COURT OF APPEALS
DECISION
DATED AND FILED

October 17, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2198 **Cir. Ct. No. 2009CV365**

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

GARY POEPPEL LIVING TRUST,

PLAINTIFF-APPELLANT-CROSS-RESPONDENT,

V.

ENBRIDGE PIPELINES (LAKEHEAD) LLC AND ENBRIDGE ENERGY, LIMITED PARTNERSHIP,

DEFENDANTS-RESPONDENTS-CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Jefferson County: WILLIAM F. HUE, Judge. *Affirmed*.

Before Blanchard, P.J., Higginbotham and Sherman, JJ.

¶1 SHERMAN, J. This case concerns an action brought by the Gary Poeppel Living Trust against Enbridge Pipelines LLC and Enbridge Energy, LP (hereinafter, Enbridge), seeking a declaration by the circuit court that Enbridge breached two easements and a subsequent agreement which gave Enbridge the

right to install pipelines across the Trust's property. The Trust sought an order of specific performance or alternatively money damages. The circuit court determined that Enbridge was in breach of contract and ordered Enbridge to specifically perform; however, the specific performance differed from that requested by the Trust. The Trust appealed and Enbridge cross-appeals. We affirm.

BACKGROUND

¶2 The Trust is the owner of approximately eighty acres of farmland (hereinafter, "the Farm") in the Town of Koshkonong. In 1968, the Trust's predecessors in interest conveyed to Enbridge's predecessor in interest, Lakehead Pipe Line Company, two easements over an eighty foot wide strip of land on the Farm for the purpose of constructing and maintaining pipelines. Except for the legal descriptions, the wording of the two easements is virtually identical. The easements provide in relevant part:

> THIRD: The Grantee shall, at the time of construction, bury said pipelines at a sufficient depth through cultivated lands so that they will not interfere with ordinary cultivation ….
>
> ….
>
> SEVENTH: Rock greater than 2-1/2 inches in diameter brought to the surface by pipeline trenching through cultivated areas, will be buried by Grantee, so as not to interfere with ordinary cultivation. Such rock that cannot be so buried, shall be removed from the premises or deposited at a location thereon as directed by Grantor.
>
> EIGHTH: In so far as practical, strata of earth removed from the proposed excavation shall be returned to the excavation in inverse order to its removal so that the surface and sub-soil strata will be of the same general characteristics as prior to removal.

> NINTH: The Grantee will bury the pipeline and other appurtenances to a depth to afford a minimum of three feet (3') of cover, except where the pipeline crosses an existing drainage ditch and a proposed drainage ditch. At these two locations, the depth below the existing surface shall be as designated by Grantor. Prior to construction of the initial pipeline, Grantee shall be given notice of the required depth of pipeline cover. It being anticipated that both locations will require not more than three feet (3') of cover below a drainage ditch depth of eight feet (8') or a total depth below existing ground surface of eleven feet (11'); and also except at a location where the drain tile is to be installed. At this location, to be specified prior to construction, the Grantee will bury the pipeline to a depth to afford a cover of six feet (6').

The easements also granted Enbridge's predecessor in interest the right to install additional pipelines.

¶3 In 1968 Enbridge's predecessor in interest installed a pipeline within its easements. After the installation of the 1968 pipeline, the Trust's predecessors in interest installed drain tile across portions of the easements, which diverted ground water to a creek. The Trust's predecessors farmed the property following the installation of the pipeline and encountered "no significant water problems" prior to 1998.

¶4 The Farm ultimately passed to the Trust and in 1997-1998, Lakehead installed a second pipeline within its easement. During installation of the second pipeline, Lakehead cut the drain tile that crossed its easement, but failed to repair or replace them. The land subsequently became wet and the Trust and Lakehead reached an agreement that, at Lakehead's expense, the drain tile would be rearranged and a "header" would be installed along one edge of the easements where some of the drain tile would drain. Ultimately, these repairs did not work and the Farm continued to suffer from drainage problems.

¶5 In 2006, Enbridge, now the owner of the easements, advised the Trust that it planned to install two additional pipelines within the easements. However, to do so, Enbridge needed permission to use additional land beyond the easement for temporary workspace and Enbridge asked the Trust's trustee, Gary Poeppel, to agree to Enbridge's usage of the additional land by signing a document entitled "Additional Pipeline Rights Exercise and Receipt." Poeppel refused to agree to Enbridge's usage of additional land on the Farm unless Enbridge agreed to take certain steps to resolve the continuing drainage problems. Poeppel believed that the 1997-98 pipeline, and possibly the 1968 pipeline, were not buried at a sufficient depth, as required by the 1968 easements, and that Enbridge had failed to replace the drain tile as required by the easements.

¶6 Poeppel informed Natalie Cheseldine, Enbridge's right-of-way agent, that he "would like Enbridge to conform the [1997-98] pipe[line] … to the conditions that are in the agreement and easement," and if the 1968 pipeline was discovered not to have been installed "to the proper elevation below grade, that it be brought in compliance with the agreement also." Enbridge's agent later advised Poeppel via email that Enbridge would "do whatever [it] need[s] to do, to get your tracts in compliance with the original easement conditions and restore the land to proper working order." Attached to the email was a document entitled "Construction Line List Items." This document provided as follows:

> 1. At time of construction, we will conform the second pipe (line 14) that was installed to meet the conditions, stated as "NINTH" in the easement ….
>
> 2. Prior to construction, we will do an inspection of the first pipe … that was installed and if the inspection shows that this pipe does not comply with the same condition, stated as "NINTH" in the easement … then this pipe will be brought into compliance at time of construction, as well.

> 3. After construction, all drain tile[] will be repaired/replaced and in proper working order. This will be done within one (1) year of completed construction.
>
> 4. The noted work and restoration is to be to the landowner's satisfaction and if he is not satisfied, then the remaining issues will be corrected until the landowner is satisfied.
>
> 5. By signing the ["Additional Pipeline Rights Exercise and Receipt"], the original easements are not being amended.

¶7 In April 2007, Poeppel signed the "Additional Pipeline Rights Exercise and Receipt" on behalf of the Trust, and both Poeppel and Cheseldine, on behalf of Enbridge, signed the "Construction Line List Items."

¶8 In the fall of 2007, Enbridge installed the two new pipelines. During the installation, Enbridge dug a trench on the Farm without segregating rock and topsoil, failed to repair the banks of the Farm's drainage ditches, and cut drain tile and the header, but failed to repair and/or replace those. At least three new springs opened up on the Farm as a result of the installation of the new pipelines. The new springs, along with the unrepaired drainage ditches and destroyed drain tile, caused water to back up and flood the Farm's fields. As a result, drainage problems on the Farm increased and the land became persistently water-logged.

¶9 In October 2007, Poeppel sent Cheseldine an email complaining that he believed that one of the two new pipelines had not been buried at the proper depth, and that the Farm was suffering from problems with water, erosion, and sediment in the drainage ditches. Cheseldine responded in November 2007, advising Poeppel that Enbridge "will still address [those] issues, but … [the pipeline contractor] is working on a deadline and need[s] to keep moving." Poeppel emailed Cheseldine again in February 2008 about the problems, but was

advised by Cheseldine at that time that the Trust's issues were "above our authority level," and that from that point forward, the Trust's issues "need[ed] to be addressed [to Enbridge's] legal counsel." Shortly thereafter, Cheseldine emailed Poeppel again and advised him that Enbridge would not consider lowering the pipelines, but would "work on the drain tile issues."

¶10 Ultimately, the Farm's drainage issues remained unresolved and in April 2009, the Trust brought suit against Enbridge seeking a declaration that Enbridge failed to comply with the terms of the 1968 easements and 2007 "Construction Line List Items." The Trust sought a judgment from the circuit court requiring Enbridge to specifically perform its obligations under the 1968 easements and 2007 Construction Line List, or, in the alternative, for money damages. Relevant to the present appeal, the Trust sought a determination by the court that Enbridge's pipelines were not buried at a sufficient depth in breach of the 1968 easements, and that the depth of the pipelines and the destruction of the drain tile resulted in the Farm being uncultivatable, in breach of the easements and 2007 Construction Line List, and it sought an order from the court obligating Enbridge to remedy those breaches.

¶11 Both the Trust and Enbridge moved for partial summary judgment. In a written decision, the circuit court concluded in relevant part that the 2007 Construction Line List was a valid contract and that the Trust was entitled to summary judgment on the issue of whether Enbridge was in breach of item "3" of that document for failing to repair and/or replace the drain tile, as required. The court ruled that the Trust was entitled to the remedy of specific performance in the form of a workable drainage system "provided that the costs associated with the remedy [were] not disproportionate to the value of the property." The court went on to conclude, however, that neither the Construction Line List nor the 1968

easements explicitly required Enbridge to install its pipelines at a depth of at least six feet, and that, although it was undisputed that the Farm suffered from drainage problems that inhibited crop production, issues of fact remained as to whether the depth of the pipelines or other alterations to the land as a result of the installation of the pipelines caused the land to be uncultivatable.

¶12 A trial to the court was then held on the issues of whether the pipeline depths interfered with ordinary cultivation, in violation of the THIRD paragraph of the easements, which required that the pipelines be buried at "a sufficient depth through cultivated lands so that they will not interfere with ordinary cultivation," and whether specific performance in the form of a workable drainage system was appropriate.

¶13 At trial, the parties took differing positions as to how the Farm should be dried out. The Trust presented evidence that lowering the pipelines was necessary, whereas Enbridge presented evidence that installation of new drain tile in between old drain tile, repair of old drain tile, and the installation of a header would be sufficient to dry the land. In a July 2012 written decision, the court found that the Trust failed to present sufficient evidence to convince the court that the Trust's plan for drying the land, which the court found had not been presented with any specificity, was superior to Enbridge's. The court further found that Enbridge's plan was supported by credible evidence and that the Trust had failed to present any evidence that, to a reasonable degree of probability, Enbridge's plan would not work. Accordingly, the court concluded that Enbridge should specifically perform by: (1) repairing, restoring and replacing drain tile on the Farm to assure that it operates properly and in a manner consistent with a plan presented at trial; (2) restoring the "strata" of the soil; (3) removing rocks greater than 2 ½ inches in diameter and construction debris in and around the easement

area; (4) removing willow trees from the Farm; and (5) excavating the drainage ditches. The court also stated that it would retain jurisdiction over the matter "so that both parties shall have immediate access to the Court should disputes arise during the course of repair, without having to file additional court fees or lawsuits concerning this matter."

¶14 Enbridge moved the circuit court for reconsideration of the court's July 2012 decision.[1] The court denied Enbridge's motion, stating that it would "not hold any other hearings" and would "not reconsider." In September 2012, the Trust and Enbridge sought confirmation from the court as to whether the court intended its July 2012 order to be final for purposes of appeal, and the court advised the parties that it "intended" the July 2012 order to be final and appealable. The Trust filed a notice of appeal and Enbridge filed a notice of cross-appeal.[2]

[1] Enbridge moved the court for "reconsideration, clarification and amendment of the court's findings of fact and conclusions of law." We construe Enbridge's request as a motion for reconsideration pursuant to WIS. STAT. § 809.64 (2011-12).

[2] Following entry of the parties' notices of appeal, the Trust moved the circuit court for postjudgment relief in the form of certain directions by the court to Enbridge with respect to top soil replacement, tree removal, electrical service and placement, and access. In a document captioned "Court Statement," the circuit court concluded that the Trust's postjudgment motion was untimely, but nevertheless clarified that it had adopted Enbridge's remediation plan and that the Trust was responsible for maintaining and paying for electrical service. The court also stated that it did "not intend to address, further, issues concerning 'reconsideration,' 'clarification,' renewal of jurisdiction, continuing jurisdiction or lawfulness of motions, postjudgment or otherwise." In its brief, the Trust puts emphasis on the "Court Statement." However, the "Court Statement" was entered after the entry of the notices of appeal and is therefore not before us on appeal. *See* WIS. STAT. RULE 809.10(4) (2011-12) (appeal from a final judgment or order brings before us only *prior* nonfinal orders or judgments).

DISCUSSION

¶15 The Trust contends the circuit court erred: (1) in concluding that Enbridge was not contractually obligated by the easements or the 2007 Construction Line List to install Enbridge's pipelines at a lower depth; (2) in concluding that the extent of Enbridge's specific performance was limited by the value of the Farm; and (3) failing to retain jurisdiction in order to "supervise [Enbridge's] process of compliance." Enbridge contends on cross-appeal that item number "4" of the Construction Line List is so vague, indefinite and lacking in mutuality as to be unenforceable.

A. Pipeline Installation Depth

¶16 In the circuit court's summary judgment order, the court concluded that neither the 1968 easements nor the 2007 Construction Line List obligated Enbridge to install its pipelines at a depth lower than three feet throughout the Farm except at three specifically identified locations—the two drainage ditches and at a location where drain tile was to be installed, the location of which was to be provided to Enbridge by the original owners at the time of the construction of the original pipeline. The Trust challenges the court's conclusion. The Trust argues that regardless of whether the Trust's land was cultivatable, Enbridge was required pursuant to the "NINTH" paragraph of the 1968 easements and by the 2007 Construction Line List to bury its pipelines at least six feet below where the Trust's drain tile existed prior to the installation of Enbridge's second pipeline in 1997-98.

¶17 Whether Enbridge was contractually obligated to install its pipelines six feet below where the drain tile existed prior to 1997-98 requires us to interpret the terms of the parties' contractual agreements. The interpretation of a contract

presents a question of law that we review independently. ***BV/B1, LLC v. InvestorsBank,*** 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622. If the terms of the contract are unambiguous, we construe the contract as it stands. ***Id.*** However, if we determine a contract provision is ambiguous, we look to extrinsic evidence to determine the contract's meaning. ***Id.*** "A contract is ambiguous when its terms are reasonably susceptible to more than one interpretation." ***Id***.

¶18 The "THIRD" provision of the 1968 easements required that "at the time of construction," Enbridge's predecessor shall "bury said pipelines at a sufficient depth through cultivated lands so that they will not interfere with ordinary cultivation." The "NINTH" provision of the 1968 easement required Enbridge and its predecessor to "bury the pipeline and other appurtenances to a depth to afford a minimum of three feet (3') of cover … except at a location where the drain tile is to be installed. At this location, to be specified prior to construction, [Enbridge] will bury the pipeline to a depth to afford a cover of six feet (6')." Item number "1" of the 2007 Construction Line List required that Enbridge "conform the second pipe [] that was installed to meet the conditions, stated as "NINTH" in the easement." And, item number "2" required Enbridge to inspect the first pipeline and "if the inspection shows that [the first pipeline] does not comply with the … 'NINTH' [condition] in the easement … then [that] pipe will be brought into compliance at [the] time of construction, as well."

¶19 We agree with the circuit court that nothing in the plain language of either the 1968 easement or the 2007 Construction Line List explicitly obligated Enbridge to install its pipelines at a depth of at least six feet below where the drain tile was installed by the Trust's predecessors after installation of the first pipeline was completed. The easement plainly obligates Enbridge to install pipeline at a depth of six feet at locations where drain tile was to be installed. However, the

plain language of the "NINTH" provision required that the Trust's predecessors specify those locations where the pipelines needed to be installed a minimum depth of six feet because of anticipated drain tile installation *prior* to construction of the first pipeline. The "NINTH" provision provides:

> *Prior to construction of the initial pipeline*, Grantee shall be given notice of the required depth of pipeline cover. It being anticipated that both locations will require not more than three feet (3') of cover below a drainage ditch depth of eight feet (8') … and also except at a location where the drain tile is to be installed. At this location, *to be specified prior to construction*, the Grantee will bury the pipeline to a depth to afford a cover of six feet (6').

Reading the provision as a whole, it is clear that the NINTH provision required the Trust's predecessors to notify Enbridge prior to construction of the first, or *initial*, pipeline of those locations where drain tile was to be installed. The Trust does not claim, nor does it cite to any evidence, that the Trust's predecessors did so. Accordingly, we conclude that neither the 1968 easements, nor the Construction Line List, required Enbridge to install the pipelines at a minimum depth of six feet where drain tile was installed after construction of the first pipeline was completed.

¶20 We read the Trust's brief as also arguing that Enbridge was required under the 1968 easements and the Construction Line List to install its pipelines at a minimum depth of six feet where the drain tile was located after 1968 and prior to 1997-98 because the Trust's land will not be otherwise cultivatable. The circuit court determined that although Enbridge breached its contractual obligation to repair or replace the drain tile, "[n]o credible evidence was presented at trial to a reasonable degree of engineering probability or any probability at all, to convince [it] that pipeline depth, in and of itself, cause[d] the land to be unusable for ordinary cultivation purposes."

¶21 The question of whether the Trust's property would be cultivatable through any various forms of remediation is a factual one. We will search the record to support a circuit court's factual findings, and we will not overturn the court's findings unless clearly erroneous. ***Fond du Lac Cnty. v. J.G.S., Jr.***, 159 Wis. 2d 685, 687-88, 465 N.W.2d 227 (Ct. App. 1990); *see* WIS. STAT. § 805.17 (2011-12).

¶22 Arthur Fish, the operator of Fish Drainage Company LLC, testified that his company had in the past installed drainage systems on property with soil conditions similar to that found on the Trust's property (muck) and that he had, at the request of Enbridge, designed a proposed drainage system for the Trust's property that would utilize headers to minimize the number of times the easement is crossed, and would space the drain tile at closer increments than those at which it was originally installed. Fish testified that in his opinion, the installation of the drainage system he designed would return the Trust's property back to cultivatable condition and that lowering the pipelines was unnecessary. Fish further testified that he had installed similarly designed drain tile systems over and around pipelines and that this type of system has become "kind of a common practice."

¶23 Jay Bergman, a civil engineer, testified that the drain tile system designed by Fish would "perform better" than the drain tile system that was originally installed on the Trust's property and would "adequately drain the property for ordinary cultivation." Bergman further testified that in his opinion, the pipelines did not need to be lowered in order for the new drain tile system to be installed.

¶24 Finally, Leonard Massie, an engineer who testified on behalf of the Trust, testified that he was uncertain as to whether reburying the pipelines at a

lower depth and installing new drain tile at their original spacing (fifty feet) would achieve greater drainage than the drainage tile system designed by Fish. Massie testified that the Trust was "perfectly happy" with the drain tile system prior to installation of the 1997-98 pipeline, and that he believed the Trust would be happy with that system.

¶25 We conclude that the court's finding that lowering the pipelines was not necessary to return Trust's land to cultivatable condition is supported by credible evidence and is therefore not clearly erroneous.

B. Land Value Limitations

¶26 The Trust contends that the circuit court properly determined that specific performance was appropriate in this case, but that the court improperly restricted that remedy based on the value of the land. We agree with Enbridge that the Trust misconstrues the court's decision.

¶27 The court did not limit specific performance to repair and replacement of drain tile based upon the perceived expense of lowering the pipelines. Rather, the court's specific performance decision was based upon its finding that replacement and repair of the drain tile system and installation of a new header would adequately address the Farm's drainage issues and return it to cultivatable condition.

¶28 In its summary judgment decision, the circuit court stated:

> If the Court required Enbridge to lower the pipeline, significant work already completed would have to be redone, significant expense would occur and cessation or reconfiguring the pipeline during reconstruction would result in significant profit and other loss to Enbridge due to

> flow interruption. Under those circumstances, specific performance likely would not be a viable remedy.

¶29 In the circuit court's findings of fact in its July 2012 order following trial, the court found that the Trust had, on summary judgment, proposed a plan to lower the pipelines, with cost estimates of $1.5 and $5.5 million. The court found that those cost estimates were so disproportionate to the value of the land that, "for the reasons set forth in the Court's analysis on [s]ummary [j]udgment," which the court "incorporated and reiterated" in its order, lowering the pipes was not warranted in equity.

¶30 The court's statements on summary judgment as to the expense of lowering the pipelines were made in the context of explaining that the specific performance ordered by it—repairing and replacing the drain tile—did not impose an inequitable burden on Enbridge. The court's statements were a further explanation that *even if* it were to find that lowering the pipelines was necessary, specific performance in that regard would not be equitable. Contrary to the Trust's suggestion, the court's statement was not an explanation as to why the court was not ordering Enbridge to rebury its pipelines at a lower depth. The court found that Enbridge was in breach of contract for failing to repair and/or replace the drain tile, not in breach of contract for failing to rebury the pipes at a lower depth. Accordingly, we conclude that the Trust's argument is without merit.

C. Continued Jurisdiction

¶31 The Trust argues that the circuit court erred in determining that the court did not have authority to answer questions pertaining to Enbridge's compliance with the court's July 2012 order. The Trust misconstrues the court's ruling.

¶32 The circuit court concluded in the July 2012 order that it "shall retain jurisdiction of this matter so that both parties shall have immediate access to the Court should disputes arise during the course of repair, without having to file additional court fees or lawsuits concerning this mater." Enbridge moved for reconsideration of the court's decision, which the court denied. Contrary to the Trust's assertion, the court did not conclude that it lacked authority to address further motions from either party. Rather, the court *denied* the Trust's motion to reconsider the July 2012 order, a decision the court later clarified in responding to the Trust's motion for postjudgment relief by stating that it would not address further "issues concerning 'reconsideration,' 'clarification,'" or the court's continuing jurisdiction over the matter. Accordingly, we conclude that the Trust's argument is without merit.

D. Cross-Appeal

¶33 Enbridge contends on cross-appeal that item number "4" on the 2007 Construction Line List is "so vague, indefinite and lacking in mutuality that it cannot be enforced or specifically performed" and, therefore, the provision is unenforceable.

¶34 Item "4" provides: "The noted work and restoration is to be to the landowner's satisfaction and if he is not satisfied, then the remaining issues will be corrected until the landowner is satisfied." Enbridge asserts that this provision is "vague, indefinite, and uncertain" so as not to be enforceable, and sets forth case law pertaining to the enforceability of vague, indefinite and uncertain contractual terms. However, Enbridge does not explain how or why item "4" is vague, indefinite and uncertain. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown*****,**

2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (an appellate court need not address conclusory and undeveloped arguments).

¶35 In its brief-in-chief, Enbridge devotes a substantial portion of its argument to emphasizing the likelihood that Poeppel will "not, and will never be, 'satisfied' with Enbridge's plan of repair and replacement of the drain tile." However, the Trust's likelihood of satisfaction is not evidence of the provision's vagueness, indefiniteness, or uncertainty. Moreover, Enbridge's claim that the Trust will never be satisfied is pure speculation. If and when the remediation efforts approved by the circuit court are carried out and the Trust is not satisfied, that issue may then be raised before the appropriate court. *See* ***Commerce Bluff One Condominium Ass'n, Inc. v. Dixon***, 2011 WI App 46, ¶22 n.6, 332 Wis. 2d 357, 798 N.W.2d 264 (this court does not provide advisory opinions).

¶36 Finally, Enbridge takes the position in its reply brief that the court's order of specific performance is "diametrically opposed" to item "4" of the 2007 Construction Line List. However, this argument was raised for the first time on reply and we therefore decline to address it. *See* ***Richman v. Security Savings & Loan Ass'n***, 57 Wis. 2d 358, 361, 204 N.W.2d 511 (1973) (we need not address arguments raised for the first time in a reply brief). Accordingly, we decline to address this issue further.

CONCLUSION

¶37 For the reasons discussed above, we affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.