COURT OF APPEALS
DECISION
DATED AND FILED

August 16, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1026 **Cir. Ct. No. 2013CV236**

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

CITY OF STURGEON BAY,

PLAINTIFF-RESPONDENT,

V.

RANDALL S. VANDEN ELZEN, ANDREW J. GUNDRUM, SR. AND KAREN M. GUNDRUM,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Door County: D. TODD EHLERS, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Seidl, JJ.

¶1 PER CURIAM. Randall Vanden Elzen, Andrew Gundrum, Sr., and Karen Gundrum (collectively "Vanden Elzen") appeal a money judgment in favor of City of Sturgeon Bay concerning a stormwater drainage outfall project. The circuit court held the parties' unambiguous contract contained a $150,000.00

limitation on the City's maximum liability for the project's cost, and Vanden Elzen was legally obligated to reimburse the City $34,551.16 for the project's cost over $150,000.00. We affirm the judgment.

¶2 The parties' agreement allowed the City to connect an outfall pipe for drainage of stormwater to a pipe previously existing under Vanden Elzen's home. The City desired to connect that pipe with an extension pipe reaching from the shoreline approximately one hundred feet into the waters of Sturgeon Bay. The agreement also conferred a benefit on Vanden Elzen, as it required the City to dredge on both sides of the extended pipe to create a deep water area for Vanden Elzen, who would then construct a pier over the pipe structure for private boating use. The parties agreed the City would pay the first $150,000.00 for the project, with costs exceeding that amount to be paid by Vanden Elzen.

¶3 The City subsequently contracted with a marine contractor to place the pipeline, dredge the channels to allow Vanden Elzen access for boating, and construct a pipe protection structure using pipe pilings. At Vanden Elzen's request, the contractor removed thirty-three truckloads of additional material from the channel.

¶4 The City commenced the present lawsuit when Vanden Elzen refused to reimburse the City for $34,551.16 paid on the project in excess of $150,000.00. After the circuit court denied cross-motions for summary judgment, the case was tried to the court. After post-trial briefing, the court issued a written decision awarding a money judgment to the City in the amount of $34,551.16. Vanden Elzen now appeals.

¶5 Vanden Elzen insists "neither Section 3.3 nor any other provision of the 2009 Agreement obligates [Vanden Elzen] to reimburse or pay the City for expenses related to the Project." Vanden Elzen is incorrect.

¶6 Section 3.3 of the agreement between the City and Vanden Elzen provides as follows:

> 3.3 The City of Sturgeon Bay commits to expend up to One Hundred Fifty Thousand Dollars ($150,000.00) in total for this project. Any expenses above that sum shall be the sole responsibility of Property Owners.

¶7 The circuit court correctly concluded "there is nothing unclear or ambiguous regarding this contract's language." A simple and straightforward reading of Section 3.3 provides the City pays the first $150,000.00 on the project and Vanden Elzen pays any expenses above that sum.

¶8 Vanden Elzen nevertheless insists the parties' agreement was "premised on the City's receipt of an easement as full consideration for the Project costs and the City's promise to stay within the $150,000 limit that was set for the project." Once again, we agree with the circuit court, there is "no merit" to Vanden Elzen's argument that they are not responsible for expenses above $150,000.00. As the court stated in its written decision:

> If it was the agreement of the parties that [Vanden Elzen] would have no financial responsibility or liability for any portion of the expense of this dredging project, the parties' contract could have been worded to that effect. It was not. If it was the parties' agreement that the total cost of this project could not go over $150,000.00 that provision could have been a part of the written contract. It was not. Instead, the contract provided the [City] was responsible for the first $150,000.00 of these expenses and if ultimately the cost exceeded that amount, [Vanden Elzen] would be responsible above that figure.

¶9 Vanden Elzen's reliance on extrinsic evidence is misguided. For example, Vanden Elzen would have this court look at the context of the negotiations to infer the parties intended to limit costs for the project to $150,000.00. But that is not a proper argument given the unambiguous contract. When the terms of a contract are plain and unambiguous, we construe the contract as it stands. ***Kernz v. J.L. French Corp.***, 2003 WI App 140, ¶9, 266 Wis. 2d 124, 667 N.W.2d 751. We presume the parties' intent is evidenced by the words they choose, if those words are unambiguous. ***Id.*** We explained the rule in ***Hortman v. Otis Erecting Co.***, 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct. App. 1982):

> In construing the terms of a contract, where the terms are plain and unambiguous, it is the duty of the court to construe it as it stands, even though the parties may have placed a different construction on it. It seems to us that when parties to a contract adopt a provision which does not contravene a principle of public policy, and which contains no element of ambiguity, the court has no right, by a process of interpretation, to relieve one of them from any disadvantageous terms which he has actually made.

¶10 In its written decision, the circuit court acknowledged that prior to the contract being entered into, it was the parties' hope that the project's cost would not exceed $150,000.00. This figure was based on estimates of material to be dredged. However, the court also appropriately found that additional dredging was done at Vanden Elzen's request. Regardless, Section 3.3 is clear and unequivocal regarding the limitation on the City's maximum liability. The ultimate cost of the project exceeded that sum, and Vanden Elzen was contractually liable for expenses over that amount.

¶11 There is also no merit to Vanden Elzen's argument concerning the sufficiency of the evidence at trial. The City proved the cost of the project through city engineer/project manager Anthony Depies, who was satisfied with the

performance of the marine contractor and approved the invoices for payment; and through city finance director Valerie Clarizio who testified:

> I look to make sure that the purchase order matches the invoice. I look to make sure that the purchase order is made out to the same vendor as the invoice. I look at the amounts. I compare the amounts of the purchase order and the invoice, and I look to see that there is a department head signature and account number.

¶12 The circuit court specifically found the City established the project's cost of $184,551.16, and the court's findings of fact are not clearly erroneous. *See* WIS. STAT. § 805.17(2). As the court stated:

> Valerie Clarizio, the [City's] Finance Director, testified at trial that the [City] for this project paid a total of $184,551.16. Those payments are detailed in Exhibit 28. [Vanden Elzen] at page 4 of [his] January 9th Closing Argument argues that this is hearsay evidence by the [City] without any supporting testimony or evidence from [the marine contractor or its subcontractor] verifying those charges.
>
> I am not convinced that [Vanden Elzen's] hearsay argument creates any question for me as the fact finder in this case that the charges by [the marine contractor] to the [City] for this project were questionable or not legitimate. [Vanden Elzen] had an opportunity to call witnesses at the trial regarding the calculation of these charges or how the measurements were conducted by [the marine contractor or its subcontractor]. [He] chose not to do so. I find the [City] has met its burden of proof by the greater weight of the credible evidence to a reasonable certainty that this project cost them $184,551.16.

¶13 Vanden Elzen argues the final dredging volume exceeded the 3,500 cubic yard limitation on the permits issued by the Wisconsin Department of Natural Resources and the United States Corps of Engineers. According to Vanden Elzen, the City was therefore "precluded from recouping any damages resulting from the unlawful excess dredging." Vanden Elzen relies upon ***Lytle v.***

Godfirnon, 241 Wis. 533, 535-36, 6 N.W.2d 652 (1942). The ***Lytle*** court held, "If, after hearing all of the evidence, the trial court concludes that plaintiff did himself perform services [as an architect] which he could not lawfully perform without a license, then he cannot recover." ***Id.*** at 535.

¶14 ***Lytle*** has no application to the present case. While the law may not enforce an illegal contract, that rule applies only between the immediate parties to the contract. *See* ***Matta v. Katsoulas***, 192 Wis. 212, 214, 212 N.W.2d 261 (1927). The contract between the City and Vanden Elzen contained no dredging limitations. In addition, the city engineer/project manager testified that it was only after project completion that the subcontractor notified the City that the dredge material permit limitation had been exceeded.

¶15 Vanden Elzen insists the contract between the marine contractor and the City was incorporated by reference into the City's agreement with Vanden Elzen. Vanden Elzen argues, "The Project and [the marine contractor's] Contract made it clear that the amount of dredged material removed from the Project was not to exceed 3,500 cubic yards and that no payment shall be made for any dredge volume above 3,500 cubic yards." This is a mischaracterization of the record. There is no language in the agreement between the City and Vanden Elzen even remotely incorporating by reference the subsequent negotiated contract between the City and the marine contractor. And, as mentioned above, the contract between the City and Vanden Elzen contained no dredge limitations. The contract between the City and the marine contractor was separate and distinct from any agreement between Vanden Elzen and the City.

¶16 Vanden Elzen also argues the court failed to give meaning to an indemnification and hold harmless provision in Section 6.1 of their agreement

with the City, that "clearly indicates that the City essentially waived any right to recoup any expenses or seek reimbursement from [Vanden Elzen] related in any way to [the] Project." Vanden Elzen further contends, "Section 6.1 provides that the City is holding [Vanden Elzen] harmless for all claims related to, among other things, 'the construction.'"

¶17 Vanden Elzen's summary of this provision is inappropriate. Section 6.1 of the agreement provided in relevant part as follows:

> City agrees to indemnify and hold harmless [Vanden Elzen] from any claims or causes of action related to the construction, maintenance, placement or replacement of pipes or work done by or on behalf of the City either in connecting to the existing pipe or in maintaining such pipe.

¶18 By its language, Section 6.1 of the agreement does not waive reimbursement for expenses related in any way to the project or "the construction." As the circuit court properly concluded:

> Section 6.1 has no relevance to Section 3.3 at all. If I were to adopt [Vanden Elzen's] strained argument regarding the interrelationship of these two contract sections, I would render meaningless the expense allocation provisions provided for in Article III.

¶19 Finally, we reject Vanden Elzen's contention that the circuit court erred by denying his motion for declaratory judgment regarding pilings Vanden Elzen claimed were improperly anchored or secured. The court determined there was insufficient expert evidence or testimony at trial to contradict city engineer Depies, who testified as to the status of the pilings, and his opinion it was not necessary to repair or modify the pilings as Vanden Elzen insisted. Although Vanden Elzen testified as to his lay viewpoint, the circuit court is the arbiter of credibility. *See* ***Estate of Dejmal***, 95 Wis. 2d 141, 151-52, 289 N.W.2d 813 (1980). In addition, to the extent Vanden Elzen again seeks to

incorporate the contract between the City and the marine contractor in support of his argument, we reiterate our rejection of that suggestion. The court properly exercised its discretion by denying the motion for declaratory relief.

By the Court.—Judgment affirmed.

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