

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 3, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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

**Appeal Nos. 2004AP1575
2004AP2043**

Cir. Ct. No. 2001CV915

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

No. 2004AP1575

WICKES LUMBER COMPANY,

**PLAINTIFF-THIRD-PARTY
PLAINTIFF-APPELLANT,**

v.

GARY D. EVERETT AND DIANE E. EVERETT,

DEFENDANTS,

NORM KEEKER, D/B/A KEEKER & SONS CONSTRUCTION,

DEFENDANT-RESPONDENT,

v.

**NEWPORT BUILDERS, INC., AND MANKOWSKI PHOENIX
CONSTRUCTION, LTD.,**

THIRD-PARTY DEFENDANTS.

No. 2004AP2043

WICKES LUMBER COMPANY,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

v.

GARY D. EVERETT AND DIANE E. EVERETT,

**DEFENDANTS-THIRD-PARTY
PLAINTIFFS-APPELLANTS,**

**NORM KEEKER, D/B/A NORM KEEKER & SONS
CONSTRUCTION,**

DEFENDANT-RESPONDENT-CROSS-RESPONDENT,

v.

**NEWPORT BUILDERS, INC., THOMFORDE CONCRETE,
INC., AND MANKOWSKI PHOENIX CONSTRUCTION, LTD.,**

THIRD-PARTY DEFENDANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court
for Kenosha County: WILBUR W. WARREN, III, Judge. *Affirmed.*

Before Anderson, P.J., Nettesheim and Snyder, JJ.

¶1 PER CURIAM. Gary and Diane Everett appeal from the judgment awarding Norm Keeker, d/b/a Keeker & Sons Construction, damages for the Everetts' breach of a contract to build the Everetts a home. They also appeal the judgment in favor of Wickes Lumber Company foreclosing on a lien for materials

and labor supplied in framing the home. Wickes Lumber cross-appeals the dismissal of its claim against Keeker for materials and labor supplied for the Everett home.¹ We conclude that the evidence supports the trial court's verdict that the Everetts breached the contract with Keeker, that the Everetts contracted directly with Wickes Lumber for materials and labor thereby eliminating the need for notice of a construction lien, and that Keeker was not liable to Wickes Lumber on his credit application for materials and labor directly contracted for by the Everetts. We affirm the judgment.

¶2 In 1999, the Everetts began construction of a new home with Newport Builders, Inc. serving as their general contractor. Newport Builders accepted a proposal from Wickes Lumber for materials and labor for rough framing of the house. In October 2000, the Everetts terminated their contract with Newport Builders. On October 31, 2000, the Everetts signed an agreement with Wickes Lumber acknowledging the termination of the Everetts' contract with Newport Builders and indicating their intent to "retain the services of Wickes Lumber in regard to the framing of their home" according to certain blueprints. The cost of the contract was stated to be \$53,722.64. By the agreement Wickes Lumber was agreeable to allowing Keeker to assume the contract in place between Wickes Lumber and Newport Builders. The agreement also required Wickes Lumber to replace warped or damaged lumber and for payment to be issued "directly to Wickes Lumber upon completion of rough framing of house."

¹ Wickes Lumber actually filed its appeal first, No. 2004AP1575. When the Everetts filed their notice of appeal, No. 2004AP2043, they moved to consolidate the two appeals. An order of August 20, 2004, realigned the parties to make Wickes Lumber a cross-appellant for easier administration of the briefing schedule.

¶3 On November 15, 2000, the Everetts contracted with Keeker to complete the construction of the home for \$373,983. Keeker completed a credit application with Wickes Lumber on November 30, 2000. In January 2001, Keeker had the materials constructed by Wickes Lumber delivered and those materials were incorporated into the home. Wickes Lumber billed Keeker for the materials and labor it provided.

¶4 On April 9, 2001, Keeker submitted his first request for a draw against construction funds. The Everetts refused to authorize the draw based on information from their independent inspector that the garage height exceeded zoning restrictions and that garage trusses were improperly manufactured. Keeker indicated to the Everetts that they could complete the project without him. After some negotiations, it was agreed that Keeker would perform some additional work, including siding the home, and submit a revised draw request. The revised draw request was submitted on June 22, 2001. The Everetts refused to authorize the revised draw. As of September 2001, Keeker had not been paid for any work.

¶5 On September 6, 2001, Wickes Lumber commenced this action to foreclose on its lien against the Everetts' home and to recover from Keeker on his credit application the cost of materials and labor used in the Everetts' home. The Everetts filed a cross-claim against Keeker to recover damages for breach of contract in excess of \$500,000, including the cost to complete the home. Keeker filed a counterclaim against Wickes Lumber and a cross-claim against the Everetts for indemnification in the event Keeker was liable to any party. Keeker also sought to be paid for work performed and sums due to his subcontractors. The claims between these parties were tried to the court over nine days in an eight-month period. The trial involved 132 exhibits and more than twenty witnesses.

¶6 The trial court wrote a lengthy decision. It found that the Everetts contracted directly with Wickes Lumber, thereby allowing Wickes Lumber to obtain a construction lien without notice. Wickes Lumber was granted a judgment of foreclosure against the Everetts for \$53,722.64, or an alternative judgment for \$55,377.64, plus statutory costs and attorney fees. The trial court found that the Everetts breached the contract with Keeker by withholding payment authorization for minor, petty, or unrelated complaints. It concluded that the damages the Everetts suffered by having the home exposed to the elements without timely completion was a result of their own breach of the contract. It also found that the contract with Keeker allowed the recovery of attorney fees and that 90% of the fees Keeker proved at trial were attributable to the Everetts' breach of contract claim. Keeker was granted judgment for \$92,528.76, plus statutory costs and actual attorney fees of \$37,687.50. Wickes Lumber's claim against Keeker was dismissed.

¶7 The trial court's factual findings will not be reversed unless they are clearly erroneous. *See* WIS. STAT. § 805.17(2) (2003-04).² We review the record in the light most favorable to the trial court's finding to determine whether that finding is clearly erroneous. The credibility of witnesses and the weight to be attached to that evidence are matters uniquely within the province of the trial court when it acts as the finder of fact. *See Global Steel Prods. Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Whether the facts found by the trial court constitute a breach of contract is a legal issue we review de novo. *Steele v. Pacesetter Motor Cars, Inc.*, 2003 WI App

² All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141. In evaluating a breach of contract claim, the trial court must determine whether a party has violated the terms of the contract and whether any such violation is material such that it has resulted in damages. *Id.* Whether a party's breach of the contract is material is a question of fact. *Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.*, 206 Wis. 2d 158, 184, 557 N.W.2d 67 (1996). Even where a material breach has occurred, "the non-breaching party may waive the claim of materiality through its actions." *Id.* at 183-84.

¶8 The Everetts argue that they did not breach the contract by failing to authorize payment to Keeker because the contract required payment on the basis of work completed as determined by their inspector, allowed payment to be withheld for defective work not remedied, and gave them ten business days to make payment. Their contention rests on the notion that when the Everetts balked about authorizing payment, Keeker terminated the contract just days after he submitted his initial draw request and before payment was actually due.³ Although there was evidence that Keeker told the Everetts they could finish the home without him, the trial court did not find that Keeker terminated the contract at that time. The trial court found: "Keeker refused to continue working on the project unless he was paid a 'progress payment' as called for in the contract." The trial court went on to discuss the Everetts' failure to pay even after Keeker performed additional items of work. It found that Keeker acted in good faith and

³ The Everetts also contend that Keeker was not entitled to payment because he had not provided lien waivers from subcontractors as required by the contract. The trial court found that the failure to provide lien waivers was not material. That finding is not clearly erroneous in light of testimony that the usual process for obtaining a draw is to present the lien waivers to the title company escrowing the construction funds after the homeowner approves the draw request.

was ready, willing, and able to proceed with construction if the draw had been paid. It also found: “Keeker was absolved from further performance on the contract when it became obvious that the Everetts were not going to perform on the contract, a date which was certainly before July 15, 2001.” Thus, it was the Everetts’ refusal to authorize payment after Keeker’s completion of additional work and submission of a revised draw request that breached the contract. The evidence supports the trial court’s finding that the contract was not terminated until Keeker went unpaid after performing the demanded additional work.

¶9 The Everetts want to negate any meaning to the subsequent negotiations between the parties which resulted in Keeker performing additional work after the initial refusal to authorize a draw. They argue that those negotiations never rose to a formal settlement agreement or an amendment to the contract. However, they do not dispute that they demanded additional work as a condition to authorizing the draw or that Keeker performed the demanded work. It does not matter that the negotiations did not result in a formal agreement. Evidence of the subsequent negotiations and the Everetts’ demands for additional work are evidence of subsequent acts affirming the contract.

¶10 The trial court found that the delay in construction was caused by the Everetts’ demands for additional work before payment would be authorized at a time when they were obligated to make payment. The Everetts ignore that the defects they cited in withholding authorization turned out to be without a basis. The evidence supports the trial court’s findings that their demands were unreasonable and not related to work that Keeker performed up to the date of the first draw request. We affirm the conclusion that the Everetts breached the contract with Keeker.

¶11 The Everetts challenge the award of attorney fees to Keeker. They first repeat their contention that it was Keeker, and not them, who breached the contract. That contention has been rejected. Their second position is that the trial court arbitrarily selected 90% of Keeker's total attorney fees as the appropriate amount of the attorney fees award. Review of the trial court's determination of the value of attorney fees is limited to determining whether the trial court properly exercised its discretion. *Village of Shorewood v. Steinberg*, 174 Wis. 2d 191, 204, 496 N.W.2d 57 (1993). The trial court explained that the enormity of the case would make it impossible to account hour for hour time spent on the contract claim. After observing the trial and the allocation of time to the claims at trial, the trial court concluded that 90% of the total fee was the appropriate amount. The trial court was uniquely positioned to make that determination and we defer to it. *See Sheboygan County v. D.T.*, 167 Wis. 2d 276, 282, 481 N.W.2d 493 (Ct. App. 1992) (appellate courts defer to lower court determination when that court was, for whatever reason, in a better position to make those particular determinations). We conclude that the award of attorney fees was a proper exercise of discretion.

¶12 We turn to the Everetts' argument that Wickes Lumber should not have recovered on its construction lien because of improper notice of the lien. The circuit court found that the Everetts contracted directly with Wickes Lumber so that Wickes Lumber did not have to give notice of its construction lien to make the lien enforceable. *See* WIS. STAT. § 779.02(1)(b). The Everetts claim that the

contract provisions the trial court relied on are ambiguous and define the issue as one of contract interpretation.⁴

¶13 We first reject the notion that the contract with Wickes Lumber is ambiguous. Not only did the contract directly state that the Everetts were retaining Wickes Lumber for materials and services, but it also provided that the title company holding construction funds would issue payment directly to Wickes Lumber upon completion of the rough framing of the house. Wickes Lumber was obligated to perform its contract with the Everetts regardless of whether Keeker was on the job. Further, even if the contract is ambiguous, the trial court's finding that the Everetts intended to contract with Wickes Lumber is supported by the evidence. In order to terminate their contract with the first builder, the Everetts had to provide assurance that Wickes Lumber would be paid. To that end the Everetts communicated directly with Wickes Lumber and signed the contract to which only the Everetts and Wickes Lumber were parties. By including the amount due to Wickes Lumber in his initial draw request, Keeker was not injecting ambiguity into the contract between the Everetts and Wickes Lumber. The draw request came months after the contract was signed and was not related to formation of the contract. We affirm the judgment in favor of Wickes Lumber on the construction lien.

¶14 The Everetts request a new trial in the interests of justice under WIS. STAT. § 752.35. They claim that the real controversy regarding their damages was

⁴ The Everetts suggest the contract is ambiguous because one sentence provides that they will "retain the services of Wickes Lumber in regard to the framing of their house," and the very next sentence acknowledges that Wickes Lumber is "agreeable to allowing Keeker Builders to assume the contract that was in place between Wickes Lumber and Newport Builders."

not fully tried and that the trial court's judgment is rife with factual errors due to the lengthy and disjointed trial. We affirm the judgment against the Everetts and need not consider whether a new trial on their damages is necessary.

¶15 We turn to the issue raised in the cross-appeal by Wickes Lumber. It argues that by establishing a credit account with Wickes Lumber, accepting responsibility as the Everetts' general contractor, including the cost of the materials and labor supplied by Wickes Lumber in his first draw request, and acknowledging at trial that he was responsible for the Wickes Lumber bill, Keeker assumed liability to Wickes Lumber for costs associated with the Everetts' home. In pursuing Keeker for the sums it recovered by the foreclosure of its construction lien, Wickes Lumber seeks to recover its attorney fees.⁵

¶16 Before Keeker signed the credit application with Wickes Lumber, Wickes Lumber directly contracted with the Everetts for payment of materials and labor supplied by Wickes Lumber. The trial court found that Keeker did not agree to be responsible for materials for which an owner directly contracted. It also found that Wickes Lumber did not agree to provide the materials to the Everetts based upon Keeker's credit. These findings are not clearly erroneous. Although Keeker acknowledged that he would pay Wickes Lumber, his doing so was a matter of convenience since he was the general contractor in contact with the title company holding the construction funds. Both Keeker and Wickes Lumber understood that the Everetts were directly responsible for payment. Notwithstanding that Keeker was invoiced for materials and labor supplied to the

⁵ Section six of Keeker's credit application states: "In the event of default, Wickes Lumber may charge Purchaser all costs of collection, including attorneys fees and court costs, to the extent permitted by law."

Everett construction site, the credit application did not create an obligation to pay for materials purchased by another person. The trial court's finding that the Everetts purchased directly from Wickes Lumber is not clearly erroneous. Thus, Keeker was not obligated under the credit application to Wickes Lumber for the materials and labor the Everetts agreed to purchase.

By the Court.—Judgment affirmed.

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

