid and legally enforceable claims and liens—not its subcontractors' claims or liens. By the clear and unambiguous terms of the Subcontracts, Badger State, NEI, and Zintl are subcontractors—not sub-subcontractors or suppliers—relative to Keller and the Project.

This argument is without merit. Regardless of the nomenclature, the arbitration award specifically lists the subcontractors by name and amount due.

B. Other Issues

1. *Keller's Motion for Dismissal or Arbitration*

¶34 Early in the proceedings, Keller moved the circuit court for judgment on the pleadings based upon a provision in the subcontracts calling for a shortened limitation time period and, in the alternative, for an order requiring mediation and arbitration under the subcontracts. Prior to granting summary judgment to the subcontractors, the court notified the parties by letter that it was denying Keller's motions and planned to separately grant the subcontractors' motion for summary judgment. The court determined that Keller was precluded under the doctrine of issue preclusion from raising his contract claims because the arbitration between Keller and St. Croix had disposed of all issues. An order was subsequently entered on the court's ruling.

¶35 Keller challenges the denial of its motions for two reasons. Keller first argues that the subcontractors' claims are time barred by the terms of the subcontracts; and second, that the same claims are subject to mandatory binding arbitration under the subcontracts. Our holding affirming the circuit court's decision granting summary judgment to the subcontractors fully disposes of the dispute between Keller and the subcontractors based upon the arbitration under Keller's agreement with St. Croix and we do not reach these contract issues raised by Keller based upon the separate subcontracts. Keller has offered no developed argument that the provisions of the subcontracts somehow trump the final award in arbitration under the provisions of the June 19 agreement. *See Turner v. Taylor*, 2003 WI App 256, ¶1 n.1, 268 Wis. 2d 628, 673 N.W.2d 716 (when a decision on one issue is dispositive, we need not reach other issues raised).

2. *Denial of the Subcontractors' Motion to Amend Pleadings*

¶36 In a cross-appeal, the subcontractors appeal the circuit court's denial of its motion to amend pleadings. The court denied this motion as moot in its order granting summary judgment. The subcontractors argue that the circuit court abused its discretion by failing to consider its ability to collect on the judgment when deciding that the grant of summary judgment rendered the motion moot. This argument is not fully developed. The subcontractors offer no legal authority for their argument. Therefore, we do not reach this issue. *See Kruczek v. DWD*, 2005 WI App 12, ¶32, 278 Wis. 2d 563, 692 N.W.2d 286 (we need not consider arguments unsupported by reference to legal authority).

CONCLUSION

¶37 For the reasons given above, we affirm the decision of the circuit court granting summary judgment in favor of the subcontractors, dismissing Keller's motions, dismissing the subcontractors' motions and denying reconsideration.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

