**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**July 25, 2006**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 2005AP1704** **Cir. Ct. No. 2004CV5149**

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

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**OTIS ELEVATOR COMPANY,**

**PLAINTIFF-APPELLANT,**

**V.**

**FULCRUM CONSTRUCTION COMPANY, LLC,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County: MICHAEL GUOLEE, Judge. *Reversed and cause remanded for further proceedings consistent with this opinion.*

Before Fine, Curley and Kessler, JJ.

¶1 KESSLER, J. Otis Elevator Company, the successor of Northwestern Elevator Company (collectively, "Northwestern"), appeals from an order dismissing its claim for approximately $17,500 for elevator components that

it custom ordered for Fulcrum Construction Company, LLC ("Fulcrum"), which ultimately were not used because the construction project was cancelled. The trial court concluded that Northwestern was not entitled to payment because it failed to submit shop drawings to the construction project's architect prior to ordering the elevator components, which the trial court concluded was required by the subcontract between Fulcrum and Northwestern.

¶2 It is undisputed that shop drawings were not submitted before the elevator components were ordered. However, Northwestern argues: (1) submission of the shop drawings was not a condition precedent to Fulcrum's performance under the subcontract; and (2) there are genuine issues of material fact as to whether Fulcrum waived strict compliance with the shop drawings provision.

¶3 We conclude that the subcontract and the general contract, parts of which purportedly applied to the subcontract, were ambiguous as to when Northwestern was to provide shop drawings, *i.e.*, whether it was required to provide shop drawings before the elevator components were ordered, or only prior to seeking permits and installing the elevator, or at some other time. Based on this ambiguity, we conclude that extrinsic evidence may be properly considered to clarify the parties' intent. Examination of this evidence reveals that there are genuine issues of material fact that require resolution by a fact finder. Therefore, we reverse the order and remand for further proceedings. We do not consider Fulcrum's argument that Northwestern's pre-contract conduct waived strict compliance with the shop drawings provision.[1]

[1] As we discuss, pre-contract conduct can help explain the meaning of an ambiguous contract, but it is axiomatic that one cannot waive contract rights before they are created. *See, e.g.*, ***Patton v. Bearden***, 8 F.3d 343, 346-47 (6th Cir. 1993) (court would not find waiver of (continued)

## BACKGROUND

¶4 On December 8, 1999, Fulcrum executed a contract (the "General Contract") with Capitol Medical Development LLC to be the prime contractor for the construction of a medical building. Several weeks prior to executing the General Contract, Fulcrum contacted Northwestern, a company it had worked with previously, to discuss having Northwestern serve as a subcontractor to install a hydraulic passenger elevator in the building. The discussions were fruitful and, on November 23, 1999, Northwestern wrote to Fulcrum thanking Fulcrum "for the contract award to perform the elevator installation." Northwestern's letter stated that the elevator components would have to be ordered sixteen weeks prior to installation, which at that time was scheduled to begin on May 1, 2000.[2] Northwestern's letter also asked Fulcrum to complete an enclosed "Elevator Ordering Information" form, and to identify any changes in elevator drawings dated September 17, 1999, that had been provided to Northwestern.

¶5 On December 16, 1999, by fax, Northwestern reminded Fulcrum that it needed a completed Elevator Ordering Information form. Fulcrum replied by saying the information had been passed on to the architect and advised that the start date for the project had been moved to January 3, 2000. The Elevator Ordering Information form was completed and signed on December 21, 1999, by Douglas Moore, an agent of the architect.

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contractual rights where party's statement that he would not seek royalties was made prior to the execution of the written contract that provided for the payment of royalties). Whether Fulcrum's *post-contract* conduct in this case constituted a waiver of the contract terms was not an issue developed at the trial court and is not an issue before us.

[2] The record suggests that the start date for the installation of the elevator was later scheduled for June 6, 2000.

¶6 On January 25, 2000, Fulcrum and Northwestern entered into a written subcontract agreement (the "Subcontract"). The Subcontract provided that Northwestern was bound by the provisions of the General Contract insofar as they were applicable to the Subcontract; this Subcontract provision was similar to the General Contract's requirement that any subcontractors performing work on the project were, to the extent of work to be done by the subcontractor, to assume all of Fulcrum's obligations and responsibilities under the General Contract. The contract language at issue in this case involved specific sections of the General Contract. Section 3.12.7 of the General Contract provided: "The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings, Product Data, Samples or similar submittals until the respective submittal has been approved by the Architect." Section 1.1.3 defined "Work" as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations. The Work may constitute the whole or a part of the Project."

¶7 The General Contract also incorporated a Project Manual, which it defined in § 1.1.7 of the General Contract as a "volume assembled for the Work which may include the bidding requirements, sample forms, Conditions of the Contract and Specifications." The Project Manual included a four-page description of the hydraulic passenger elevators, including specifications for the elevator. Part of this description specified what was to be included in shop drawings, project data and other submittals. Shop drawings were defined in § 3.12.1 by the General Contract as: "drawings, diagrams, schedules and other data specially prepared for the Work by the Contractor or a Subcontractor, Sub-

subcontractor, manufacturer, supplier or distributor to illustrate some portion of the Work."

¶8 On February 3, 2000, Northwestern ordered the elevator components so that they would arrive in time to be installed beginning on June 6, 2000. Northwestern admits it had not submitted shop drawings to Fulcrum or the architect by the time it ordered the elevator components, although the architect had approved the Elevator Ordering Information form in December.[3]

¶9 On March 15, 2000, Fulcrum sent all subcontractors a notice indicating that the project was "on hold" due to a problem obtaining a building permit. The memo stated in relevant part:

> This is to advise you that the … project has been put on **hold** as of today due to inability to obtain a building permit from the City of Milwaukee. The Owner has been unable to obtain permission from the adjacent property owner to connect to an existing storm sewer located on the adjacent property.… The Owner anticipates resolving this matter at a future date, but [is] unable to predict when that may be.
>
> The above information is as accurate as we have right now. Our contract with the Owner has NOT been terminated, and, at this time, we are not terminating any subcontracts issued. We will contact each of you when we have further information.

(Emphasis in original.)

¶10 On April 12, 2000, Northwestern submitted shop drawings in writing and told Fulcrum that Northwestern "must be in receipt of the approved elevator shop drawing before we can apply for permit [sic]…." The shop drawings were never approved or returned to Northwestern. On May 18, 2000, Northwestern sent

[3] Northwestern does not argue that the architect's approval of the Elevator Ordering Information form constituted approval of Shop Drawings.

an invoice to Fulcrum for $17,491.50 in elevator components it had ordered.[4] Fulcrum refused to pay the invoice, noting in a written response that "Fulcrum has been strictly advised that no materials are ordered [sic] by NW Elevator/Otis until all shop drawings have been approved. I have no record of shop drawings being submitted for this job."

¶11 Ultimately, the medical building project was cancelled.[5] Northwestern filed suit against Fulcrum to recover the cost of the elevator components that Northwestern had ordered for the project. Fulcrum denied any liability, asserting that Northwestern's work had not been authorized because Northwestern had failed to "prepare and submit to Fulcrum shop drawings for approval by Fulcrum and the project architects" prior to ordering the elevator components. Fulcrum noted that "such shop drawings were not submitted by [Northwestern] until after [Northwestern] was notified that the construction … was not proceeding." Fulcrum argued that the elevator components were ordered without authorization, and that Fulcrum was therefore not obligated to pay for them.

¶12 Fulcrum moved for summary judgment, which the trial court granted. The trial court held that approval of the shop drawings by Fulcrum was a condition precedent to any payment under the Subcontract, and that Northwestern's failure to submit the shop drawings prior to ordering the elevator components removed Fulcrum's liability to pay for the elevator components.[6] The

[4] The total contract amount was to be $32,488.

[5] The owners were unable to obtain a building permit. It appears this was the reason the project was cancelled.

[6] As of the date of the motion for summary judgment, the elevator components remained in Northwestern's possession. The parties disagreed about how easily Northwestern might be able to use part or all of the elevator components for other jobs. Because the trial court concluded (continued)

trial court also concluded that it could not consider correspondence that occurred prior to the execution of the Subcontract because pre-contract conduct was irrelevant where the written contract superseded prior agreements, and because considering that correspondence would violate the parol evidence rule. This appeal followed.

## LEGAL STANDARDS

¶13 When reviewing a summary judgment, an appellate court applies the same methodology as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). The methodology is well-established, *see* ***State Bank of LaCrosse v. Elsen***, 128 Wis. 2d 508, 511-12, 383 N.W.2d 916 (Ct. App. 1986), and need not be repeated here. We will affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶14 The established rules of contract interpretation apply here. The primary goal in contract interpretation is to give effect to the parties' intentions. ***Johnson Controls, Inc. v. Employers Ins. of Wausau***, 2003 WI 108, ¶30, 264 Wis. 2d 60, 665 N.W.2d 257. We ascertain the parties' intentions by looking to the language of the contract itself. ***State ex rel. Journal/Sentinel, Inc. v. Pleva***, 155 Wis. 2d 704, 711, 456 N.W.2d 359 (1990). Such language is to be interpreted consistently with what a reasonable person would understand the words to mean

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that Fulcrum was not liable under the contract, Northwestern's potential to use the components on other jobs and the potential effect that could have on its damages are not the subject of this appeal.

under the circumstances. ***Danbeck v. American Family Mut. Ins. Co.***, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150.

¶15 "When the terms of a contract are plain and unambiguous, we will construe the contract as it stands." ***State v. Peppertree Resort Villas, Inc.***, 2002 WI App 207, ¶14, 257 Wis. 2d 421, 651 N.W.2d 345. The terms of a contract are ambiguous if they are "reasonably or fairly susceptible to more than one construction." ***Maas v. Ziegler***, 172 Wis. 2d 70, 79, 492 N.W.2d 621 (1992). "When a contract provision is ambiguous, and therefore must be construed by the use of extrinsic evidence, the question is one of contract interpretation for [a fact finder]." ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177, 557 N.W.2d 67 (1996).

¶16 Although the parties' intent presents a question of fact, "'the parol evidence rule prohibits a trial court from inquiring into the intent of parties to an unambiguous written agreement.'"[7] ***Mitchell Bank v. Schanke***, 2004 WI 13, ¶46, 268 Wis. 2d 571, 676 N.W.2d 849 (citation and footnote omitted). The parol evidence rule "prohibits the use of oral testimony of prior or contemporaneous

[7] Wisconsin's parol evidence rule is codified at WIS. STAT. § 402.202, which provides:

> **Final written expression: parol or extrinsic evidence.** Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented:
>
> **(1)** By course of dealing or usage of trade (s. 401.205) or by course of performance (s. 402.208);
>
> **(2)** By evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

negotiations to vary the terms of a written instrument complete upon its face." ***O'Connor Oil Corp. v. Warber***, 30 Wis. 2d 638, 642, 141 N.W.2d 881 (1966). One exception to the parol evidence rule is that parol evidence "can be used to explain an ambiguous term of the written instrument." ***Id.*** "A word or term in a contract to be ambiguous must have some stretch in it—some capacity to connote more than one meaning—before parol evidence is admissible." ***Conrad Milwaukee Corp. v. Wasilewski***, 30 Wis. 2d 481, 487, 141 N.W.2d 240 (1966). Whether a contract is ambiguous presents a question of law to be reviewed *de novo*. ***Mitchell Bank***, 268 Wis. 2d 571, ¶46.

## DISCUSSION

¶17 At issue is whether Northwestern is entitled to payment from Fulcrum for the elevator components it ordered. It is undisputed that the elevator components were ordered, and that Northwestern purchased them. Fulcrum argues that Northwestern is not entitled to payment because Northwestern failed to submit shop drawings for the elevator to Fulcrum's architect prior to ordering the elevator components. Fulcrum contends that "[t]he General Contract and Subcontract [require] that shop drawings for the Elevator needed to be submitted and approved by the project architects before any portion of the work could be performed." To support that position, Fulcrum points to § 3.12.7 of the General Contract, which provided in relevant part: "The Contractor shall perform no portion of the Work for which the Contract Documents require submittal and review of Shop Drawings … until the respective submittal has been approved by the Architect." Fulcrum reads this provision to require the approval of shop drawings before *any* work is performed.

¶18 Fulcrum does not appear to dispute that correspondence prior to the signing of the Subcontract indicated that Northwestern would be ordering the

elevator components sixteen weeks prior to the estimated installation date, and the fact that Fulcrum completed the Elevator Ordering Information form prior to the date the Subcontract was signed. However, Fulcrum argues that the parties' ultimate intent with respect to whether the architect had to approve shop drawings before the elevator components were ordered was embodied in the parties' Subcontract, and that any prior correspondence or understanding is irrelevant.

¶19 Northwestern's position with respect to the meaning of the Subcontract and General Contract language is not entirely clear. In its opening brief, Northwestern states that it:

> does not dispute that a provision of the [General Contract] between Fulcrum and Capitol, which was incorporated by reference into the contract between Fulcrum and Northwestern (the [S]ubcontract) would have Northwestern submit shop drawings to the project's architects before fabricating the elevator, for the limited purpose of ensuring the finished elevator's conformance with the specifications in the [G]eneral [C]ontract.

Yet, three pages later, Northwestern asserts that "a reasonable interpretation of the shop drawings provision is that it was intended to make [sure] the elevator that was installed conformed with the plans and did not require submittal of shop drawings before ordering the components of the elevator." In its reply brief, Northwestern asserts that the contractual terms "do not unambiguously require Northwestern to submit and obtain approval of shop drawings prior to ordering elevator parts." It is unclear whether Northwestern meant to assert that the Subcontract and the General Contract are ambiguous, or that they unambiguously do not require Northwestern to submit shop drawings prior to ordering parts.

¶20 The lack of clarity in Northwestern's position does not prevent our review of the summary judgment, given the applicable *de novo* standard of review. *See* ***Green Spring Farms***, 136 Wis. 2d at 315-17. Applying that standard, we

conclude that the contract language was ambiguous because it is not clear when Northwestern was required to submit the shop drawings. Therefore, parol evidence is potentially admissible to determine the parties' intent. *See* ***Kasten v. Markham***, 1 Wis. 2d 352, 356, 83 N.W.2d 885 (1957) ("'Whenever the terms of a contract are susceptible of more than one interpretation, or an ambiguity arises, or the extent and object of the contract cannot be ascertained from the language employed, parol evidence may be introduced to show what was in the minds of the parties at the time of making the contract and to determine the object on which it was designed to operate.'") (citation omitted). We reverse the summary judgment and remand for further proceedings.[8]

¶21 Our analysis begins with the contract terms. As noted earlier, § 3.12.7 of the General Contract provided that no portion of Work that required "submittal and review of Shop Drawings, Product Data, Samples or similar submittals" could be performed "until the respective submittal has been approved by the Architect." The term "Work" was defined in § 1.1.3 as "the construction and services required by the Contract Documents, whether completed or partially completed, and includes all other labor, materials, equipment and services provided or to be provided by the Contractor to fulfill the Contractor's obligations." The specific shop drawings required for the elevator were described in detail in the four pages of the Project Manual devoted to the elevator specifications.

¶22 Based on these terms, it is clear that Northwestern was required to provide shop drawings at some time. However, it is not clear that the shop

[8] Because we reverse the summary judgment, we do not consider Northwestern's argument that the provision it allegedly breached was not material.

drawings were required prior to ordering the elevator components. As Northwestern notes, "A reasonable interpretation of the contractual provisions is that Product Data submission would be required before ordering the product and the shop drawings are required before obtaining a permit and installing the product." Another reasonable interpretation, advanced by Fulcrum, is that the shop drawings were to be submitted prior to ordering the elevator components.[9] Faced with at least two reasonable interpretations of the contract, we conclude that the contract is ambiguous as to precisely when Northwestern was required to submit the shop drawings. *See* ***Maas***, 172 Wis. 2d at 79.

¶23 Because we conclude that the Subcontract and General Contract language was ambiguous, it is appropriate to consider parol evidence—*i.e.*, the parties' conduct prior to contracting—to determine the parties' intent. Our review of the evidence in the record reveals potential contradictions in the facts and the inferences to be drawn from the facts. These genuine issues of material fact preclude summary judgment. Therefore, we reverse and remand for further proceedings.

*By the Court.*—Order reversed and cause remanded for further proceedings consistent with this opinion.

Not recommended for publication in the official reports.

[9] Fulcrum at times argues for an even stricter view of the contract: that *no* work may be performed until the shop drawings are submitted. If a subcontractor is prohibited from doing *any* work until shop drawings are approved, one is left to wonder how a subcontractor can even *produce* shop drawings as that, too, would constitute Work under the General Contract. This is one more example of the ambiguity created by the contract language.