COURT OF APPEALS DECISION DATED AND FILED

March 26, 2003

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 No. 02-1440

Cir. Ct. No. 01-SC-4802

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

FARINA BUILDING CO., INC.,

PLAINTIFF-RESPONDENT,

V.

GENERAL LUMBER & SUPPLY CO., INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: J. MAC DAVIS, Judge. *Affirmed in part; reversed in part, and cause remanded with directions*.

¶1 SNYDER, J.[1] General Lumber & Supply Co., Inc. (General), appeals from a judgment entered in favor of Farina Building Co., Inc. (Farina), in

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2001-02). All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

the amount of $3919.44.[2] Farina's small claims complaint alleged breach of contract and conversion of trust funds, contending that General had been overpaid for windows used in the construction of a home that Farina built for Frederick and Linda Kappl (Linda).[3]

¶2 The trial court concluded that Farina "has established that General Lumber and Farina Building entered into a contract to deliver 32 windows for the price of $11,686, which included the tax." The trial court further determined that General had been paid a total of $14,954 for the windows, leaving a difference of $3268 owed to Farina. The court held that General was entitled to a credit from Farina of $71.10 for a delivered doorframe and entered judgment in favor of Farina for $3169.90 on the window contract. The court assessed interest at 5% per annum in the amount of $580.24, service fees of $20, a filing fee of $61 and $88.30 for subpoena costs.

¶3 General first contends that Farina was not entitled to any damages because Farina did not overpay General for the windows. In actions tried to the court, the question of the sufficiency of the evidence to support the findings of the court may be raised on appeal. WIS. STAT. § 805.17(4). The court shall find the ultimate facts and state separately its conclusions of law thereon. Sec. 805.17(2). Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the

---

[2] Judgment was entered in the principal amount of $3169.90 plus prejudgment interest of $580.24 and costs of $169.30.

[3] Linda Kappl testified at the trial and was Farina's primary contact on the building contract. We will use her first name to represent the homeowner's interests in the construction of the home under the contract with Farina.

witnesses. ***Id.*** Requests for findings are not necessary for purposes of review. ***Id.*** We turn to the trial record relied upon by the trial court for its findings and conclusions of law.

¶4 The essential facts are somewhat convoluted. Farina is a party to two contracts. First, on January 22, 1998, Farina contracted to build a home for Linda in Sussex, Wisconsin (building contract). The building contract stated a fixed price of $167,971, of which $12,600 was designated and escrowed for "Pella pro Line" windows. In May 1998, Linda decided to switch the brand of windows from Pella to "Andersen" and so advised Farina.

¶5 Farina requested a quote for the Andersen windows from General. General requested and received an estimate from Radford, its Andersen window supplier. Radford erred in that it provided a quote of $11,686, including sales tax, for thirty rather than the required thirty-two windows. General provided the erroneous quote to Farina. David Farina (David) testified that based on General's quote it had an agreed, enforceable contract price of $11,686 for the Andersen windows (window contract). The trial court agreed, finding that the quote represented a contract between Farina and General in spite of the error.

¶6 Farina told Linda that the window change would create a price increase, characterized the verbal window upgrade as a "change order" and told Linda that she would have to deposit an additional $2954 with General before General would order the Andersen windows. David testified that the additional deposit was "for a change in window manufacturers" and that he "told Mrs. Kappl to deposit those funds over to General Lumber because [Farina] didn't want to touch the money."

¶7 A possible upgrade from Pella windows was contemplated in the building contract, which stated in relevant part, "if Upgrade Windows - no 15% ... Mark-Up pre-Contract Item." In addition, the building contract stated that "[n]o changes in the plan and specifications are to be made except upon written order ... signed by Buyer and Builder setting forth a detailed description of the changes ... and the cost, or credit, therefore." The record contains no written change order to the building contract concerning windows. Consistent with the building contract terms, Linda made the additional $2954 deposit directly to General. General credited the deposit to Linda.

¶8 As to Farina's understanding of the additional deposit made to General by Linda, David testified as follows:

> Q Okay. I'm asking you what you told Linda Kappl. What did you tell her when you asked her to go to General Lumber and pay additional money?
>
> A [David Farina] It was after I got the price on 5-18 and the change was manufacturers from Pella to Andersen. So, the price that I gave her was 2954 more. So what I told her to do was deposit those funds over at General Lumber, and that is what happened. And that was for a change under the contract it was changed.
>
> Q Okay. So you told her that the increase is due to a changing from Pella to Andersen windows?
>
> A Yes.

¶9 All thirty-two windows were delivered to the construction site, and the Andersen windows invoice reflected the corrected price for thirty-two windows, rather than thirty, at $14,711.90, including tax. In August 1998, General drew $12,000 from the building contract escrow of $12,600 and retained the $2954 deposited by Linda for the change to Andersen windows, for a total of $14,954, or $242.10 over the billed amount for the Andersen windows.

¶10 David testified that General "went to the title company [and] pulled a full $12,000 out of the [escrow] draw when they were only entitled to 11,686," leaving a difference of $314. David also testified that he was billed $14,711.90 from his building contract account as shown on the corrected invoice for the Andersen windows, which billing included the $2954 deposit amount Linda paid to General at his direction "as my agent on my behalf."

¶11 The trial court held that Farina is entitled to the difference between $11,686, the contract price between Farina and General based on the mistaken quote on the Andersen windows, and the $14,954 amount paid to General, or $3268 in damages. We cannot agree.

¶12 The determination of the proper measure of damages for a specific claim presents a question of law which this court reviews independently. ***Magestro v. N. Star Envtl. Const.***, 2002 WI App 182, ¶10, 256 Wis. 2d 744, 649 N.W.2d 722. Contract damages should compensate the wronged party for damages that arise naturally from the breach; said damages are limited by the concept of foreseeability. ***Id.*** An injured party is only entitled to the benefit of his or her agreement, which is the net gain he or she would have realized from the contract but for the breach. ***Id.*** at ¶14.

¶13 Under the building contract, Farina would have been entitled to draw an amount of $12,600 for windows. The trial court found that Farina had an enforceable contract from General to provide Andersen windows for $11,686. General withdrew $12,000 from the escrow, $314 more than it was entitled to withdraw under the existing contract with Farina. Farina was denied a net gain of $314 because General withdrew from escrow an amount in excess of the window contract price. We conclude that Farina was entitled to damages from General.

¶14 We next turn to General's contention that the trial court miscalculated the damages. Farina is entitled under the building contract with Linda to the amount of $12,600 for the house windows. The trial court held that Farina is entitled to recover $14,954 for the windows. We cannot agree.

¶15 Farina is not entitled to more than it bargained for in the building contract for the windows. The amount deposited by Linda for the Andersen windows upgrade was foreseeable; a window change might occur, but the change would not result in a markup in Farina's favor. No written change to the building contract exists in the record. Therefore, the trial court's conclusion that Farina is entitled to an amount in excess of the $12,600 contract amount is not supported by the record, is not explained upon the record, and we must conclude that the conclusion is in error.

¶16 The difference between the $12,600 window costs allowed in the building contract and available in the $11,686 escrow is $914, the maximum amount that Farina could claim under the original building contract without a required written change order. Because General only claimed $12,000 of the escrow against the window costs, $600 was left in the escrow account. We are unaware of a theory of contract law that would allow Farina to recover money from a supplier that was not paid to the supplier. Nor do the trial court's findings and conclusions provide a rationale for such a damages award in favor of Farina.

¶17 The difference between General's $12,000 escrow draw for windows provided under the building contract and Farina's $11,686 Andersen windows contract with General is $314. Based on the evidence in this case, we agree that Farina would be entitled to damages from General in the amount of $314, representing the difference between the $12,000 General drew from the escrow

account and the $11,686 that General was entitled to draw based on the contract between General and Farina.

¶18 As to the $2954 window change order deposit by Linda being a credit to Farina, we are unaware of any theory of contract law that would support that conclusion. The contention is contrary to the building contract's requirement for written change orders allowing Farina to increase the contract's window costs to its benefit. The contract specifically prohibits a 15% markup for a window change order, or $353.10, that would be based on the difference between $14,954 and $12,600. However, Farina was awarded $2354 in damages, an increase of 19% over the building contract window escrow. We conclude that the $2354 is excessive and not supported by the building contract, the window contract or applicable contract law.

¶19 Farina's directive to Linda to pay the additional amount to General supports a conclusion that the window upgrade was made extraneous to the building contract and to the escrowed amount that Farina was entitled to for the window costs. To the extent that the trial court entered judgment inconsistent with the building contract, and with Farina's entitlements under the building contract for windows, we set aside the judgment damages awarded to Farina.

¶20 We conclude as a matter of law that the record supports damages to Farina in the amount of $314, the amount received by General from the window escrow minus the amount that General quoted to Farina for the Andersen windows.[4] Farina does not appeal from the $71.10 doorframe setoff granted by

[4] The Kappls are not a part of this action, have settled their difference with Farina in a separate lawsuit, and we do not address in this appeal the issue of whether the Kappls are entitled to a refund in whole or in part of the $2954 deposit for the window change order.

the trial court, leaving judgment damages in favor of Farina in the amount of $242.90.

¶21 Lastly, General appeals from the trial court's calculation of prejudgment interest on the damages awarded to Farina. We are satisfied that the trial court's interest calculations are correct as a matter of law.

¶22 In sum, we reverse the judgment as to the amount of damages. We conclude that a reassessment of damages in favor of Farina may occur based upon the existing record. Farina is entitled to a judgment of $242.90 plus interest and costs from General. We remand for judgment to be entered accordingly.

By the Court.—Judgment affirmed in part; reversed in part, and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.