

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 1, 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. 03-0450-FT
STATE OF WISCONSIN**

Cir. Ct. No. 01-CV-597

**IN COURT OF APPEALS
DISTRICT III**

HOEPPNER BUILDING CORPORATION,

PLAINTIFF-APPELLANT,

v.

WIERSGALLA COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Eau Claire County: PAUL J. LENZ, Judge. *Reversed.*

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

¶1 PER CURIAM. Hoepner Building Corporation appeals a summary judgment dismissing its breach of contract claim against Wiersgalla

Company.¹ Hoepner contends the trial court erroneously concluded the suit was barred by the statute of limitations. We agree and reverse the judgment.

BACKGROUND

¶2 Hoepner was the primary contractor in the construction of Parkview Elementary School in Chippewa Falls. On June 9, 1994, Hoepner and Wiersgalla entered into a subcontract for Wiersgalla to do the plumbing work for the project. No performance deadline was stated in the subcontract, although Hoepner's general contract with the school district stated that "substantial completion" of the project should be accomplished by July 10, 1995.

¶3 In the construction industry, "substantial completion" means the work is sufficiently complete to allow the owner to occupy the building. The owner then generates a "punch list" of items to be resolved before the job is complete. Schools usually take occupancy of a new building in the summer and punch list items are resolved during the following winter break.²

¶4 Wiersgalla substantially completed the plumbing work by May 1, 1995, and Hoepner paid Wiersgalla for the work by June 21, 1995. In July 1995, the school moved into the building. The school district generated a punch list, which included work Wiersgalla was required to complete.

¹ This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

² Steven Thompson, Hoepner's vice president, noted this standard practice of the industry in his affidavit. Wiersgalla does not contradict these statements.

¶5 Wiersgalla worked on the punch list during the 1995-1996 winter break but did not complete all the items on the list. Wiersgalla returned to the school several times after the winter break, but still did not complete its items on the punch list. Finally, in 2001, Hoepfner hired another plumbing company to complete the work.

¶6 On October 23, 2001, Hoepfner filed suit to recover the amount charged by the replacement plumbing company. In its answer, Wiersgalla alleged that the action was barred by the statute of limitations. Wiersgalla moved for summary judgment. The court concluded the breach occurred when Hoepfner made its final payment to Wiersgalla on June 21, 1995. WISCONSIN STAT. § 893.43 provides for a six-year statute of limitations in breach of contract cases. Hoepfner did not commence its action until October 2001, more than six years after June 1995. Consequently, the court granted Wiersgalla's summary judgment motion and dismissed the action. Hoepfner appeals.

DISCUSSION

¶7 We review summary judgments independently, employing the same methodology as the trial court. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶8 The statute of limitations for a breach of contract claim is provided by WIS. STAT. § 893.43:

An action upon any contract, obligation or liability, express or implied, including an action to recover fees for

professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred.

Here, the parties differ as to when the breach occurred.

¶9 Hoepfner argues the breach occurred when Wiersgalla failed to complete the punch list items by the end of the 1995-96 winter break. Using Hoepfner's argument, the statute began to run in January 1996, and would not expire until January 2002. Because Hoepfner commenced this action in October 2001, he contends it would be within the limitations period.

¶10 Wiersgalla, on the other hand, argues the breach occurred no later than the substantial completion date listed in Hoepfner's general contract with the school district, July 10, 1995. Although Wiersgalla acknowledges the standard practice in the industry of returning to complete punch card items, it argues that standard practices do not overrule the terms of a contract. Instead, Wiersgalla argues the punch list proves that the work was not properly completed by July 10, 1995.³ It argues the deadline for completion was never extended beyond that date, and any breach must have occurred at that time. Consequently, Wiersgalla maintains the limitations period began in July 1995 and expired in July 2001. Under this argument, Hoepfner's action was untimely because it was commenced in October 2001.

¶11 We agree with Hoepfner and conclude that the action was timely filed before the expiration of the limitations period. The contract between Hoepfner and the school district called for "substantial completion" by July 1995.

³ We note that Wiersgalla's argument ignores the word "substantial" in the phrase "substantial completion."

However, the subcontract between Hoepfner and Wiersgalla did not list any completion date. Therefore, we turn to standard practices in the construction industry to determine when Wiersgalla's work was to be completed.

¶12 Standard practice in the industry is that the contractors return to finish punch list items after the work has been substantially completed. Here, Wiersgalla substantially completed its plumbing work and was paid in June 1995. It therefore had not breached the contract at that time. The punch list was then generated in July 1995. Based on its actions, Wiersgalla evidently understood that it was obligated to return to the school to complete items during the 1995-96 winter break. We conclude that completing the punch list was part of Wiersgalla's contractual duties. When Wiersgalla failed to complete the list, the breach occurred. The limitations period therefore runs from January 1996. Hoepfner filed this action in October 2001, within the six-year limitations period. Consequently, the court erred by granting Wiersgalla's motion for summary judgment.⁴

By the Court.—Judgment reversed.

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

⁴ Hoepfner makes an alternative argument that there was a new contract created in 1997, when Wiersgalla sent letters to Hoepfner indicating it would complete its work on the project. We do not reach this issue, however, because we conclude the action was filed within six years of the original contract.

Wiersgalla also makes an argument regarding a pending motion for costs, and urges us to remand for a review of that motion. However, the motion is based on an allegation that the action is frivolous. It is unnecessary for us to address this issue because we reverse the summary judgment motion, and therefore the action is not frivolous.

