

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 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. 02-1964
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-272

**IN COURT OF APPEALS
DISTRICT II**

MILLER HOMES, INC.,

PLAINTIFF-RESPONDENT,

V.

WARD BUILDERS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County:
JOSEPH D. McCORMACK, Judge. *Affirmed in part, reversed in part and cause remanded.*

Before Vergeront, P.J., Dykman and Lundsten, JJ.

¶1 PER CURIAM. Ward Builders, Inc. appeals a judgment in favor of Miller Homes, Inc. The judgment orders a construction lien removed, awards Miller \$1,000 for slander of title, and dismisses Ward's counterclaim. We reverse the counterclaim dismissal, and otherwise affirm.

¶2 The material facts pertaining to the removed lien are not in dispute. Miller was the general contractor on a home construction project. Ward was a carpentry sub-contractor. The sub-contract provided that Ward would perform the “rough carpentry” on the project, including several specific tasks. Under the heading “Price” Miller agreed to pay Ward \$36,394 for “rough carpentry,” and \$3,500 for “interior basement wall rough.” The latter was not included in the description of “rough carpentry” in the scope of the work.

¶3 Ward completed most of its work by June 2000, and received a substantial payment from Miller.¹ At Miller’s request, Ward’s president signed a “Waiver of Construction Lien” providing that “we [Ward] hereby waive ALL rights and claims for lien on [the constructed home] ..., In Full.” (emphasis in original).

¶4 Ward subsequently performed additional work on the project, for which it billed the \$3,500 price for the “interior basement wall rough.” Miller failed to pay, and Ward placed a construction lien on the constructed residence, under the provisions of WIS. STAT. sub-ch. 1, ch. 779.

¶5 Miller commenced this action to remove the lien and for punitive damages of \$1,000, under WIS. STAT. § 706.13(1) (2001-02).² In response, Ward counterclaimed for the \$3,500 Miller allegedly still owed under the contract, and

¹ Neither party mentions the amount of the payment, and this court could not find the amount stated in the record.

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

denied that it had waived its right to use statutory lien procedures to obtain the amount due.

¶6 Miller moved for summary judgment on its complaint. In a memorandum decision the trial court applied the plain language of the lien waiver to order the lien removed and to assess \$1,000 in WIS. STAT. § 706.13(1) damages. Miller submitted a proposed order for judgment. Ward asked the court to modify the order to indicate that its counterclaim remained pending. Miller responded by arguing that the court had implicitly resolved the counterclaim issue in its favor. Ward subsequently briefed the issue, contending that a factual dispute remained whether Miller had paid the contract price in full, notwithstanding the signed lien waiver. The trial court ultimately signed a judgment that dismissed the counterclaim but did not address the arguments in Ward's brief.

¶7 On review of a summary judgment we apply the same standard of review as the trial court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). Summary judgment is proper if there are no genuine issues of material fact and one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). If the facts are undisputed, the interpretation of a contract also presents a question of law. *Yauger v. Skiing Enters., Inc.*, 206 Wis. 2d 76, 80, 557 N.W.2d 60 (1996). When a contract is plain and unambiguous, we will construe it as it stands. *Keller v. Keller*, 214 Wis. 2d 32, 37, 571 N.W.2d 182 (Ct. App. 1997). A contract is ambiguous only if it is reasonable susceptible to more than one meaning. *Duhamé v. Duhamé*, 154 Wis. 2d 258, 266, 453 N.W.2d 149 (Ct. App. 1989).

¶8 The language of the lien waiver could not be more plain. "We waive ALL rights and claims for lien ... In Full." Whether Miller paid the contract price

in full or not, that language has only one meaning: Ward forfeited its right to use the statutory construction lien procedures to collect any amount due on the project for past, present or future work.

¶9 The trial court properly awarded punitive damages of \$1,000 against Ward. WISCONSIN STAT. § 706.13(1) provides that a person filing a lien is subject to the penalty if the person knows or should have known that the lien was “false, a sham or frivolous.” Ward contends that it could reasonably believe that the lien waiver only applied to work done and paid for through the date it was signed. As noted, the encompassing language of the waiver, exemplified by the capitalized and boldfaced words “all” and “in full,” renders Ward’s interpretation frivolous.

¶10 A factual dispute remains concerning Ward’s claim to an additional \$3,500 for its work. The counterclaim alleged that after the June 2000 payment and lien waiver, Ward performed additional work at Miller’s request, and \$3,500 remained due for that work. Miller’s reply alleged that Ward had been paid in full, placing the issue squarely in dispute. The submissions on summary judgment did not resolve that dispute. Nor did the trial court’s lien waiver decision. *See* WIS. STAT. § 779.05 (lien waiver does not waive any existing contractual rights). Further proceedings are therefore necessary to resolve the counterclaim.

¶11 There are no costs to either party.

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

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

