

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 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. 2012AP789

Cir. Ct. No. 2011SC439

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

SEEFELDT CONSTRUCTION,

PLAINTIFF-RESPONDENT,

V.

DAVID BOWE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Calumet County:
JEFFREY S. FROEHLICH, Judge. *Affirmed.*

¶1 NEUBAUER, P.J.¹ David Bowe appeals from a small claims judgment in favor of Seefeldt Construction. Pursuant to the judgment, Bowe is to

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

pay a total of \$2205.64 to Seefeldt including \$1106.64 in accrued interest and approximately \$1100 in attorney fees and costs. Bowe contends that the trial court erred when it failed to credit him for a \$1000 down payment made under the terms of the contract. Bowe further argues that, when the \$1000 down payment is credited, he owes no interest and therefore, no attorney fees. We reject Bowe's contentions. We affirm the judgment.

¶2 Seefeldt and Bowe entered into a contract on November 6, 2009, for the construction of a pole shed. The contract indicates a total contract price of \$22,105, which includes \$1000 down payment; \$4500 for concrete; \$11,500 for delivery and \$5105 for completion. Bowe paid the \$1000 down payment. The record reflects that, after the concrete slab for the shed had been poured, Bowe paid Seefeldt \$4500 for the concrete work and then canceled the contract.² Seefeldt had already purchased building materials in the amount of \$6511.70. Over the course of approximately fifteen months, Seefeldt was able to credit Bowe for materials used on other jobs and, in March 2011, Bowe's son paid Seefeldt \$3436.31 for remaining materials which were ordered for the shed but not used.³

¶3 Seefeldt filed an amended small claims complaint against Bowe demanding \$1842.65 plus attorney fees for Bowe's failure to fulfill obligations under a building contract. The \$1842.65 was the interest due under the contract.

² The parties disputed whether Bowe canceled the contract after informing Seefeldt that he was unable to get financing for the pole shed or whether there was a breach of contract concerning the quality of the concrete slab that was poured. The trial court rejected Bowe's counterclaim for breach of contract and Bowe does not appeal that ruling.

³ The record reflects that Seefeldt ordered materials in the amount of \$6511.70. However, Seefeldt was able to use some of the materials (lumber and overhead doors) on other jobs and, therefore, issued credits to Bowe's account. Seefeldt agreed to settle the balance for the remaining materials for \$3436.31, not including interest.

The attorney fees totaled \$954.50. Following a trial at which both Bowe and Marshall Seefeldt testified, the trial court found that Bowe had made a \$1000 down payment and had paid for the concrete work in full. As to Seefeldt's claim for interest on amounts owing for materials, the court found that Bowe defaulted and that Seefeldt had gone to great lengths to mitigate its damages related to the materials ordered for Bowe's construction project. The court determined that "the contract clearly sets forth the terms and conditions concerning default and interest." It found:

[C]onsidering the amount of the original contract, over \$22,000, and the significant mitigation on behalf of [Seefeldt], as well as the fact that there was over \$10,000 worth of materials and concrete involved in the project and that almost two years have elapsed since the delivery of the materials ... The Court will find for [Seefeldt] and award the interest costs and fees totaling \$2,205.64.

Bowe then requested he be credited for the \$1000 down payment. While the court acknowledged that the down payment had not been applied to any particular piece of equipment or construction material, it found:

[I]t appears that the \$1,000 down payment was, in fact, accounted for in the time and effort that Mr. Seefeldt put into the original planning and preparation concerning the ordering of the materials as well as the other duties that he carried out before construction began. As least that's the Court's recollection from the testimony that was elicited at trial.

Bowe requested reconsideration of the court's ruling, arguing that the \$1000 was not a general contractor fee under the parties' contract, but a down payment. Following a motion hearing, the court rejected Bowe's argument.

¶4 Bowe appeals.

¶5 Bowe contends that he is entitled to credit for the \$1000 down payment and that the trial court erred when it held that the down payment could be used to compensate Seefeldt for the planning and preparation of construction. The interpretation of a contract is a question of law which is subject to de novo review. See *Borchardt v. Wilk*, 156 Wis. 2d 420, 427, 456 N.W.2d 653 (Ct. App. 1990). The ultimate aim of all contract interpretation is to ascertain the intent of the parties. *Patti v. Western Mach. Co.*, 72 Wis. 2d 348, 351-52, 241 N.W.2d 158 (1976). If this intent can be determined with reasonable certainty from the face of the contract itself, there is no need to resort to extrinsic evidence. *Id.* If, however, the language of the contract is ambiguous, then the court is not restricted to the face of the instrument in ascertaining intent, but may consider extrinsic evidence. *Id.* Words or phrases in a contract are ambiguous when they are reasonably susceptible of more than one meaning. *Id.*

¶6 Bowe does not challenge the trial court's default ruling. He posits the issue presented on appeal as whether the contract provides for the forfeiting of the down payment as an amount owing under the construction contract. The contract is ambiguous in that it does not specify what materials or labor the down payment covers.⁴ Bowe argues that there was no evidence offered by Seefeldt to support the trial court's finding that the down payment was compensation for Seefeldt's work in planning and preparation for the construction project. However, Seefeldt testified he informed Bowe that the \$1000 down payment would not be refunded and that it was Seefeldt's "wage for selling the building, ordering the building." Bowe did not contradict Seefeldt's account. In reaching

⁴ The contract is prefaced with the statement, "We hereby propose to furnish the materials and labor necessary for completion of this project."

its decision, the trial court clearly found Seefeldt to be credible, stating: “I believe [the down payment] has been accounted for with the time and effort that Mr. Seefeldt put into this project before the contract fell through.” The trial court’s finding is not clearly erroneous and we have no basis to disturb it on appeal. *See* WIS. STAT. § 805.17(2); *Bank of Sun Prairie v. Opstein*, 86 Wis. 2d 669, 676, 273 N.W.2d 279 (1979) (when the trial judge acts as the finder of fact, the judge is the ultimate arbiter of the credibility of witnesses).

¶7 We conclude that the trial court’s decision was reasonable under the contract. The contract provided for interest at a rate of 1 1/2% per month (18% APR) on any unpaid balance. There was evidence in the record to support the trial court’s determination that Bowe defaulted under the terms of the contract and, given Seefeldt’s labor prior to Bowe’s breach, Seefeldt’s retention of the \$1000 down payment as an amount owing was reasonable. We need not address Bowe’s challenges to the calculation of interest and award of attorney fees, both of which are provided for under the contract. *See Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed). We affirm the judgment.

By the Court.—Judgment affirmed.

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

