COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2478 **Cir. Ct. No. 2012SC1734**

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

DAN MARINGER AND CARRIE MARINGER,

PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS,

V.

BURBACK BUILDERS, LLC,

DEFENDANT-RESPONDENT-CROSS-APPELLANT.

APPEAL and CROSS APPEAL from a judgment of the circuit court for Racine County: GERALD P. PTACEK, Judge. *Affirmed*.

¶1 NEUBAUER, P.J.[1] This appeal and cross-appeal are about a dispute regarding the installation of windows in a remodeling project. Dan and

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

Carrie Maringer (collectively referred to as Maringer) appeal the trial court's judgment in favor of Burback Builders, LLC, arguing that Burback violated home improvement consumer protection law because it did not perform according to their construction contract when it installed single-hung windows instead of double-hung windows in Maringer's home. Burbank cross-appeals, arguing that the trial court erred in reducing its claimed attorney's fees. We affirm.

BACKGROUND

¶2 The following facts were established at trial. Maringer entered into a remodeling contract with Burback on September 12, 2008. The contract incorporated "Professional Drawings and Specifications," dated July 1, 2008,[2] including "Construction Note E," which provided for the installation of Pella Proline clad double-hung windows. In a separate attachment, also incorporated into the contract and dated September 8, 2008, the brand of windows was indicated as Vinyl Kraft, not Pella. There was testimony that the Pella windows were out of Maringer's price range, so Burback agreed to supply Vinyl Kraft windows. There was also testimony that the parties decided on single-hung windows after Maringer had complained about problems with condensation; Burback advised that single-hung would be better to address this problem. There was also testimony that it would have been impossible for all the windows in the plans to be double-hung, as some were shown as fixed, sliders and octagonal. The windows that were installed included Vinyl Kraft single-hung windows; no double-hung windows were installed. Maringer accepted the construction work done at a final walk-through on June 4, 2009. At the final walk-through, Maringer

[2] The contract refers to these drawings and specifications as dated July 22, 2008.

did not question the type of window installed and in fact requested that a different style of glass be installed in one of the single-hung windows (which was done). There was testimony that, after the walk-through, Burback went out to Maringer's home six to ten times to address condensation concerns and that Maringer never brought up the single-hung versus double-hung issue.

¶3 In fall of 2010, Maringer complained of condensation on the inside of the windows. Burback contacted Vinyl Kraft, which sent representatives to the home and explained to Maringer that humidity in the house was causing condensation on the windows, including windows other than the Vinyl Kraft windows. Then, on March 27, 2012, Maringer filed a small claims complaint, alleging that Burback installed single-hung windows when the contract called for double-hung and requesting damages for breach of contract, violation of WIS. STAT. §§ 100.18(2)(a) and 100.20, Unfair and Deceptive Business Practices, breach of implied warranty of merchantability and fitness for a particular purpose and failure to follow accepted trade standards for workmanlike construction. Ultimately, the case was tried to the court, and the court entered judgment in favor of Burback, dismissed Maringer's claims with prejudice, and awarded Burback $12,751.57 of its claimed $23,284.07 in costs and attorney's fees. Maringer appeals the judgment in favor of Burback and dismissal of his claims and the award of actual attorney's fees in lieu of the statutory amount recoverable as costs, set forth in WIS. STAT. § 814.04(1). Burback cross-appeals the reduction of the amount of claimed attorney's fees.

DISCUSSION

Appeal

Judgment on Contract

¶4 Maringer argues that Burback violated WIS. STAT. §100.20(1) and WIS. ADMIN. CODE § ATCP 110.02(3)(d) (Oct. 2004)[3] "by providing contractually non-conforming goods and services under a written contract without a prior written agreement with the Maringers." Maringer contends that the trial court's decision relies on common law contract remedies and that such remedies "are displaced by this consumer protection statute." According to Maringer, our review "involves the application of a statute to uncontested material facts" and therefore is de novo.

¶5 Maringer is mistaken regarding our standard of review. Although the meaning of an unambiguous contract is a matter of law, ***Fillbach v. Production Credit Ass'n of Lancaster***, 141 Wis. 2d 767, 771, 416 N.W.2d 617 (Ct. App. 1987), when a provision is susceptible to different constructions, and therefore must be construed with the use of extrinsic evidence, the contract interpretation is a question of fact, ***Management Computer Serv., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996). Furthermore, the intent of the parties presents a question of fact and is to be determined from their words, written and oral, and their actions. ***Household Utils., Inc. v. Andrews Co., Inc.***, 71 Wis. 2d 17, 29, 236 N.W.2d 663 (1976).

[3] This provision has since been repealed and recreated. *See* WIS. ADMIN. CODE § ATCP 110.023(1) (Mar. 2014). Further references in this opinion to WIS. ADMIN. CODE § ATCP 110.02 are to the October 2004 version.

Once the facts are determined, the application of a statute to those facts is a question of law. *See* ***Reusch v. Roob***, 2000 WI App 76, ¶10, 234 Wis. 2d 270, 610 N.W.2d 168.

¶6 The facts as to the terms of the contract were disputed. This was a matter filed in small claims court that ended up with a two-day trial. We now review the trial court's determination of the terms of the contract. These are findings of fact that we review under the clearly erroneous standard. *See* WIS. STAT. § 805.17(2).

¶7 The trial court found that the written contract was ambiguous, and we agree. The court explained its conclusions at the decision on Maringer's motion for reconsideration:

> I guess what I'd say is what was the contract. You know, there clearly was a written contract that was used here. It was marked as an exhibit. It's in the court file, but it's also clear that … the facts preceding that show that there were discussions about what would be included. The contract itself doesn't say double hung or single hung. It simply incorporates a set of plans drawn by somebody else….
>
> Here, it's referring to another document that's attached, and that document in and of itself for the blueprints or the plans from the architect are confusing in and of itself as to what types of windows are to be installed in various places. It said that the windows are to be double hung, and clearly a number of the windows, including in the drawings, can't be double hung. They're impossible to be double hung. In fact, the architect's drawings themselves show sliding windows in some places, obviously not double hung windows, and the record is—is in my opinion replete with evidence that shows that Mr. Maringer and his wife did agree to a better installation. They were told of a more efficient installation with single hung versus double hung.
>
> And I'm satisfied based upon the testimony that I heard and the findings of fact that the Court made at the time of

> the trial, that they did agree to single hung prior to … signing the contract ….
>
> I think the facts establish here that the contract was in fact for single hung windows, not double hung because the contract itself does not state whether the windows are double hung or single hung. It refers to a set of blueprints, and obviously the meeting of the minds that occurred when this contract was signed was different than what the blueprints show. So I'm satisfied that … the contract was executed after the parties agreed to single hung windows, not double hung. That they made the change prior to signing the contract. The contract doesn't state one way or another. It simply incorporates blueprints, which in fact are not clear ….
>
> [I]t's physically impossible that all the windows in the drawing in the blueprint could be double hung. Some are fixed. Some are sliding. Some are octagonal, and so I'm satisfied that based upon the confusion created by the blueprints, that the agreement was made prior to the signing of the contract, and the meeting of the minds that occurred when the parties signed the contract was for the windows to be single hung ….

As detailed above in the background section, documents attached to the contract indicated two different brands of window, evidencing a change to Vinyl Kraft windows in September, with no indication in the document that the windows should be double-hung. The body of the contract was silent on the subject. The documents and testimony in the record support the trial court's conclusions, and the finding that the parties agreed to single-hung windows prior to signing the contract is not clearly erroneous.

¶8 Maringer argues that the case involves the application of a statute to uncontested facts and that the trial court erred by applying "common law contractual defenses and measure of damages arguments" when the case was really about the alleged violation of WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.02, which requires that changes to a written home improvement contract must be evidenced by the buyer's written consent.

¶9 What Maringer misses in his argument regarding consumer protection law is that the trial court found that the parties agreed on single-hung windows prior to the execution of the contract. The issue here is not which governs, common law contract doctrines or Wisconsin consumer law. The issue here is what was the meeting of the minds about the type of windows to be installed. The statutory and administrative law relied upon by Maringer assumes that there is a contract and that the contract has been subsequently modified. The statutes and code address whether modifications to the contract—change orders—were authorized by the buyers. Here there was no change order that needed to be signed by Maringer. There was no bait and switch selling—Maringer agreed to the single-hung windows prior to the execution of the written contract. The trial court found that there were no unfair trade practices and we agree that, as a matter of law, there was no violation of WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.02. *See* ***Reusch***, 234 Wis. 2d 270, ¶10 (application of statute to facts is a question of law).

Award of Attorney's Fees

¶10 The contract called for reasonable attorney's fees to the prevailing party in an action brought to enforce or interpret provisions of the contract. After the trial court dismissed Maringer's claims, it awarded $12,751.57 in attorney's fees and costs to Burback. Maringer argues that it was error for the court to award attorney's fees in excess of the costs set forth in WIS. STAT. § 814.04(1). Maringer maintains the maximum award is dictated by the small claims costs statute, WIS. STAT. §§ 799.25(10)(a) (allowing as item of costs attorney fees as provided in WIS. STAT. § 814.04(1)) and 814.04(1) (allowing as item of costs attorney fees ranging from $100 to a maximum of $500).

¶11 With some exceptions not applicable here, the rule is that a party is not entitled to recovery of attorney fees unless they are authorized by contract or statute. ***Milwaukee Teachers' Educ. Ass'n v. Milwaukee Bd. of Sch. Dirs.***, 147 Wis. 2d 791, 796-97, 433 N.W.2d 669 (Ct. App. 1988). WISCONSIN STAT. § 814.04 does not permit a court to award actual attorney fees. Instead, it gives the court discretion to award "costs" to the successful party. These "costs" include only limited attorney fees, depending on the amount of the underlying claims. Sec. 814.04(1). This is in contrast to an award of actual attorney fees pursuant to the terms of a contract. *See* 20 C.J.S. *Costs* § 140 (2007) ("If a party's claim to attorney's fees is based upon a contract, the terms of the contract necessarily govern and prevail over limits imposed by general statutes or rules authorizing an award of attorney's fees." (footnotes omitted)). WISCONSIN STAT. § 814.045, entitled Attorney fees; reasonableness, applies "in any action involving the award of attorney fees that are not governed by [§] 814.04(1)," the general "Items of costs" statute. Here, the award of attorney fees is not governed by § 814.04(1) because it is governed by the contract. The statutory scheme recognizes that parties may contractually agree to attorney fees wholly aside from statutorily prescribed costs. *See* § 814.045(3) ("This section does not abrogate the rights of persons to enter into an agreement for attorney fees, and the court shall presume that such an agreement is reasonable.") The trial court did not err in awarding Burback attorney's fees pursuant to the contract instead of the statutory maximum for costs set forth in § 814.04(1).

Cross-Appeal

Reduction of Attorney's Fees

¶12 Burback argues on cross-appeal that the trial court erroneously exercised its discretion in reducing Burback's claimed attorney's fees from $22,932.59 to $12,000. Burback points out that the trial court considered the fifteen factors set forth in WIS. STAT. § 814.045 and concluded that the factors supported the claimed award, but that the protracted nature of the case was due to "the Plaintiff's penchant for detail and over-trial."

¶13 Appellate review of an award of attorney fees is limited to whether the trial court properly exercised its discretion. ***Anderson v. MSI Preferred Ins. Co.***, 2005 WI 62, ¶19, 281 Wis. 2d 66, 697 N.W.2d 73. The trial court's decision will be upheld if we can find any facts in the record that support it. ***Peplinski v. Fobe's Roofing, Inc.***, 193 Wis. 2d 6, 20, 531 N.W.2d 597 (1995).

¶14 The trial court here addressed the applicable factors in a well-reasoned and thorough written decision. While the trial was protracted, the case presented no novel or difficult issues. Nothing suggested that Burback's attorney was precluded from seeking other employment by his representation of Burback. Burback's attorney possessed the skill and experience to defend Burback, and the hourly fee charged was customary for the area. While the case was a small claims action, it took on characteristics of a large claim action in that the court considered a motion in limine, competing motions for summary judgment, two separate withdrawal motions, and heard a two-day trial and a motion to reconsider. Other factors the court considered were the $10,000 limit on a small claims recovery and Maringer's claimed damages in excess of $14,000, which, had he recovered, would have capped his attorney's fees at $42,000 under WIS. STAT.

§ 814.045(2)(a). Taking these facts into consideration, the trial court concluded that "fees of $23,000 for this small claims action is unreasonable when placed in perspective…. [T]his case was not unique or difficult in any way …." Given the ordinary nature of the case, the trial court concluded that $12,000 in attorney's fees was a reasonable amount. The trial court's conclusion is supported by the record and we affirm.

By the Court.—Judgment affirmed.

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