COURT OF APPEALS DECISION DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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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 No. 01-3330 | **Cir. Ct. No. 00 CV 3187**

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

JOSEPH W. VOLKMANN, D/B/A ALL SEASONS CONTRACTING,

PLAINTIFF-RESPONDENT,

V.

SUPERIOR HOME SERVICES, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL P. SULLIVAN, Judge. *Affirmed*.

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

¶1 PER CURIAM. Superior Homes Services, Inc. (“Superior”) appeals from the judgment, following a bench trial, awarding Joseph W. Volkmann (d/b/a All Seasons Contracting) $14,342.37 for unpaid home

rehabilitation services. Superior contends that the circuit court erred by: (1) failing to require Volkmann's strict compliance with the terms of the contracts; (2) concluding that Superior waived its right to claim damages by making periodic payments due under the contract; and (3) concluding that Superior failed to establish the difference in value between the actual improvements and the improvements called for in the contract, which accounted for its withholding of Volkmann's payments. We affirm.[1]

I. BACKGROUND

¶2 Volkmann operates a contracting business that provides home repair and restoration services. Superior aids insurance companies in finding contractors to perform home repair and restoration services to properties damaged primarily by vandalism, fire, flood, or other weather conditions. Testimony established that insurance adjustors surveyed the damaged properties involved in this case and developed lists of necessary repairs, which were then submitted to Superior. In the instant case, after receiving the lists and soliciting bids from other contractors, Superior contracted with Volkmann to complete the listed repairs on two residences in Wisconsin and one in Illinois. Prior to the three contracts at issue in this case, Volkmann and Superior had successfully executed and performed under seventeen similar contracts for home rehabilitation.

¶3 The three contracts between Volkmann and Superior contained language similar to the language they used in their seventeen prior contracts. The

[1] Because we, like the circuit court, conclude that no material breach occurred, we need not address the damages issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issue need be addressed).

contracts provided that "[a]ny deviation from the repair list . . . without prior written approval from Superior, will result in a reduction in the final payment amount received by the Independent Contractor." (Bold and italic type omitted.) The contracts also stated that "[a]ll [r]eplacement materials should be new and of the same quality as those which existed in the property." (Bold type omitted.)

¶4 Despite these provisions, when Superior's repair lists called for plaster, or for drywall/plaster, Volkmann always used drywall. Superior paid Volkmann for installing drywall on all seventeen prior contracts, even if the contract specified "plaster" on the repair list. Superior also paid Volkmann in periodic installments, or draws, throughout the restoration of the three disputed homes, despite his use of drywall instead of plaster. Superior, however, withheld Volkmann's final payment on the three contracts at issue. Volkmann sued for the final payment claiming that Superior had always accepted drywall as a substitute for plaster. The circuit court agreed and awarded Volkmann over $14,000 due on the contracts.

II. ANALYSIS

¶5 Superior concedes that "Volkmann did substantially perform all three contracts." Superior contends, however, that the contracts' plain and unambiguous language forbade deviation from the repair list without Superior's approval and required the use of new and quality replacement materials. Specifically, Superior claims that Volkmann's use of drywall, instead of plaster, violated the contracts and reduced the value of services rendered. We disagree.

¶6 The determination of whether a contract is ambiguous presents a question of law that we review independently on appeal. *See* ***Capital Invs., Inc. v. Whitehall Packing Co.***, 91 Wis. 2d 178, 189, 280 N.W.2d 254 (1979); ***Hortman***

v. Otis Erecting Co., 108 Wis. 2d 456, 461, 322 N.W.2d 482 (Ct. App. 1982). Words or phrases in a contract are ambiguous when they are reasonably or fairly susceptible to more than one construction. ***Katze v. Randolph & Scott Mut. Fire Ins. Co.***, 116 Wis. 2d 206, 213, 341 N.W.2d 689 (1984). It is simply not enough that the parties disagree as to the contract's meaning. The court must examine the contract's language itself to determine if well-informed persons should have become confused. ***Milwaukee Fire Fighters Ass'n v. City of Milwaukee***, 50 Wis. 2d 9, 14, 183 N.W.2d 18 (1971).

¶7 The three contracts at issue in this case consisted of three parts. The first part gave a brief description of the property, detailed the payment schedule, and specified the term of the agreement. The second, referred to as Addendum A, set forth the "responsibilities" of the "Independent Contractor," and the third, "Addendum B" or "Repair List," specified the repairs or renovation work for each room of the residence subject to the agreement.

¶8 Under each of the three contracts, the repair list stated, "Remove/Replace Ceiling Plaster," or "Remove/Replace Wall Plaster," in several rooms at each residence. In addition, each contract had provisions stating: "***Any deviation from the repair list (Addendum B*** [the repair list]***) without prior written approval from Superior, will result in a reduction in the final payment amount received by the Independent Contractor***," and; "**All Replacement materials should be new and of the same quality as those which existed in the property. If there is a question as to what type to use, use standard residential grade builder's materials.**" Finally, two of the three contracts had payment schedules which stated that payment would be made upon completion of drywall and plaster work.

¶9 The trial court implicitly concluded that the contract was ambiguous as to whether plaster or drywall was required under the contracts. We agree. At the very least, the terms "deviation" and "of the same quality" were open to interpretation. Thus, none of the contract provisions highlighted by Superior expressly precluded the use of drywall, even where plaster was originally used. Indeed, the parties' contract to repair a home in Collision, Illinois required that Volkmann "Repair/Replace Wall Plaster," but specified that a payment, or a draw, would be made upon completion of "drywall/plaster."

¶10 After a contract has been found to be ambiguous, it is the duty of the court to determine the intent of the parties at the time the agreement was entered. ***Patti v. Western Mach. Co.***, 72 Wis. 2d 348, 353, 241 N.W.2d 158 (1976). To resolve the ambiguity, a court may look beyond the fact of the contract and consider extrinsic evidence. ***Id.*** at 351. "Although the construction of an unambiguous contract is a matter of law, when there is ambiguity, as here, the sense in which the parties intended the words to be used is a question of fact. The finding of the [circuit] court regarding the intended meaning of the word must therefore be upheld unless it is contrary to the great weight and clear preponderance of the evidence." ***Id.*** at 353-54 (footnote omitted). Further, any ambiguity in the contract must be construed "most strongly against the drafting party." ***Strong v. Shawano Canning Co.***, 13 Wis. 2d 604, 609, 109 N.W.2d 355 (1961).

¶11 Here, the extrinsic evidence consisted of trial testimony and the parties' prior contracts. The evidence established that photographs sent to Superior during these three rehabilitation projects show that drywall was being used, that Superior knew that, and that Superior paid Volkmann, never expressing any dissatisfaction that Volkmann was using drywall instead of plaster. In

addition, trial testimony established that, except for small repairs, plaster is rarely used, having been replaced by drywall in most projects many years ago because of the expense and difficulty involved in plasterwork. Finally, Volkmann testified that, in their previous contracts, Superior had encouraged him to use his discretion to reduce costs.

¶12 Based on this evidence, the circuit court found that Superior had "set up a routine practice . . . that drywall would be a suitable substitute for replacing damaged or defective plaster." We agree. Volkmann did not breach the contracts and, therefore, he was entitled to the recovery the trial court ordered.

By the Court.—Judgment affirmed.

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