COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP2542 **Cir. Ct. No. 2014CV60**

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

BOB EWERS CONTRACTING LLC,

PLAINTIFF-RESPONDENT,

V.

JACOBEAN ENTERPRISES, LLC,

DEFENDANT-APPELLANT.

APPEAL from a judgment and orders of the circuit court for Richland County: WILLIAM ANDREW SHARP, Judge. *Affirmed*.

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

¶1 PER CURIAM. This case concerns a construction contract dispute. Jacobean Enterprises, LLC entered into a contract with Bob Ewers Contracting LLC for excavation and other tasks related to the construction of an All American Do-It Center in Richland Center. After a fact-intensive five-day bench trial

spanning several months, the circuit court found that Jacobean had breached the contract and entered judgment in favor of Ewers in the amount of unpaid invoice balances. For the reasons discussed below, we affirm.

BACKGROUND

¶2 In early 2013, Jacobean developed plans for the All American Do-It Center project. After two rounds of bidding, Jacobean awarded the contract for the Do-It Center excavation and preparatory work to Ewers.

¶3 On August 31, 2013, Ewers and Jacobean entered into the contract. Jacobean drafted the contract as a "firm bid" contract, meaning that Ewers would be paid no more than the amount stated. As pertinent here, the contract provides that invoices "for work completed shall be submitted on a monthly basis" with payment due within seven days of the invoice, and that "[d]elays caused by acts of God shall not result in penalties being enforced."

¶4 During the fall of 2013 and the following winter, Ewers worked at the Do-It Center site. By late April 2014, the parties had terminated their contract. Jacobean retained other contractors and subcontractors in order to complete the work covered by its contract with Ewers. Thereafter, Ewers sued for breach of contract and to recover unpaid invoice balances and Jacobean lodged a counterclaim alleging that Ewers had breached the contract and seeking damages.

DISCUSSION

¶5 Jacobean argues that the circuit court erroneously: (1) found that Jacobean breached the contract when it failed to pay the December 31, 2013 invoice from Ewers; (2) found that Jacobean again breached the contract when it terminated the contract in April 2014 after Ewers did not return to work due to

what Ewers perceived as excessively wet conditions; and (3) calculated the damages to include an amount that should have not been invoiced.[1]

¶6 We begin with the standard of review that governs this appeal, and then explain why, under that standard of review, Jacobean's arguments of error fail.

I. Standard of review

¶7 We review a circuit court's factual findings at a bench trial under the clearly erroneous standard. WIS. STAT. § 805.17(2) (2013-14).[2] This standard is well established:

> Findings of fact by the [circuit] court will not be upset on appeal unless they are against the great weight and clear preponderance of the evidence. The evidence supporting the findings of the [circuit] court need not in itself constitute the great weight or clear preponderance of the evidence; nor is reversal required if there is evidence to support a contrary finding. Rather, to command a reversal, such evidence in support of a contrary finding must itself constitute the great weight and clear preponderance of the evidence. In addition, when the trial judge acts as the finder of fact, and where there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses. When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the inference drawn by the trier of fact.

[1] Jacobean also argues that if we reverse the circuit court as to whether Jacobean breached the contract, then the evidence shows that Ewers breached the contract in April 2014 and Jacobean is entitled to damages. Because we affirm, we do not address this argument.

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Cogswell v. Robertshaw Controls Co., 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979) (citations omitted).

¶8 In sum, we will not set aside a fact found by the circuit court unless the record shows it to be clearly erroneous—meaning that, after accepting all credibility determinations made and reasonable inferences drawn by the fact-finder, the great weight and clear preponderance of the evidence supports a contrary finding. ***Noll v. Dimiceli's, Inc.***, 115 Wis. 2d 641, 643-44, 340 N.W.2d 575 (Ct. App. 1983). The standard for reversal is heavily weighted on the side of sustaining circuit court findings of fact in cases tried without a jury. ***Leimert v. McCann***, 79 Wis. 2d 289, 296, 255 N.W.2d 526 (1977).

II. The circuit court's finding that Jacobean breached the contract by failing to pay the December 31, 2013 invoice from Ewers

¶9 The circuit court found that Jacobean breached the contract because it was undisputed that Jacobean did not pay the December 2013 invoice from Ewers within seven days of the invoice, contrary to the contract term requiring payment within seven days of each monthly invoice. Jacobean argues that the circuit court erroneously found that Jacobean breached the contract when it did not pay the December 2013 invoice from Ewers, for two reasons. First, Jacobean argues that the circuit court erred as a matter of law by construing the contract in a way that fails to give meaning to the contract term requiring Ewers to be paid only for work completed. Second, Jacobean argues that the circuit court erroneously found as fact that Ewers had billed only for the work it had completed. We address and reject Jacobean's arguments as follows.

¶10 Jacobean first attempts to invalidate the circuit court's finding, which is based on undisputed evidence, by arguing that the circuit court erred as a

matter of law by erroneously construing the contract to require payment of an invoice even if the work was not completed and Ewers was consequently overpaid or had overbilled Jacobean. Jacobean's resort to "error of law" obscures the real nature of its argument, which is that Jacobean was excused from paying the December 2013 invoice because the invoice billed for work that had not been completed, and the circuit court erroneously found that the invoice was for work that had been completed and that Ewers was not overbilling and had not been overpaid. This is an argument that targets fact finding, not contract construction. We therefore reject Jacobean's "error of law" argument as improperly framed, and we proceed to address the factual error on which Jacobean's argument is based.

¶11 In deciding whether Jacobean was required to pay the December 31, 2013 invoice in order to avoid breaching the contract, the circuit court considered the evidence regarding whether Ewers had completed the work it billed for in that invoice. The court undertook a detailed review of the evidence and testimony presented at trial and found that "the most credible testimony in the record is that Ewers Construction performed work in December 2013 that is reflected in the monthly billing of December 31, 2013." The court reviewed the testimony for Jacobean to the contrary and found that it conflicted with and was undercut by other testimony and evidence. The court found that the December 2013 invoice was substantiated by credible evidence. The court concluded its extensive review of the evidence relating to whether the December 2013 invoice billed for work that Ewers had actually completed by pointing to evidence from Jacobean itself. That evidence comprises an email in which Jacobean's owner states that, as of January 2014, Ewers had completed roughly seventy percent of the work required by the contract. The court noted that the amount paid to Ewers under the contract as of that date was just shy of seventy percent of the total contract price. Based on this

and all other evidence presented at trial, the court found that "Jacobean had no legitimate reason not to pay" the December 2013 invoice from Ewers.

¶12 Jacobean on appeal engages in its own extensive review of the detailed and conflicting evidence offered by the parties as they sought to ascertain how much work had been completed, and whether Ewers had been overpaid or had overbilled as of December 2013. Jacobean argues that the circuit court wrongly relied on the evidence and calculations offered by Ewers' witnesses over evidence and calculations, undertaken "in a different manner," by Jacobean's witnesses. However, it is for the circuit court to resolve conflicting testimony and to assess the weight and credibility of the evidence presented. *See* ***Welytok v. Ziolkowski***, 2008 WI App 67, ¶28, 312 Wis. 2d 435, 752 N.W.2d 359 ("When there is conflicting testimony, the circuit court is the ultimate arbiter of the witnesses' credibility. Such deference is appropriate because the court has the opportunity to observe firsthand the demeanor of the witnesses and gauge the persuasiveness of their testimony." (citations omitted)). Jacobean itself identifies the evidence that supports the circuit court's findings as to this issue, but argues that the court should have credited and given greater weight to other evidence. Ultimately, Jacobean tries to relitigate the issue, but fails to demonstrate that the circuit court's findings as to this issue are clearly erroneous.

III. The circuit court's finding that Jacobean "again" breached the contract by demanding performance in April 2014

¶13 Jacobean contacted Ewers to resume work on the site after winter conditions abated. Specifically, Jacobean directed Ewers to resume work on April 21, 2014, saying that the contract would end if Ewers did not resume work at the site on that date. Ewers refused because the site was too wet. Jacobean argued in the circuit court that Ewers breached the contract when Ewers refused to resume

work on the site. The circuit court stated that this issue was "rendered moot by the Court's finding of [Jacobean's] breach of contract" when Jacobean failed to pay the December 2013 invoice from Ewers, but "for the sake of addressing all the issues in the case," the court proceeded to "decide it."

¶14 Neither of the parties addresses mootness on appeal. Rather, both parties address the merits, as the circuit court did. Consequently, we will do so as well.

¶15 The circuit court found that significant rain and snow storms resulted in the site being too wet to work in April 2014, that "[s]torms are an act of God," and that "Jacobean again breached the Contract by voiding the 'acts of God' provision and demanding Ewers Construction return to work." Jacobean argues, but fails to show, that the circuit court's findings are clearly erroneous.

¶16 The contract between Ewers and Jacobean specifies that delays "caused by acts of God shall not result in penalties being enforced." Acts of God consist of unforeseen, accidental circumstances "occasioned exclusively by the *violence of nature*; by that kind of force of the elements which human ability could not have foreseen or prevented." ***Klauber v. American Express Co.***, 21 Wis. 21, 24 (1866) (emphasis in original). Multiple witnesses and precipitation tables presented at trial indicated that the spring of 2014 was rainy and wet. A contractor brought in by Jacobean to finish tasks at the Do-It Center site asserted that spring 2014 "was mushy … so many of us contractors, we didn't virtually do anything until almost June." Another contractor testified that, in late spring 2014, there was "just water standing in all the spots" at the Do-It Center site and some parts of the parking lot area could not be drained of water. Bob Ewers, who has fifty-six years

of experience in excavation work, testified that it was "absolutely too wet" to resume work under the contract.

¶17 The contractors testified that excavation and construction work requires heavy equipment including gravel trucks and grading machines. If the ground surface is wet, it is less firm and is "mushy." A fully-loaded gravel truck weighs between 73,000 and 74,000 pounds, and driving that much weight across a wet area would result in the truck getting stuck.

¶18 Jacobean asserts that the part of the Do-It Center site that was unfilled in April 2014 was dry enough to support heavy equipment, and points to a photograph showing a piece of equipment called a telehandler being supported by the ground in that area. However, Jacobean's owner testified that a telehandler weighs only 22,000 pounds, less than a third of what a fully-loaded truck—which the Ewers employees would have driven—weighs. Jacobean also argues that work undertaken at the site later that spring "completely rebuts Ewers' claim it was impossible to perform the Contract." However, later conditions at the site do not render clearly erroneous the circuit court's finding, based on the evidence summarized above, that the ground was not dry enough to support heavy equipment of the kind required to fulfill the contract *at the time* that Jacobean directed Ewers to resume work at the site.

¶19 Jacobean asserts that the real reason Ewers failed to perform was Ewers' demand for payment from Jacobean, based on Bob Ewers' testimony that the contract ended in April when Jacobean said it was not going to pay Ewers "for nothing, no more. Told him I'm done. We're not going back to work without getting paid." There are at least two problems with Jacobean's reliance on this testimony. First, following Jacobean's breach due to non-payment, Jacobean does

not explain why Ewers was still obligated to perform without receiving payment. Second, it was for the circuit court to weigh the evidence, and the evidence summarized above shows that the circuit court's finding that the wet condition of the site was the reason for non-performance is not clearly erroneous.

IV. The amount of damages

¶20 Jacobean's final argument is that the circuit court's award of $58,808.25 in damages owed to Ewers under the invoices should be reduced by $6,750, because that specific amount was improperly invoiced. However, Jacobean did not raise this issue before the circuit court. Therefore, we do not consider it. *See* ***Schill v. Wisconsin Rapids Sch. Dist.***, 2010 WI 86, ¶45 & n.21, 327 Wis. 2d 572, 786 N.W.2d 177 (explaining that issues not raised in the circuit court are forfeited, and supporting the proposition that appellate courts generally do not address forfeited issues).

CONCLUSION

¶21 For the reasons stated, we affirm.

By the Court – Judgment and orders affirmed.

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