COURT OF APPEALS
DECISION
DATED AND FILED

January 23, 2007

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2006AP945 **Cir. Ct. No. 2005CV8**

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

CLIFFORD SPICKLER AND DEBRA SPICKLER,

PLAINTIFFS-RESPONDENTS,

V.

CHRIS PETERSON, D/B/A PETERSON CONSTRUCTION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Eau Claire County: LISA K. STARK, Judge. *Affirmed.*

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

¶1 PER CURIAM. Chris Peterson appeals a judgment requiring him to refund payments Clifford and Debra Spickler made pursuant to a building contract. Peterson argues the court erred by concluding he breached the contract,

and the court should have held the Spicklers were the breaching party. We disagree and affirm the judgment.

BACKGROUND

¶2 Peterson is a home builder operating as a sole proprietor under the name Peterson Construction. On April 13, 2004, Peterson entered into a building contract with the Spicklers for a house in Eau Claire. At the time the contract was entered into, Peterson had already partially framed the house and intended to sell it as a spec home.[1]

¶3 The written contract contained twenty-one typewritten terms, including a term requiring Peterson to "apply for and obtain all necessary building, occupancy, and other governmental permits and licenses required" for construction. In addition to the typewritten terms, the parties handwrote several additional terms onto the final page of the contract. One of those terms stated that the contract price included a twenty-four by forty foot garage. It also stated Peterson was to provide the Spicklers "with copies of building plans for 24 x 40 garage for approval." The garage was to be a second detached garage in addition to the attached two-car garage that was already part of the plan.

¶4 From that point, the parties' accounts diverge. According to the Spicklers, Cliff drew up a sketch of the garage he wanted and gave it to Peterson before he signed the contract. The sketch was of a four-car garage with a gable and dormers that would allow for extra storage. Peterson gave Cliff a $25,000

[1] The term "spec home" refers to any home a builder builds to sell on the open market, as opposed to a home built for a specific buyer.

estimate, which he included in the total purchase price, and told Cliff that building the garage would be no problem at all. Both Spicklers testified they would not have bought the house without the detached garage because of their storage needs.

¶5 According to Cliff, Peterson furnished him with plans for the garage about a week later. Cliff said he believed those were the plans Peterson eventually submitted to the planning commission. The commission rejected the plans at a meeting on August 2, apparently due to opposition from neighbors and the height of the proposed garage. After the plans were rejected, the Spicklers attempted to find a solution that was acceptable to their neighbors, the subdivision developer, and the planning commission. They struck on an idea involving additions to the house and attached garage; however, Peterson's estimate for that proposal was $112,000. The Spicklers believed this price was too high and decided they wanted nothing more to do with the transaction. In an October 14 letter, Peterson informed the Spicklers that he was resuming construction according to the original plans and would attempt to find a new buyer.

¶6 Peterson disputed most of the Spicklers' account. He testified the $25,000 for the garage was an "allowance," meaning that the total price of the home included $25,000 that could be put toward a detached garage, and that the Spicklers never showed him any drawing of what they wanted.[2] He claimed he had nothing to do with the design of the garage; rather, the Spicklers had created

[2] Peterson testified this meant the Spicklers could sign the building contract immediately and select a design for the garage at some later point. If building the garage cost more than the $25,000 allowance, the Spicklers would pay the excess. If it cost less, the Spicklers would receive a credit for the unused funds.

the plans that were rejected by the planning commission. Finally, he said the $112,000 estimate included additions that were unrelated to the garage.

¶7 The Spicklers filed suit on January 5, 2005. They alleged Peterson had breached the contract when he was unable to build the detached garage.[3] They demanded return of the $80,000 they had paid under the contract up to that point. In his answer, Peterson claimed the Spicklers breached the contract before he did. He also claimed damages for changes to the home he made at the Spicklers' request.

¶8 The case was tried to the court commencing on February 3, 2006. The court ordered Peterson to return the Spicklers' payments with interest. The court reasoned:

> I do find that the provision concerning the garage was a material term and I don't think that [Peterson] denies that.
>
> ….
>
> [T]he contract indicates that, "The contractor shall apply for and obtain all necessary building, occupancy, and other governmental permits and licenses." Unfortunately, Mr. Peterson was unable to do so here.
>
> ….
>
> Under the circumstances, I think that [a] material term of the contract was breached. After many attempts at revision, [Peterson] was unable to meet the demands for the garage and, therefore, I do find the contract was breached by [Peterson].

[3] The Spicklers also claimed Peterson violated WIS. STAT. § 100.18. The circuit court dismissed that claim, and the Spicklers do not cross-appeal that dismissal. All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

The court went on to conclude that impossibility did not excuse Peterson's nonperformance. The court also discussed the doctrine of frustration of purpose:

> [T]he construction of the garage was frustrated by an outside force, that being the City of Eau Claire. … The [Spicklers] did not cause the frustration. They're harmed by it, and they may be excused from performing their promise to purchase the residence.

¶9 Finally, the court denied Peterson's counterclaim, concluding that there was no breach of the contract by the Spicklers, and even if there was, Peterson had not proven any loss.

STANDARD OF REVIEW

¶10 On appeal, the circuit court's findings of fact will not be set aside unless clearly erroneous. WIS. STAT. § 805.17. When extrinsic evidence is used to construe an ambiguous contract provision, the meaning of the provision is a question of fact. ***Management Computer Servs., Inc. v. Hawkins, Ash, Baptie & Co.***, 206 Wis. 2d 158, 177-78, 557 N.W.2d 67 (1996). Similarly, whether a breach is material is a question of fact. ***Id.*** at 183. However, whether the facts found by the circuit court amount to a breach of contract is a question of law reviewed without deference to the circuit court. ***Steele v. Pacesetter Motor Cars, Inc.***, 2003 WI App 242, ¶10, 267 Wis. 2d 873, 672 N.W.2d 141.

DISCUSSION

¶11 Peterson's primary argument on appeal is that the circuit court erred in concluding that frustration of purpose relieved the Spicklers of any further obligations under the contract. However, as the Spicklers point out in their brief, a material breach relieves the non-breaching party from any further obligation to perform under the contract. Frustration of purpose was an alternate basis for the

court's conclusion. We affirm based on the circuit court's findings that (1) Peterson materially breached the contract; and (2) the Spicklers did not breach the contract.

¶12 A material breach by one party to a contract excuses subsequent performance by the other party. ***Entzminger v. Ford Motor Co.***, 47 Wis. 2d 751, 755, 177 N.W.2d 899 (1970). In order to be material, a breach must "be so serious … as to destroy the essential objects of the contract." ***Management Computer Servs.***, 206 Wis. 2d at 183 (citations omitted). In determining materiality, a fact finder is to consider "the extent to which the injured party will be deprived of the benefit that he or she reasonably expected, and the extent to which the injured party can be adequately compensated for his or her loss." ***Id.*** at 184.

¶13 The Spicklers testified they would not have entered into the contract if it did not include a guarantee that the garage would be built. The court also noted that their later actions—including demanding at one point that Peterson stop construction until he obtained permits for the garage—were consistent with their testimony that the garage was an essential part of the contract to them. The court's finding that the breach was material was not clearly erroneous.

¶14 We also discern no error in the court's conclusion that Peterson was responsible for the breach. Peterson argues that nothing in the contract calls for a garage as tall as the one rejected by the planning commission. However, the court heard conflicting testimony as to what the handwritten garage term meant, including Cliff Spickler's testimony that the plans rejected by the planning commission were based on a sketch he showed to Peterson before the contract was entered into. Because either side's interpretation was consistent with the text of the handwritten garage term, the term contained a latent ambiguity, and its

meaning was a question of fact. ***Id.*** at 177-78; ***In re Gibbs***, 14 Wis. 2d 490, 496, 111 N.W.2d 413 (1961). The court, as fact finder, was entitled to accept Cliff's testimony that the contract called for a garage tall enough to have required a variance from the planning commission. *See* ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980). The court was also entitled to conclude the contract required Peterson to obtain the permit for the garage based on the written term making him responsible for obtaining all necessary permits.

¶15 Because Peterson's material breach excused any further performance by the Spicklers, the Spicklers justifiably refused to perform any further obligations under the contract. *See* ***Entzminger***, 47 Wis. 2d at 755. We therefore need not address the circuit court's alternative holding that the Spicklers were excused from further performance because of frustration of purpose. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (court of appeals decides cases on the narrowest possible grounds).

¶16 Peterson argues the Spicklers were in fact the breaching party. He argues they breached the contract by failing to act in good faith and by hindering his ability to perform his contractual obligations. These claims are based primarily on allegations that the Spicklers delayed the project by taking too long to pick out materials and asking for design changes, that they failed to make payments on time, and that they failed to attend the planning commission hearing to support the garage plan that was ultimately rejected.

¶17 Again, this is simply a challenge to the circuit court's findings of fact. The circuit court concluded Peterson had failed to show how any delays in

the project amounted to an overall breach of contract. The court also concluded that because the construction was so far behind schedule, the Spicklers' failure to make required payments on time was not a breach of the contract. And while the court did not specifically address the Spicklers' failure to attend the planning commission hearing, it was entitled to accept Cliff Spickler's testimony that Peterson told him the planning commission meeting was a routine matter and there was no need for Spickler to attend.[4]

By the Court.—Judgment affirmed.

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

[4] Peterson also argues the Spicklers waived strict performance by failing to immediately terminate the contract after they learned the planning commission had rejected the plans for the garage. However, Peterson admits he did not make this argument to the circuit court, and he therefore is barred from raising it here. *See* ***State v. Hansford***, 219 Wis. 2d 226, 243 n.16, 580 N.W.2d 171 (1998). Trial by consent of the parties under WIS. STAT. § 802.09(2) merely allows a party to amend its pleadings at trial in certain instances; it has nothing to do with what issues may be raised on appeal.