COURT OF APPEALS
DECISION
DATED AND RELEASED

February 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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No. 96-0753

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

VANSLETT CRAFTSMEN, INC., a Wisconsin Corporation,

Plaintiff-Appellant,

v.

THE C.W. CARLSON COMPANY, INC., a Wisconsin Corporation,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Dane County: PAUL B. HIGGINBOTHAM, Judge. *Reversed and cause remanded*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

VERGERONT, J. VanSlett Craftsmen, Inc. appeals the trial court's judgment dismissing its action against The C.W. Carlson Company, Inc. at the close of VanSlett's presentation of its case to the jury. We conclude that the trial court correctly determined that there was no evidence to support the proposition, under either a contract or promissory estoppel claim, that a certain

condition to Carlson's performance had occurred. However, we also conclude that there was sufficient evidence to support a verdict that Carlson's conduct contributed to the nonoccurrence of that condition. Because we reject Carlson's alternative theories for sustaining the trial court's decision, we reverse and remand.

VanSlett, a cabinetry subcontracting firm, entered into a contract during July 1992 with a general contractor, Pepper Construction Company, to furnish approximately $458,000 in cabinetry and millwork for the South Chicago Community Hospital project (Pepper/VanSlett contract). VanSlett had manufactured and installed a substantial portion of the cabinetry and millwork on the project by early October 1992. During mid-September of 1992, VanSlett's chief executive, Peter VanSlett,[1] informed Pepper's superintendent on the project, Ted Commons, that, due to cost overruns on an unrelated project, VanSlett's cash flow would not allow it to timely complete the South Chicago project without using another cabinetry shop for much of the unfinished work.

VanSlett solicited bids from several cabinetry shops, including Carlson. There were various discussions and negotiations between VanSlett and Carlson, which will be described in more detail later in the opinion. However, it is undisputed that Mr. VanSlett and representatives of Carlson met at Carlson's office on September 28, 1992,[2] at which time Carlson presented to VanSlett a written proposal with respect to the South Chicago project.[3] It is also undisputed that on October 1, 1992,[4] representatives of VanSlett, Carlson and Pepper met on the job site in Chicago and had discussions concerning the

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[1] We will refer to Peter VanSlett as Mr. VanSlett to distinguish him from the company, VanSlett. We will follow the same practice with respect to Chris Carlson, CEO of C.W. Carlson Company, Inc., referring to him as Mr. Carlson.

[2] From the record it is unclear whether this meeting was September 28 or 29, 1992. Resolution of this conflict is not pertinent to our decision. We will use September 28 in this opinion.

[3] The parties have stipulated that there was a written proposal but that it cannot be located. The parties have not stipulated to the contents or the significance of the proposal.

[4] It is not clear whether this meeting was October 1 or 2, 1992, but we need not decide this issue. We will use October 1 in this opinion.

completion of the work under the Pepper/VanSlett contract and Carlson's role in that.

VanSlett claims that it accepted Carlson's written proposal of September 28, 1992, entering into an agreement with Carlson on that date for Carlson to do the work necessary to complete VanSlett's work on the project for $247,500 beginning on October 4, 1992. VanSlett contends that Carlson breached this agreement by failing to take over the work, causing Pepper to declare VanSlett in default and causing damages to VanSlett. Carlson, among other defenses, contends that the contract negotiations were never completed and there was no contract. Carlson also contends that Pepper's approval of a contract between VanSlett and Carlson was an essential condition of the contract, or of any promise made by Carlson, and that approval was never given.

Claims for breach of contract and promissory estoppel were tried to a jury. At the close of VanSlett's case-in-chief, Carlson moved to dismiss, arguing that VanSlett lacked the capacity to contract with Carlson because the Pepper/VanSlett contract required Pepper's approval for any subcontract between VanSlett and a third party,[5] and Pepper never gave its consent.

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[5] The Pepper/VanSlett subcontract contained these provisions with respect to assignment and sub-subcontracting.

> 9. Subcontractor shall not sublet or assign this contract nor sell or assign the proceeds of this contract without the prior written consent of PEPPER, and any such subletting or assignment without PEPPER'S written consent shall be null and void. PEPPER shall have the right to assign this Subcontract without the consent of Subcontractor."
>
> ...
>
> A57 Subcontractor agrees not to sub-subcontract more that (sic) 5% of this contract agreement without the expressed written consent of Pepper Construction Company for all proposed sub-subcontractors in excess of 5%, subcontractor shall furnish contractor an AIA Document A-305 or equal Subcontractor's Qualification Statement, not less than five (5) working days prior to final execution of any sub-subcontractor Agreement. In accordance with project

Therefore, according to Carlson, any contract between Carlson and VanSlett was "void."

The court granted Carlson's motion. The court concluded that the Pepper/VanSlett subcontract provided that a subcontractor could not sub-subcontract its obligations without Pepper's written approval. The court found that it was undisputed, based on the evidence presented by VanSlett, that Pepper did not give its written approval. For that reason, the court concluded, any contract between VanSlett was "void as a matter of law." The court also concluded that any promise made by Carlson was conditioned on Pepper's approval, which was never given. The court determined that Carlson's conduct did not in any way affect Pepper's decision not to give its approval.

DISCUSSION

When ruling on a motion to dismiss for insufficient evidence at the close of a plaintiff's case, the trial court may not grant the motion unless, considering all credible evidence in the light most favorable to the plaintiff, there is no credible evidence to support a verdict for the plaintiff. Section 805.14(1), STATS.; ***Weiss v. United Fire Casualty Co.***, 197 Wis.2d 365, 388, 541 N.W.2d 753, 761 (1995). Put another way, the trial court may not grant a motion unless it finds, as a matter of law, that no jury could disagree on the proper facts or the inferences therefrom and there is no credible evidence to support a verdict for the plaintiff. ***Id.*** This standard also applies to our review of the trial court's decision. ***Id.*** However, in reviewing the trial court's decision, we must give substantial deference to the trial court's better ability to assess the evidence. ***Id.*** at 389, 541 N.W.2d at 761.

On appeal VanSlett argues, as it did before the trial court, that there was sufficient evidence of Pepper's written consent and also that there was sufficient evidence that Carlson caused Pepper not to consent. VanSlett does not dispute that Pepper's written approval was necessary before Carlson

(..continued)

> General Conditions, subcontractor agrees he shall not contract with any such proposed person or entity to whom the Owner or the Architect has reasonable objection in accordance with the provisions of the contract documents.

had an obligation to perform. VanSlett also acknowledges that Pepper's written approval was a condition of both the contract and the promise supporting the promissory estoppel claim.

Carlson does not pursue on appeal its theory of incapacity to contract. Instead it argues that there is no evidence that Pepper gave its consent and no evidence that Carlson's conduct contributed to Pepper's decision not to consent.[6]

A contract is not void because it is subject to a condition; rather there is a binding contract but no duty to perform until the condition is satisfied. ***Kocinski v. Home Ins. Co.***, 147 Wis.2d 728, 738, 433 N.W.2d 654, 658 (Ct. App. 1988), *modified on other grounds*, 154 Wis.2d 56, 452 N.W.2d 360 (1990). However, where the condition is the consent of a thirty party, the parties must make reasonable efforts to bring about the consent; failure to do so would itself be a breach. CORBIN ON CONTRACTS, Vol. 2, § 5.31 at 165-66 (1950). *See also*, Vol. 3A, § 770 at 557 (because of implied promise not to hinder or prevent condition, hindrance or prevention of condition itself may be breach). Where there is a binding promise by a party to perform if a condition is met, if that party has unjustifiably prevented the occurrence of the condition, it may not take advantage of the nonoccurrence. *See* ***Variance Inc. v. Losinske***, 71 Wis.2d 31, 40, 237 N.W.2d 22, 26 (1976). That party is not excused from performance, and a judgment for damages may be obtained for failure to perform. CORBIN ON CONTRACTS, Vol. 3A, § 767 at 543-46 and § 770 at 557.

We first consider whether, viewing the evidence in the light most favorable to VanSlett, there is any credible evidence that Pepper gave its written approval to a contract between VanSlett and Carlson under which Carlson

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[6] Because Carlson is no longer pursuing its theory of VanSlett's incapacity to contract and because both parties agree that Pepper's approval was a condition to Carlson's performance, we do not address VanSlett's argument that Carlson lacks "standing" to enforce the Pepper/VanSlett contract or its argument that the Pepper/VanSlett contract requires Pepper's written approval but not *prior* written approval. We also do not address occasional suggestions in Carlson's brief that VanSlett could not begin to negotiate with Carlson without Pepper's approval. That is inconsistent with Carlson's position as stated elsewhere in its brief and Carlson cites no authority in favor of this proposition.

would complete VanSlett's obligations to Pepper. We agree with the trial court that there was not.

Mr. VanSlett testified that he and Carlson representatives met with Commons at the job site on October 1 to obtain Pepper's consent for VanSlett to enter into a subcontract with Carlson. Commons did not give his consent on that date but he testified that at the end of the meeting he understood that VanSlett would finish the job through Carlson. According to Mr. VanSlett, sometime between that meeting and October 6, a Carlson representative called Mr. VanSlett to say that Carlson had concerns about working with VanSlett on a subcontract basis and wanted to contract directly with Pepper. When discussions between VanSlett and Carlson did not resolve this, Mr. VanSlett called Commons to tell him that Carlson was no longer willing to work as a subcontractor of VanSlett. Commons testified that he had telephone calls from both Mr. VanSlett and a Carlson representative about the same time, after the October 1 meeting, in which both indicated that there was a problem and they would not be able to have a "joint contract arrangement." In the phone call from the Carlson representative, the representative asked Commons whether Pepper was receptive to a direct contract with Carlson. Commons testified that he did not approve the terms of any contract between VanSlett and Carlson at any time.

On October 6, 1992, Commons sent two letters, one to VanSlett, copied to Carlson, and one to Carlson, copied to VanSlett. The letter to VanSlett stated:

> Confirming our previous conversations and meeting of October 1, 1992, it is your intent to have "The Carlson Company" complete the balance of work currently under your respective sub-contracts.
>
> As it is now apparent that a separate sub-contract will have to be issued for this work, and until a final definitive scope has been prepared, Pepper will issue a letter of intent to Carlson Company in order to expedite the priority 3 millwork fabrication.

> Until the final scope of work has been defined, the letter of intent will be issued under the "Right To Carry Out The Work" provisions per paragraph 19 of the subcontract agreements. When the final scope is completed a deduct change order and separate sub-contract for same will be issued....
>
> If there are any questions in this regard please contact me immediately.

The letter to Carlson stated:

> Confirming our previous conversation and the October 2, 1992 meeting with Ms. Linda Dryer and Mr. James Tomich of your firm, it is the intent of Pepper Construction Company to enter into a sub-contract agreement with The Carlson Co., for the incompleted millwork under contract with Van Slett Craftsmen. Until such time that a definitive scope document has been prepared and agreed to, we are authorizing the following work to proceed on a "T & M" basis:
>
> 1)Pick-up, inventory and store all raw millwork material purchased for this project and presently stored at Van Slett Craftsmen warehouse.
>
> 2)Pick-up, inventory and store all fabricated stock cabinets for this project and presently stored at Van Slett Craftsmen warehouse as follows:
>
> a)Project 2, Phase 2 stock cabinets
> b)Project 2, Phase 3 stock cabinets
> c)All remaining Project 1 cabinets with the exception of the new addition cabinets. They will be delivered to the job by Van Slett.

> 3)Release for and fabricate all remaining custom millwork for Priority 3 shop drawings.
>
> 4)Release for and fabricate all custom millwork for Priority 4 shop drawings.
>
> The above "T & M" work will be covered by the final scope agreement and sub-contract.
>
> In view of this authorization, kindly review and advise when we could expect the balance of Priority 3 millwork to be delivered to the site.
>
> Thank you for your prompt attention to this matter.
>
> If there are any questions please feel free to call.

It is these two letters that VanSlett claims are evidence of Pepper's consent. We do not agree. Viewing these letters most favorably to VanSlett, we agree with the trial court that these letters do not constitute evidence of Pepper's approval of a contract between VanSlett and Carlson, or raise any reasonable inference of approval. Indeed, we conclude, as did the trial court, that based on these letters, it is undisputed that Pepper declined to approve a contract between VanSlett and Carlson. The second paragraph of Commons' letter to VanSlett states Pepper's intent to enter into a subcontract with Carlson, issuing a letter of intent during preparation of that subcontract with Carlson so that Carlson could immediately perform certain work. The third paragraph states that the letter of intent to Carlson will be issued under Paragraph 19 of the Pepper/VanSlett subcontract. Paragraph 19 of that subcontract provides that if the subcontractor--VanSlett--becomes insolvent and in certain other situations, Pepper may terminate the subcontract. We see no ambiguity in this letter. It is a clear statement of Pepper's rejection of a contract between VanSlett and Carlson and of Pepper's adoption of an alternative course of action: terminating its subcontract with VanSlett and entering into a subcontract with Carlson.

Commons' letter to Carlson also clearly states Pepper's intent to enter into a subcontract with Carlson to complete VanSlett's work under the Pepper\VanSlett subcontract. Consistent with Pepper's letter to VanSlett, Commons' letter to Carlson is a "letter of intent" until the subcontract between Carlson and Pepper is finalized.

VanSlett's argument seems to be that Pepper's letter to Carlson is evidence that Pepper is approving Carlson as a subcontractor. The letters are evidence that Pepper is approving Carlson as a subcontractor--but a subcontractor of Pepper, not of VanSlett. The condition that VanSlett and Carlson agreed to was that Pepper would approve a subcontract between Carlson and VanSlett.

We now consider the evidence concerning the reason Pepper did not approve a subcontract between VanSlett and Carlson. The trial court determined that it was undisputed that Carlson's conduct had nothing to do with Pepper's decision not to approve a subcontract between Carlson and VanSlett but instead to subcontract directly with Carlson. In explaining its decision, the court referred to Commons' testimony about his concerns with VanSlett's inability to complete the project, VanSlett's financial problems, and Commons' statement that Carlson did nothing to encourage Pepper to "declare VanSlett in default." We conclude that the court erred because it did not take into account testimony favorable to Van Slett's position.

First, we note that portions of Commons' testimony can be interpreted favorably to VanSlett's position. Commons testified that he did not consider VanSlett in default until the date on which VanSlett failed to pay its workmen on the project, either October 9 or October 12, 1992. He testified that he decided not to approve a subcontract between Carlson and VanSlett on or before October 6. A reasonable jury could interpret Commons' testimony--that Carlson did not influence Pepper's decision to declare VanSlett in default--as referring to a decision Pepper made *after* deciding not to approve a subcontract between VanSlett and Carlson. Commons' testimony about telephone calls he received from Mr. VanSlett and Carlson's representative after the October 1 meeting and before October 6 is evidence that Pepper decided to contract directly with Carlson because Commons learned that Carlson did not want to enter into a subcontract with VanSlett.

Mr. VanSlett's testimony as described previously is further evidence of this. In addition, Mr. VanSlett testified that Commons told him that Pepper had to make a separate subcontract with Carlson because Carlson would not subcontract with VanSlett.

Further testimony supporting VanSlett's position comes from Carlson employees. One employee representing Carlson in the negotiations testified that she was assuming that Carlson was going to contract with VanSlett until Mr. Carlson informed her that he wanted a direct contract with Pepper rather than a subcontract with VanSlett; she believed this occurred after the October 1 meeting but she was not sure of the date. Another employee representing Carlson gave similar testimony, at one point testifying that Mr. Carlson made this decision because of VanSlett's financial condition before Commons told him (the Carlson employee) that Pepper was going to contract directly with Carlson, and at another point stating he was not sure of the time frame.

It is true, as the trial court pointed out, that the timing of the phone calls in relation to each other after the October 1 meeting were not provided "absolutely," but that is not the test at this stage of the proceeding. And, while the trial court's assessment of Commons' motives is a reasonable one based on the evidence, that is not the test either. Although we give substantial deference to the trial court in reviewing its decision, we must nevertheless conclude there is credible evidence to support a jury determination that Carlson changed its mind about subcontracting with VanSlett, that this was conveyed to Pepper, and that this either influenced or caused Pepper's decision to contract with Carlson directly rather than approving a subcontract between VanSlett and Carlson.

Carlson raises alternative theories to support dismissal, three relating to the contract claim and one relating to the promissory estoppel claim.[7] First, Carlson contends that there is no credible evidence to support a jury determination that Carlson and VanSlett entered into a binding contract on September 28, 1992. We disagree and conclude there is credible evidence to support such a determination.

According to the testimony of Carlson employees, before the September 28 meeting, Mr. VanSlett provided Carlson with blueprints, specifications and other documentation of the work remaining to be done by

[7] Although not all these alternative arguments were presented to the trial court, we address them because we may affirm a trial court's decision on a basis different than that presented to the trial court. ***State v. Holt***, 128 Wis.2d 110, 125, 382 N.W.2d 679, 687 (Ct. App. 1985).

VanSlett under the Pepper/VanSlett project, including times and dates for all the phases, and there were a number of discussions between the two parties. At the meeting, a Carlson representative presented a proposal for completing all phases of VanSlett's work on the project and identifying the scope of the work, and scheduling was agreed upon. The proposal contained a price, which a Carlson representative identified as $247,000.

Mr. VanSlett testified that he accepted the proposal[8] at the September 28 meeting, telling the Carlson representatives that he accepted, and the two parties then made plans to meet with Commons to get approval so Carlson could begin. According to Mr. VanSlett, he understood that an agreement was reached at the September 28 meeting and there was no question in his mind that Mr. Carlson understood that. A handwritten document reflecting everything that was discussed was to be typed up, but that never occurred. Because Mr. VanSlett never received the typed document he expected, he sent a handwritten memo to Carlson on October 9, 1992, confirming what he thought the agreement was and adjusting some details because Carlson had not yet started on the job as it had agreed to do.

While testimony of the Carlson representatives disputes that Carlson intended to be bound on September 28, 1992, we conclude that the testimony we have just recited is sufficient to survive a motion to dismiss. Carlson argues it is insufficient because even VanSlett acknowledged that a written agreement was contemplated. Carlson cites cases for the proposition that, if during preliminary negotiations it is understood that one party is to prepare and present to the other party a formal written agreement to evidence the contemplated contract, there is no binding contract unless the written agreement was actually prepared and signed by both parties. *See, e.g.,* ***Johann v. Milwaukee Electric Tool Corp.***, 270 Wis. 573, 589, 72 N.W.2d 401, 410 (1955). However, it is also true that an oral agreement that is complete in itself is binding even though it is anticipated that a written agreement embodying its terms would afterwards be signed, provided the parties so intend. ***Id.*** *See also*

[8] Mr. VanSlett's testimony is that the proposed price, which he accepted, was $247,500. Because it appears the Carlson employee did not mean that the proposal price was $247,000 rather than $247,500, because Mr. VanSlett's testimony never varied from the $247,500 figure, and because that is the figure VanSlett uses in its brief on appeal, we will use the $247,500 figure in this opinion.

Leggett & Co. v. West Salem Canning Co., 155 Wis. 462, 469, 144 N.W. 969, 972 (1914). The determining factor is the intent of the parties.

While portions of Mr. VanSlett's testimony support a finding that he understood there was no binding contract until a document was prepared and signed, other portions support a finding that he understood that the oral agreement was binding notwithstanding the document to be typed and signed, and he believed Mr. Carlson understood that as well. The court must consider testimony in the light most favorable to VanSlett, not to Carlson.

Carlson also argues that because the parties did not agree on a material term--whether Carlson would subcontract with VanSlett or directly with Pepper--there was no binding contract. However, VanSlett's testimony is sufficient to support a jury determination that Carlson agreed to subcontract with VanSlett and then changed its mind; and some of the testimony of Carlson's employees, interpreted most favorably to VanSlett, supports this view as well.[9]

Carlson next challenges the sufficiency of the evidence of contract damages. VanSlett's theory of contract damages is that, if Carlson had completed VanSlett's work on the project for $247,500 as agreed, VanSlett would have been entitled to $24,500--the difference between that sum and the $272,000 in available funds remaining on the project.[10] There is evidence to support these figures. Carlson's arguments are: (1) charge-backs and deductions would have reduced the $24,500 figure, and (2) the project could not be completed for $247,500 due to omission in information provided by VanSlett to Carlson, as evidenced by the fact that Pepper paid Carlson and others significantly more than $247,500 to finish VanSlett's work.

The one specific charge-back/deduction Carlson points to--$14,429--was comprised of $8,320 for administrative time charged by Pepper because of VanSlett's default. However, a jury could reasonably conclude that

[9] We do not address in this context Carlson's argument that there was no binding contract until Pepper approved because we have already discussed that issue.

[10] We are uncertain whether VanSlett is claiming additional contract damages, but we need not resolve that question.

this deduction would not have occurred had Carlson performed under a subcontract with VanSlett. We reject Carlson's suggestion that to avoid dismissal at this stage, VanSlett must present evidence of a negative: that there would have been no deductions, or no deductions greater than $24,500, had Carlson performed as VanSlett contends it agreed to do.

Carlson's evidence that VanSlett would have had to pay Carlson substantially more than $247,500 to complete the VanSlett work, even if there had been a binding contract for that amount, is countered by VanSlett's testimony. VanSlett testified that the higher amount Pepper paid Carlson and others was not due to lack of information provided by VanSlett and could have been avoided had Pepper and Carlson handled the installation work differently. This is sufficient evidence to avoid a dismissal on this ground.

Carlson next asserts that any contract between VanSlett and Carlson is void under § 241.02(1)(b), STATS., which provides that, "every special promise to answer for the debt, default or miscarriage of another person" is void unless it is in writing and signed by the party charged. We reject this argument. Carlson devotes only a short paragraph to the argument and cites no legal authority to support its position. The Pepper/VanSlett contract permitted VanSlett to subcontract its obligations, subject to certain conditions including Pepper's consent. It is undisputed that Commons did not consider VanSlett in default until after the date on which VanSlett contends it entered into a contract with Carlson.

Regarding the promissory estoppel claim, Carlson contends that VanSlett's reliance on any promise by Carlson was unreasonable as a matter of law because the Pepper/VanSlett contract required Pepper's approval. We disagree.

Since a contract subject to a condition is not void for that reason, *see* ***Kocinski***, 147 Wis.2d at 738, 433 N.W.2d at 658, we see no reason why a promise subject to a condition may not be the basis for a promissory estoppel claim, assuming the requirements for promissory estoppel are met and the same analysis is applied to the fulfillment of the condition as under a contract analysis. The promise asserted in this case is that Carlson promised VanSlett that it would perform its work under the Pepper/VanSlett contract for a

specified sum on the condition that Pepper approve. The evidence we have already described supports a jury verdict that there was such a promise.

One element of a claim for promissory estoppel is that the promise is one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee. ***Barbler v. Roelli***, 39 Wis.2d 566, 572, 159 N.W.2d 694, 159 N.W.2d 694, 697 (1968). The evidence we have already described is sufficient to support a jury finding that Carlson should reasonably have expected VanSlett to rely on its promise to perform for a specified sum on the condition that Pepper approve.

Because the trial court erred in dismissing the contract and promissory estoppel claims on the ground that there was insufficient evidence from which a jury could find that Carlson's conduct affected Pepper's decision not to approve a subcontract between Carlson and VanSlett, and because none of the other theories advanced by Carlson support dismissal, we reverse.

By the Court.—Judgment reversed and cause remanded.

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