COURT OF APPEALS
DECISION
DATED AND FILED

August 15, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-3345-FT

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

CAROLYN A. BENSON,

PLAINTIFF-APPELLANT,

V.

ROBERT PETERSON, D/B/A DENNIS AND ROB'S CUSTOM CABINETRY AND MILLWORK,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Ashland County: ROBERT E. EATON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Carolyn Benson appeals a judgment awarding Robert Peterson $4,731 for breach of contract.[1] Peterson claimed that Benson contracted with him to custom-build cabinets for her new home and that Benson breached that contract. Benson signed two written proposals and placed a $7,000 deposit with Peterson, who began design work and ordered materials. Before construction started, however, Benson repudiated the contract, claiming there was no contract, and sued to recover her deposit. After a bench trial, the trial court rejected Benson's claim and awarded Peterson damages on his counterclaim for part performance.

¶2 Benson submits five arguments on appeal: (1) the contract was void on its face for indefiniteness, the parties having failed to reach agreement on essential terms such as the kind of wood and other specifications; (2) even if the contract was not void, the parties intended the contract to be ineffective until Benson completed a further implementing document; (3) the trial court should not have awarded damages for Benson's nonperformance of an executory contract; (4) Peterson could not recover damages without a liquidated damage clause; and (5) the trial court should not have awarded damages for design work, since the contract did not itemize it and cabinetmakers customarily do not separately bill for it. We reject these arguments and affirm the judgment.

¶3 Peterson wrote both proposals. Benson signed both next to a line stating: "The above prices, specifications, and conditions are satisfactory and are hereby accepted. You are authorized to do the work as specified. Payment will be made as outlined above." Neither proposal provided a great deal of detail,

[1] This is an expedited appeal under WIS. STAT. RULE 809.17 (1997-98). All references to the Wisconsin Statutes are to the 1997-98 version.

describing the work in abbreviated terms, a common practice in building proposals.

¶4 The first proposal called for "maple custom vanities" for the bathroom. It included six different measurements and provided that "all hardware was included," with the customer to make the "final size decisions." Several vanities were to have "laminate counters." The total price was $2,500. The second proposal concerned the kitchen and provided a little more information. The "maplewood cabinetry" would have "water-based finishes, stain, sealer, and topcoat." The counter would be "laminate with rolled edge," with "hardware included." The cabinetry would be custom "per the approved plan." "Price includes labor, material, tax." The upper cabinet would extend "to the ceiling with crown," with "hardware included" and "installation included." The total price of this proposal was $11,650, while the combined price of both proposals was $14,150. Benson never completed the specification sheet Peterson furnished her. This sheet would have specifically identified more details of the construction. We will refer to both proposals collectively as the "contract."

¶5 The trial court made a series of findings at the close of testimony. The trial court first found that the contract set a date of completion, a price for completion, specific details about the cabinetry to be supplied, the hardware to be supplied, and the type of wood to be used. The trial court found that there was an offer, acceptance, and consideration, the essentials of a contract. The trial court additionally found that there was a "good degree of specificity spelling out what it was the defendant [Peterson] is to supply to entitle him to the money set forth in the contract." The trial court further found that the parties intended the phrase "custom cabinetry as per approved plan" to mean Benson would fill out the specification sheet, with Peterson to complete his plans at that time. While the

trial court acknowledged that the contract was uncertain in some respects, the court concluded that the contract was not so indefinite or uncertain as to be unenforceable. In the trial court's view, the core of the contract was present, with only details missing. The trial court ruled that any missing details could be inferred from the circumstances surrounding the contract and other means. In short, the trial court found that the proposals were sufficiently definite to create a valid, binding contract, with the uncertainties and ambiguities affecting only details.

¶6 We agree with the trial court that the contract was not facially void for indefiniteness. Parties have no meeting of the minds unless their contract is definite on all essential terms. *See* ***Shetney v. Shetney***, 49 Wis. 2d 26, 38-39, 181 N.W.2d 516 (1970). Here, the contract was at the most ambiguous, not impermissibly indefinite. The contract provided for price, subject matter, and completion dates. It also contained some general, partial measurements and references to some materials. These were the essentials. The type of wood and specific, highly detailed measurements were unessential. Courts may read into contracts the customs, standards, practices, and usages of an industry to cure ambiguity. *See* ***State v. Jorgensen***, 137 Wis. 2d 163, 170, 404 N.W.2d 66 (Ct. App. 1987).

¶7 In other words, if the contract was ambiguous as to the kind of wood and the parties had not orally agreed on that material, then Benson would have been entitled to choose any wood customarily used in the cabinetry business and not expressly excluded by the contract. The same rule applies to other specifications. If the contract was ambiguous on any materials and they were not otherwise orally agreed to, Benson could have chosen anything customarily used in the industry, and Peterson was obligated to provide those for the total price that

he set. In short, the contract contained the essentials needed to be valid, and all facial ambiguities could have been cured by other means.

¶8 Benson next argues, in essence, that the parties mutually intended there be no contract until she completed the specification sheet. Courts may consider extrinsic evidence of the parties' mutual intent to help understand ambiguous contracts. *See* ***Hope Acres, Inc. v. Harris***, 27 Wis. 2d 285, 291, 134 N.W.2d 462 (1965). The trial court was the judge of the credibility of witnesses and the weight of their testimony. *See* ***State v. Toy***, 125 Wis. 2d 216, 222, 371 N.W.2d 386 (Ct. App. 1985).

¶9 Benson testified to several extrinsic facts to support this claim. She claimed that the parties agreed she could withdraw from the project at any time before completing the specification sheet. She pointed out that Peterson never gave her any wood samples, that Peterson never began the construction of the cabinets, and that Benson never chose any wood or wood stain. She claimed that payment was conditional on her future election to authorize construction and that the money was just a deposit she could get back if she decided to withdraw from the project. Peterson testified, however, that the parties mutually intended the two proposals to create a contract effective upon signing. As the arbiter of credibility and the weight of the evidence, the trial court accepted Peterson's testimony, rejected Benson's, and concluded that Peterson's account was more probable and consistent with common experience. The trial court also rejected Benson's claim that any and all payment was conditional on the project's completion.

¶10 We next uphold both the trial court's decision to award Peterson damages for Benson's nonperformance of an executory contract and its measure of those damages. If one party breaches an executory contract, the nonbreaching

party may recover damages for part performance. 5 CORBIN ON CONTRACTS § 1031, at 192 (1964). The injured party may recover damages representing either (1) the expectation interest, measured by the difference between the contract price and expected cost to perform the entire contract; or (2) reliance interest, measured by the cost of materials and labor expended in partially performing the contract. *See* ***Thorp Sales Corp. v. Gyuro Grading Co.***, 111 Wis. 2d 431, 438, 331 N.W.2d 342 (1983); MCCORMICK ON DAMAGES § 142, at 582-86, § 164, at 640-42 (1935). The trial court elected to award Peterson damages at the rate of $60 per hour for forty-four hours. This award represented his reliance interest, for actual time worked at the customary rate, which the trial court deemed reasonable. The trial court could have awarded Peterson damages measured by his expectation interest, giving him the benefit of his bargain on the entire contract. Reliance damages may have actually subjected Benson to a lower award than expectation damages paying Peterson his expected profit on the total contract price.

¶11 Finally, we reject Benson's remaining challenges to the damage award. First, Peterson was entitled to recover damages for breach of contract regardless of whether the contract contained a liquidated damage clause. Such a clause, if valid, would have freed Peterson of the duty to prove actual damages. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 528, 331 N.W.2d 357 (1983). The converse is not true; the lack of a liquidated damage clause does not bar the injured party from recovering damages for actual loss. Second, Peterson could recover for his design work even if other cabinetmakers customarily would not bill for such work and even though the contract did not itemize payment for that work. The design work was one part of the total contracted performance. As noted above, if Benson's breach prevented Peterson from fully performing, Peterson was entitled to recover for his actual part performance as a remedy for breach of

contract, by resort to expectation or reliance measures of damage. *See* ***Thorp Sales***, 111 Wis. 2d at 438; MCCORMICK § 142, at 584-85, § 164, at 640-42. Peterson's actual part performance consisted of design work, something that would have been compensated by the total contract price, though unexpressed, if the contract had been fully performed. Peterson's contract law remedies to recover for his actual part performance, such as design work, control over whether other cabinetmakers would itemize the cost of design work in fully performed contracts.

By the Court.—Judgment affirmed.

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