COURT OF APPEALS
DECISION
DATED AND FILED

July 17, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2006AP1945 **Cir. Ct. No. 2005CV4679**

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

DIONNE CONSTRUCTION AND TRAFFIC COMPANY, LTD.,

PLAINTIFF-APPELLANT,

V.

KENNY CONSTRUCTION COMPANY AND MILWAUKEE METROPOLITAN SEWERAGE DISTRICT,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County: DANIEL A. NOONAN, Judge. *Affirmed*.

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 FINE, J. Dionne Construction and Traffic Company, Ltd., appeals the circuit court's grant of summary judgment dismissing its breach-of-contract

claim against Kenny Construction Company and the Milwaukee Metropolitan Sewerage District.[1] Dionne contends that the circuit court erred because it claims that there are genuine issues of material fact whether Kenny breached its subcontract with Dionne. We affirm.

¶2 Dionne also contends that there are issues of fact whether it could recover for Kenny's alleged breach of the subcontract under the scatter-shot theories of: supervening frustration, impossibility, promissory estoppel, parole evidence, unjust enrichment, implied duty of good faith, and equitable lien. It did not, however, raise these matters before the circuit court. Accordingly, we will not address them. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443–444, 287 N.W.2d 140, 145–146 (1980) (generally, appellate court will not review issue raised for first time on appeal).

I.

¶3 The Sewerage District contracted with Kenny to work on the Boylston Street to Mason Street Rehabilitation Project. In February of 2004, Kenny subcontracted with Dionne to rehabilitate approximately fifty-two manholes.

¶4 Under Article 14 of the subcontract, Kenny agreed to pay Dionne $290,290 or $5,582.50 for each completed manhole. Completion required that Dionne prepare, coat, and seal each manhole to the satisfaction of the Sewerage District.

[1] The Milwaukee Metropolitan Sewerage District did not file an appellate brief. *See* WIS. STAT. RULE 809.19(3)(a)3.

¶5 Under Article 19 of the subcontract, Kenny could terminate the subcontract if Dionne "fail[ed] to execute [the subcontract] according to its terms" or "default[ed] in the performance of any of [its] conditions":

> if the Sub-contractor shall fail to execute this Agreement according to its terms or shall default in the performance of any of the foregoing conditions, then and in that event the Contractor, by giving three (3) days notice in writing to the Sub-contractor of his intention to do so, may terminate the Sub-contractor's right to proceed with the work or any separate part thereof, and may enter upon and employ other persons to finish said work by contract or otherwise, and do or perform any further acts as are reserved by the Owner in its prime contract with the Contractor. In the event of such termination, in whole or in part, the cost of doing such work by the Contractor shall be paid by the Sub-contractor and such cost may be deducted from the contract price if there are sufficient monies and if not, that the Sub-contractor will immediately, upon demand, pay the Contractor such costs including costs of supervision and overhead.

(Underlining in original.) The Sewerage District is the "Owner." Article 14 of the subcontract provided that if Dionne defaulted or failed to perform, Kenny could:

> retain out of any monies at any time due the Sub-contractor a sum sufficient to pay all persons who have performed labor or furnished materials for the work included in this contract, and to protect said contractor against loss in the event the Sub-contractor shall default or fail to perform this contract or any separate part thereof, and said sums may be retained until satisfactory evidence is furnished the Contractor that all such claims have been fully satisfied and waivers of lien from said claimants delivered to the Contractor.

¶6 Dionne began work on the manholes in March of 2004. It had cash-flow problems, and, as a result, the Sewerage District agreed to make partial payments to Dionne when the Sewerage District determined Dionne had successfully completed parts of the work in connection with each manhole:

$2,000 for completion of the preparation; $3,082.50 for completion of the coating; and $500 for completion of the sealing.

¶7 On November 3, 2004, Kenny, which had become increasingly dissatisfied with Dionne's work, sent a letter to Dionne:

> As required by our subcontract, you are hereby put on notice that the following items must be completed within the next three business days, otherwise Kenny Construction Company ("Kenny") will formally terminate your subcontract.
>
> > 1. Provide Kenny with written evidence that all required insurance policies are in place and current.
> >
> > 2. Provide Kenny with a revised schedule showing that the manhole rehabilitation work will be completed on time. This schedule should include a manpower schedule, on a daily basis, giving specifics as to crew activities, etc.
> >
> > 3. Submit current partial waivers showing that payments to your subs/vendors are current. (We have been contacted by suppliers of your firm requesting direct payments and threatening the placement of liens.)
> >
> > 4. Supply evidence to Kenny that the required materials to complete the manhole rehabilitation are in your possession or on the job-site.
>
> As you know, Contract No. C07016C01 for the [Milwaukee Metropolitan Sewerage District] requires a completion date of November 24, 2004, otherwise we are in default. Based upon the issues referenced above, this date cannot be met, and Kenny must pursue other means to complete the work. This is the only notice to cure your firm shall receive.

¶8 On November 7, 2004, Dionne wrote Kenny "acknowledging" that it had received the November 3 letter and "reminding" Kenny that it had not been paid for what it claimed was completed work. In response to Kenny's concerns, Dionne represented that it was attaching the following to Dionne's letter: an

insurance policy and two partial lien waivers.[2] Additionally, Dionne's letter set out a work schedule for the manhole rehabilitation and assured Kenny that it had enough material to complete the work.

¶9 On November 9, 2004, Dionne faxed to Kenny a request for payment. The facsimile also purported to respond to Kenny's concerns:

> Here is my answer to your four stipulations:
>
> > 1). Certificate of Insurance Policy sheet enclosed it runs from 10/25/04 to 10/25/05.
> >
> > 2). If you can get my check that you owe me out to me this week I can do three manholes per day and we will work on Saturday. There are 28 Manholes left and 16 days in which I can do them in including two Saturdays. That is slightly more than one per day my friend.
> >
> > 3). Waivers are included – one due to your slow payment did not clear the bank I bounced a check (sorry about that I thought you would have paid me By [*sic*] now). As soon as you pay me I will get a cashiers check or money order Down [*sic*] to Chem-grout and I will pay them by money order here after [*sic*].
> >
> > 4). [Y]our superintendent on the above referenced project is welcome to come up to my shop and view what we have. I currently have 70 Bags of LaFarge PH or enough to do 10 Manholes at ½ inch. As soon as you Pay [*sic*] me I will get the rest of the required Super Coat up here.
> >
> > Can you please give me a little time to get the Cretex Manhole Seals in my shop As you know from my letter to [the] Director of [the Milwaukee Metropolitan Sewerage District]: there are Some

[2] The only item referenced in the letter that is in the Record is the insurance policy. We again remind appellants that it is their responsibility to ensure that a record on appeal is complete. *See* ***State Bank of Hartland v. Arndt***, 129 Wis. 2d 411, 423, 385 N.W.2d 219, 225 (Ct. App. 1986).

> [*sic*] issues with what is being required to install this item. Also the sewage [*sic*] District on several other projects still has this Item [*sic*] of work not installed one of Them [*sic*] is Bay Street. I promise you that before I ask for my last payment that These [*sic*] seals will be installed as they have been installed on all other projects that I have worked on.

¶10 On November 11, 2004, Kenny, with the approval and authorization of the Sewerage District, sent a letter to Dionne terminating the subcontract:

> As a follow-up to my notice to cure letter of November 3, 2004, please let this letter serve as your formal notice, pursuant to Article 19 of our subcontract agreement, that your services on this project are terminated effective immediately.
>
> Contrary to your correspondence of November 9, 2004, you
>
> > 1. Have not provided us with the appropriate insurance policies required by Article 11 of the subcontract agreement.
> >
> > 2. Failed to address the scheduling issues raised in our previous letter to you.
> >
> > 3. Have not provided the required lien waivers showing payment to your suppliers. (We are still receiving calls from vendors asking for money.)
> >
> > 4. Failed to purchase the necessary materials to complete the work.
> >
> > 5. Failure to pay employees wages.
> >
> > 6. Contrary to Article 4 of the subcontract agreement, you advised [the Milwaukee Metropolitan Sewerage District], per your letter of November 7, 2004, that you need additional money to continue the project.
>
> In reviewing the progress meeting minutes for this project, there has been a consistent pattern of failures by your firm to carry out the terms of the specifications of the subcontract agreement. In accordance with the subcontract agreement, we are proceeding to complete the work via another subcontractor. Once the project is over, we will address any outstanding issues concerning unpaid vendors.

Significantly, Dionne did not exercise its right under Article 18 of the subcontract to appeal the subcontract-termination to the Sewerage District.

¶11 Kenny hired Kim Construction Company, Inc., to finish the remaining work on the manholes. It is undisputed that when Kim completed the work, Kenny paid it $158,289 for work originally subcontracted to Dionne. Thus, under Article 19, Kenny offset the subcontract price by the amount it paid Kim, for a new price of $132,001. It is also undisputed that at the time of termination, Kenny had paid Dionne $91,419.75 for the partially completed work. Accordingly, Kenny further offset the subcontract price by this amount, for a new price of $40,581.25. Kenny withheld the remaining $40,581.25 to cover potential claims by Dionne's vendors and employees.

¶12 Dionne brought this suit, claiming that Kenny breached the subcontract when it did not timely pay Dionne for the work Dionne contended it had performed. Dionne's lawsuit sought $166,892.50 for work it claimed to have completed, and also sought to enforce what it contended were its lien rights against the $166,892.50 being held by the Sewerage District.

¶13 Kenny and the Sewerage District sought summary judgment, claiming that the subcontract unambiguously gave it the right to: (1) terminate the subcontract; (2) reduce the subcontract price by amounts Kenny paid to other subcontractors to finish the work; and (3) withhold payment if Dionne did not pay its subcontractors or employees.

¶14 The circuit court handled the summary judgment motion in two parts. First, it awarded partial summary judgment to Kenny and the Sewerage District, concluding that there was no fact dispute in connection with Kenny's termination of the subcontract with Dionne, and that the termination was proper.

The circuit court deferred its decision on the rest of the summary-judgment motion. Dionne then sought reconsideration, claiming that it did not fulfill the four conditions in Kenny's November 3 letter because it claimed that Kenny did not pay Dionne timely and that this, it contended, "essentially would mitigate against [its] breach of contract."

¶15 In a written decision, the circuit court denied Dionne's motion to reconsider and granted the remainder of Kenny and the Sewerage District's motion for summary judgment. The circuit court concluded that there were no issues of fact that had to be resolved, that under the terms of the subcontract Kenny properly offset the subcontract price by what it had paid another subcontractor to complete the work, and that Kenny properly withheld the payments Dionne contended it was owed.

II.

¶16 We review *de novo* a circuit court's grant of summary judgment. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315–317, 401 N.W.2d 816, 820–821 (1987). Summary judgment must be granted when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. WIS. STAT. RULE 802.08(2).

A. *Termination.*

¶17 Dionne contends that the circuit court erred when it concluded that Kenny properly terminated the subcontract because it asserts that there is a dispute of fact that it claims the trial court did not address, namely whether, as phrased in Dionne's brief on this appeal, Kenny's "payment failures" caused what Dionne

admits were its "shortcomings."[3] This argument is belied by the clear language in the subcontract.

¶18 The interpretation of a contract, including the determination of whether its terms are ambiguous, is a question of law that we review *de novo*. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Unambiguous language in a contract must be enforced as it is written. ***Cernhorsky v. Northern Liquid Gas Co.***, 268 Wis. 586, 593, 68 N.W.2d 429, 433 (1955). Language in a contract is ambiguous only when it is "reasonably or fairly susceptible of more than one construction." ***Borchardt***, 156 Wis. 2d at 427, 456 N.W.2d at 656. The terms of the subcontract between Kenny and Dionne are clear.

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[3] Dionne also claims that Kenny violated WIS. STAT. § 66.0135(3), which provides, as material:

> (a) Except as provided in sub. (4) (e) or as otherwise specifically provided, principal contractors that engage subcontractors to perform part of the work on an order or contract from an agency shall pay subcontractors for satisfactory work in a timely fashion. A payment is timely if it is mailed, delivered or transferred to the subcontractor no later than 7 days after the principal contractor's receipt of any payment from the agency.
>
> (b) If a subcontractor is not paid in a timely fashion, the principal contractor shall pay interest on the balance due from the 8th day after the principal contractor's receipt of any payment from the agency, at the rate specified in s. 71.82 (1) (a) compounded monthly.

Dionne points to this statute not to make a claim for interest but to argue that it supports its claim that Kenny failed to pay it timely. The statute, however, permits parties to contract differently, *via* the statute's recognition that the parties could, in their contracts, "specifically provide[]" "otherwise." Further, Dionne pled an action for breach of contract and did not assert in its complaint an alleged violation of § 66.0135(3).

¶19 As we have seen, Article 19 of the subcontract allows Kenny to terminate the subcontract "if the Sub-contractor shall fail to execute this Agreement according to its terms *or shall default in the performance of any of the foregoing conditions*." (Emphasis added.) It is undisputed that Dionne defaulted under the terms of the subcontract. Under Article 4 of the subcontract, Dionne agreed to provide Kenny with all requested lien waivers: "The Sub-contractor agrees to execute and deliver to Contractor any and all waivers of liens, and other forms that may be requested for partial and final payments." At a hearing on the motion for summary judgment, Dionne's lawyer admitted that Dionne had defaulted by not providing lien waivers:

> THE COURT: I mean the default isn't too difficult, he didn't give the lien waivers. That alone is a conceded fact, that one aspect alone.
>
> [Dionne's lawyer]: Well, that's where the November 7th letter where he's providing lien waivers. It says, here are two lien waivers.
>
> THE COURT: Then you go to the November 9th letter, and he's still got one outstanding.
>
> [Dionne's lawyer]: Correct.
>
> THE COURT: So, where is the disputed fact just on that alone?
>
> [Dionne's lawyer]: There is none.

¶20 Moreover, Article 11 of the subcontract required Dionne to provide insurance:

> The Sub-contractor will obtain and submit to the General Contractor, before any work is performed under this contract, certificates from the Sub-contractor's insurance carriers indicating coverage for the following: Workmen's Compensation and Occupational Diseases, including Employers' Liability subject to a limit of no less than 500,000. Commercial General Liability to cover the indemnity agreement in Article 10a through 10c above,

> although the existence of insurance shall not be construed as limiting the liability of the Sub-contractor under this contract.

Dionne did not do so. The only proof of insurance in the Record is a certificate of commercial general liability insurance dated January 7, 2005, which provided coverage from October 14, 2004, to October 14, 2005, and listed a "Stevens Construction" as an additional insured. This does not satisfy Dionne's burden to show a genuine issue of material fact whether Dionne had obtained adequate insurance for the Sewerage District project. *See* ***Transportation Ins. Co. v. Hunzinger Constr. Co.***, 179 Wis. 2d 281, 290, 507 N.W.2d 136, 139 (Ct. App. 1993) (The party resisting summary judgment has the burden to set forth specific facts to establish the elements on which they have the burden of proof at trial.).

¶21 Dionne also claims that a question of fact exists whether the three-day-notice provision in Article 19 of the subcontract gave it a right to cure. This argument does not raise a *material* dispute of fact because, as seen from the subcontract, it requires a three-day notice of termination, and whatever the situation might have been *if* Dionne "cured" its default in those three days, there is nothing in this Record showing that it did.

¶22 Finally, Dionne contends that there is a dispute whether it received notice of its termination and thus waived its right under Article 18 of the subcontract to appeal its termination. The Record shows otherwise. At a hearing on the motion for summary judgment, Dionne's lawyer admitted that Federal Express delivered the November 11 letter terminating the subcontract. The Record also has a Federal Express delivery confirmation receipt showing that someone at Dionne's office signed for a letter on November 12, 2004.

Accordingly, the undisputed evidence shows that Dionne received notice of its termination, which triggered its right to appeal.

B. *Payment.*

¶23 Dionne contends that the circuit court erred when it concluded that Dionne was not entitled to the money Kenny allegedly owed it because there is "an unresolved factual question" whether Kenny adequately mitigated its damages. In its written decision, the trial court concluded:

> there is no evidence that Kenny has enjoyed a benefit resulting from the breach. In other words, Kenny was not placed in a better position due to Dionne's breach. Kenny claims to have paid out the same total amount, $290,290.00, for the completion of the same manhole work that the original Contract between Dionne and Kenny called for. Dionne does not dispute this, only claiming that Kim was paid more per manhole than Dionne. Nothing in the contract requires Kenny to hire any other subcontractors at the same rate. The Contract was completed on schedule within the total designated Contract amount. Therefore, this argument that Kenny did not mitigate its damages is without merit.

(Record citation omitted.) We agree. As we have seen, Article 19 of the subcontract permitted Kenny to "employ other persons to finish said work by contract" and "deduct[the cost] from the contract price." Further, as we have also seen, it was Dionne's burden on summary judgment to show that there was a fact issue on its lack-of-mitigation contention. *See* ***Transportation Ins. Co.***, 179 Wis. 2d at 290, 507 N.W.2d at 139. There is nothing in the Record that supports Dionne's contention that the $158,289 Kenny paid Kim was improper. Further, as the circuit court noted, Article 14 permitted Kenny to, as material:

> retain out of any monies at any time due the Sub-contractor a sum sufficient to pay all persons who have performed labor or furnished materials for the work … until satisfactory evidence is furnished the Contractor that all

> such claims have been fully satisfied and waivers of lien from said claimants delivered to the Contractor.

Kenny withheld $40,581.25 under this provision. Dionne does not dispute that it owes $16,584.22 to Chem Grout, one of Dionne's vendors. Dionne also does not dispute that it owes $17,719.62 to another vendor, Pro-Safety. Additionally, it also does not dispute that it owes a total of $7,287.79 to at least three of its employees. All this equals $41,591.60, which, of course, is more than the $40,581.25 withheld.

By the Court.—Order affirmed.

Publication in the official reports is not recommended.