

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

May 1, 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. 96-2374

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

CLIFF NAVIS COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

ANTHONY SHOMBERG,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Dane County:
MARK A. FRANKEL, Judge. *Affirmed.*

DEININGER, J.¹ Anthony Shomberg appeals a judgment requiring him to pay \$4000 plus costs for masonry work performed by Cliff Navis Company,

¹ This appeal is decided by one judge pursuant to § 752.31(2)(a), STATS.

Inc.² Shomberg contends that the trial court erred when it found that Navis did not breach the contract with Shomberg. Because we conclude that the trial court's factual finding that Navis complied with the literal terms of the contract is reasonably supported by the evidence of record, the judgment is affirmed.

On August 19, 1993, Anthony Shomberg contracted with Cliff Navis Company, Inc., to make masonry repairs required by a City of Madison work order on a building owned by Shomberg at 145 West Gilman Street. The contract specified the type of work to be done for the sum of \$4500 as:

- 1.) Cut out defective mortar, mortar that has lost its bound [sic] to the brick units. This will be extensive in the parapets, and the areas where water run off has weakened mortar. Also tuckpoint all mortar joints that are void of mortar, and any mortar joint that is eroded deeper then [sic] one inch, shall be tuckpointed to within ½inch of brick surface.
- 2.) If it is necessary to remove and relay the parapets to make them structural [sic] sound, that is what will be done.
- 3.) West wall will have a caulk joint installed at the vertical joint that is devoid of mortar. The rest of the brick to the back of the back of the Bldg. will be tuckpointed as above.

Following Navis' completion of the masonry work, the city building inspector deemed the work satisfactory. Navis billed Shomberg for the masonry work at the contract price, but Shomberg failed to remit payment.

² In its brief on appeal, the Cliff Navis Company, Inc., alleges that the proceedings below were heard not, as reflected in the record, by Judge Mark A. Frankel, but by Judge Daniel R. Moeser. The trial transcript, the notice of hearing, and the court minutes all list Judge Frankel as the presiding judge, and we have done likewise in this opinion. If the Cliff Navis Company believes the record is inaccurate, it is entitled to correct any defects in the record by filing a motion to correct the record. *See* § 809.15(3), STATS.

The trial court found that Navis complied with “the literal terms of the contract.” However, the court also found that one of the parapet walls appeared rough and that “at least some of the brick work perhaps could have been or should have been replaced.” As a result, the court deducted \$500 from the original contract price as an allowance to Shomberg for the rough brick work on the parapet.

Shomberg contends that Navis did not complete the work according to the contract terms and that the quality of the work Navis did perform was poor. Specifically, Shomberg argues that Navis failed to tuckpoint the mortar joints, failed to remove and relay the parapets and failed to tuckpoint and replace missing bricks on the back of the building. He also claims that Navis parged portions of the wall, which Shomberg had not authorized, and thereby concealed some of the claimed deficiencies.

Navis in turn contends that the masonry work was performed in accordance with the contract and that the work was done according to standard and accepted trade practices. Clifford Navis testified that the defective mortar joints were cut out and tuckpointed; that structural soundness of the parapets was achieved by tuckpointing the mortar and parging; that the back wall's defective mortar joints were tuckpointed; and that the caulk joint was installed. He denied knowledge that the City of Madison work order mentioned replacing any deteriorating or missing bricks. Mr. Navis also stated that Shomberg did not complain about the masonry work when it was completed, but only after Navis began pressing Shomberg for payment.

When conflicting testimony is offered by the parties, it is the trial judge's duty as fact-finder to resolve the conflict. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). We do not set aside a trial court's

factual findings on appeal unless they are clearly erroneous, and we give due regard to the trial court's opportunity to judge the credibility of the witnesses. Section 805.17(2), STATS.

In arriving at its decision, the trial court weighed the disputed testimony and construed the evidence presented in favor of Navis. The trial court found that the masonry work performed by Navis successfully corrected the building code violations and that Navis had complied with the literal terms of the contract. In addition, the court inferred that Shomberg's delay in communicating his complaints about Navis' work showed that Shomberg was satisfied with the masonry work at the time the work was completed. The trial court acknowledged the dispute over whether tuckpointing was done on the back wall of the building before it was parged. However, no evidence was presented to confirm Shomberg's speculation that the tuckpointing was not done prior to the parging of the wall.

We conclude that the trial court's finding that Navis complied with the terms of the contract is supported by evidence in the record, and it is thus not clearly erroneous. The trial court did find that one of the parapet walls was rough and probably should have been repaired by replacing some of the brick. However, the defect did not prevent the city from accepting the work as rectifying the building code violations. As a result, the trial court concluded that this merited an adjustment in the contract price rather than voiding the contract itself.

We conclude that the trial court's judgment awarding Navis \$4000 of the contract price plus costs was reasonable and supported by the evidence of record. Accordingly, we affirm the judgment.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* § 809.23(1)(b)(4), STATS.

