COURT OF APPEALS
DECISION
DATED AND FILED

June 14, 2011

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP2640 **Cir. Ct. No. 2009CV102**

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

GERARD G. GEIGER AND KELLY K. GEIGER,

PLAINTIFFS-APPELLANTS,

V.

DORIS A. HANNEMAN AND CHICAGO TITLE INSURANCE COMPANY,

DEFENDANTS,

COLEMAN ENGINEERING COMPANY,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Iron County: MARK MANGERSON, Judge. *Reversed*.

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Gerard and Kelly Geiger appeal a summary judgment dismissing their negligence claim against Coleman Engineering Company and awarding Coleman attorney fees and litigation expenses. The circuit court concluded the Geigers' suit was untimely because they did not make their claim within the time period required by their contract with Coleman. The Geigers argue the circuit court erred because the contract was ambiguous, and, in any event, Coleman did not provide sufficient evidentiary support for its motion for summary judgment. The Geigers also contend the circuit court erred by awarding attorney fees and litigation expenses pursuant to the contract. In response, Coleman argues we lack jurisdiction because the Geigers did not timely initiate this appeal.

¶2 As a threshold matter, we reject Coleman's assertion that we lack jurisdiction over the Geigers' appeal. We next conclude that the Geigers' contract with Coleman unambiguously required them to make their claim within one year after they reasonably knew or should have known of the claim's existence. However, we agree with the Geigers that Coleman failed to provide sufficient evidentiary support for its summary judgment motion. We therefore reverse the summary judgment dismissing the Geigers' claim. Because we reverse the summary judgment, we need not address the issue of Coleman's attorney fees and litigation expenses.[1]

[1] *See* ***Skrupky v. Elbert***, 189 Wis. 2d 31, 47, 526 N.W.2d 264 (Ct. App. 1994) (if a decision on one point disposes of the appeal, we need not decide other issues raised).

BACKGROUND

¶3 The Geigers filed this lawsuit against Coleman on October 23, 2009. The complaint alleged the Geigers purchased property in Iron County in October 2003 and contracted with Coleman to complete a survey of the property's boundaries. Coleman completed the survey on November 4, 2003 and reported that the property's boundaries were as described in the Geigers' warranty deed.

¶4 The Geigers' neighbors to the north, the Gilberts, subsequently sued the Geigers in Washington County. The Gilberts sought a declaratory judgment that the northern boundary line of the Geigers' property was not as described in the deed. The court entered a declaratory judgment in favor of the Gilberts. We affirmed the judgment, and the supreme court denied the Geigers' petition for review. Based on the Washington County judgment, the Gilberts then commenced an action in Iron County, seeking reformation of the Geigers' deed. On September 9, 2009, the Iron County circuit court entered a judgment reforming the deed.

¶5 The Geigers then sued Coleman, alleging it negligently surveyed their property. Coleman moved for summary judgment,[2] arguing the Geigers did not assert their claim within the time period required by their contract with

[2] Coleman actually moved to dismiss the Geigers' claim. However, the motion to dismiss was accompanied by an affidavit, and therefore went beyond the allegations in the Geigers' complaint. Accordingly, we treat the motion as one for summary judgment. *See* WIS. STAT. § 802.06(2)(b); *see also* ***Nierengarten v. Lutheran Soc. Servs. of Wis.***, 219 Wis. 2d 686, 692 n.9, 580 N.W.2d 320 (1998).

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Coleman. Coleman also contended the contract entitled it to recover attorney fees and litigation expenses.

¶6 The circuit court granted Coleman's motion. The court determined the contract between Coleman and the Geigers was unambiguous and required the Geigers to "make their claim within one year of when they had notice of the existence of the claim." The court further concluded, "I think it's also very clear that much more than a year passed before the Geiger[s] gave their notice."

¶7 The court entered a judgment dismissing the Geigers' claim against Coleman on June 17, 2010. The judgment also stated that, pursuant to the contract, Coleman was entitled to recover attorney fees and litigation expenses. The judgment further provided that the Geigers were entitled to a hearing "to dispute the reasonableness of the cost[s] and fees[.]" A hearing was held on August 20, 2010, and on September 10, 2010 the court entered a second judgment awarding Coleman $19,860.21. The Geigers appeal from the September 10 judgment.

DISCUSSION

I. Jurisdiction

¶8 We first address Coleman's contention that we lack jurisdiction over the Geigers' appeal. Coleman contends the June 17 judgment was a final judgment for purposes of appeal. Because the Geigers did not file their notice of

appeal within forty-five days[3] of June 17, Coleman argues their appeal is untimely and we therefore lack jurisdiction. *See* WIS. STAT. RULE 809.10(1)(e) ("The filing of a timely notice of appeal is necessary to give the court jurisdiction over the appeal."). Whether a party timely appealed from a final judgment, and whether a judgment is final for purposes of appeal, are questions of law that we review independently. ***Werner v. Hendree***, 2011 WI 10, ¶58, 331 Wis. 2d 511, 795 N.W.2d 423.

¶9 We do not agree with Coleman that the June 17 judgment is a final judgment.

> [A] document constitutes the final document for purposes of appeal when it satisfies each of the following conditions: (1) it has been entered by the circuit court, (2) it disposes of the entire matter in litigation as to one or more parties, and (3) it states on the face of the document that it is the final document for purposes of appeal.

Tyler v. RiverBank, 2007 WI 33, ¶26, 299 Wis. 2d 751, 728 N.W.2d 686. The June 17 judgment does not satisfy the second condition for finality. The judgment did not dispose of the entire matter in litigation as to one or more parties because it did not dispose of Coleman's claim that it was contractually entitled to attorney fees and litigation expenses. In fact, the June 17 judgment specifically provided for a further hearing on that issue, and following the hearing the court awarded Coleman nearly $20,000. The June 17 judgment therefore did not "completely settle the rights of the parties." *See* ***Heaton v. Larsen***, 97 Wis. 2d 379, 396-97, 294 N.W.2d 15 (1980). Moreover, the judgment does not satisfy the third

[3] If notice of entry of judgment is given within twenty-one days, in accordance with WIS. STAT. § 806.06(5), an appeal must be initiated within forty-five days of the entry of the judgment appealed from. *See* WIS. STAT. § 808.04(1). Here, notice of entry of the June 17 judgment was given on June 21, 2010.

condition for finality because it does not contain a statement that it is a final judgment for purposes of appeal. Accordingly, the Geigers were not required to appeal within forty-five days after entry of the June 17 judgment, and, in fact, they could not have appealed that judgment as a matter of right. *See* WIS. STAT. § 808.03(1).

¶10 Instead, the Geigers properly appealed from the September 10 judgment, which entirely disposed of the litigation between Coleman and the Geigers.[4] The Geigers filed their notice of appeal on October 21, 2010, forty-one days after entry of the judgment. As a result, the Geigers' appeal from the September 10 judgment is timely. *See* WIS. STAT. § 808.04(1). Appeal from a final judgment brings before us all prior judgments and rulings adverse to the Geigers and in favor of Coleman, including the June 17 judgment. *See* WIS. STAT. RULE 809.10(4). We therefore have jurisdiction over the Geigers' appeal.

II. Summary judgment

¶11 The Geigers contend the circuit court erred by granting summary judgment in favor of Coleman. We independently review a grant of summary judgment, using the same methodology as the circuit court. ***Hardy v. Hoefferle***, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is

[4] Admittedly, the September 10 judgment also lacks a statement that it is a final judgment for purposes of appeal. However, our supreme court has stated that "[a]bsent such a statement, appellate courts should liberally construe ambiguities to preserve the right of appeal." ***Wambolt v. West Bend Mut. Ins. Co.***, 2007 WI 35, ¶4, 299 Wis. 2d 723, 728 N.W.2d 670; *see also* ***Tyler v. RiverBank***, 2007 WI 33, ¶26, 299 Wis. 2d 751, 728 N.W.2d 686 ("In the (hopefully) rare cases where a document would otherwise constitute the final document, but for not including a finality statement, courts will construe the document liberally in favor of preserving the right to appeal.").

proper if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2).

The Geigers' contract with Coleman

¶12 The circuit court concluded the Geigers' suit was untimely because they did not make their claim within the time period required by their contract with Coleman. The Geigers argue the circuit court erred because the contract is ambiguous and should therefore be construed against Coleman, the drafter. The interpretation of a contract presents a question of law that we review independently. ***Rosplock v. Rosplock***, 217 Wis. 2d 22, 30, 577 N.W.2d 32 (Ct. App. 1998). Whether a contract is ambiguous is also a question of law subject to independent review. ***Id.*** A contract is ambiguous if it is reasonably susceptible to more than one meaning. ***Id.*** "In such instances, any ambiguity is to be interpreted against the drafter," particularly when "a standard form is supplied by the drafting party." ***Gorton v. Hostak, Henzl & Bichler, S.C.***, 217 Wis. 2d 493, 506, 577 N.W.2d 617 (1998). However, if the contract is plain and unambiguous, we construe the contract as it stands. ***Rosplock***, 217 Wis. 2d at 31.

¶13 The Geigers' contract with Coleman states:

> Any claim, whether based upon contract, tort, breach of warranty, professional negligence (including errors, omissions or other professional acts), or otherwise, shall be deemed waived unless made by CLIENT in writing and received by COLEMAN within one (1) year after CLIENT reasonably knew or should have known of its existence but, in no event, shall such claim be asserted by CLIENT later than six (6) years after COLEMAN's completion of the Services with respect to which the claim is made.

The circuit court concluded this language required the Geigers to make their claim within one year after they reasonably knew or should have known of its existence.

However, the Geigers contend the language is ambiguous because it is reasonably subject to another interpretation. The Geigers argue:

> The quoted language requires the "making" of the claim within one year but then goes on to provide that "but in no event" should it be asserted after more than six years. Because that "but in no event" phrase lies between the two functional equivalents "making" and "asserting" a claim, the "but in no event" language may reasonably be construed to modify or qualify the one-year language about "making" a claim by providing an alternative, absolute deadline of six years for the "making" or "assertion" of claim. The language can be construed, reasonably, to inform the client that, while Coleman prefers a claim to be "made" within the one year, it absolutely insists that such claim be asserted (*i.e.*, made) within six years.

Essentially, the Geigers argue the contract sets forth two deadlines triggered by the same event—a one-year deadline and a six-year deadline—but only the six-year deadline is mandatory. Thus, because the Geigers filed their lawsuit against Coleman within six years after Coleman completed the survey, the Geigers argue their claim is timely under the contract.

¶14 The Geigers' interpretation is unreasonable. The Geigers disregard the fact that both the one-year and six-year limitations include the word "shall," which typically indicates that a condition is mandatory. *See* ***Armstrong v. Colletti***, 88 Wis. 2d 148, 153-54, 276 N.W.2d 364 (Ct. App. 1979) (construing "shall" in a contract as "mandatory language"). The contract states that a claim "shall be deemed waived" unless made within one year after the client reasonably knew or should have known about its existence. The contract also states that "in no event, shall such claim be asserted" by the client more than six years after completion of Coleman's services. Because both conditions include the word "shall," it is not reasonable to read the one-year limitation as something that Coleman merely prefers the client to do and the six-year limitation as something that Coleman

absolutely requires the client to do. By their plain language, both time limitations are mandatory.

¶15 More importantly, the Geigers' interpretation disregards the fact that the one-year and six-year limitations are triggered by different events. The one-year limitation starts running after the client "reasonably knew or should have known of [the claim's] existence." In contrast, the six-year limitation, similar to a statute of repose, starts running immediately upon "COLEMAN's completion of the Services with respect to which the claim is made." The contract therefore sets forth two separate time limitations, each mandatory and each triggered by a distinct event. Accordingly, for a claim to be timely under the contract, the client must make the claim *both* within one year of when he or she reasonably knew or should have known about it *and* within six years of when Coleman completed its services. If, for instance, the client did not find out about the claim until eight years after Coleman completed the work, the claim would still be untimely, even if the client made the claim within one year of when he or she became aware of it. Conversely, where, as here, the client made the claim within six years after completion of Coleman's services,[5] the claim is nevertheless untimely if it is not also made within one year of when the client reasonably knew or should have known that it existed.

¶16 The Geigers' interpretation, which assumes that the one-year deadline is not mandatory and that both deadlines are triggered by the same event, is therefore unreasonable. A contract is only ambiguous if it is *reasonably*

[5] Coleman completed its survey of the Geigers' property on November 4, 2003. The Geigers filed their lawsuit against Coleman on October 23, 2009, just shy of six years later.

susceptible to more than one meaning. ***Rosplock***, 217 Wis. 2d at 30. Here, the only reasonable interpretation of the contract language is that it requires the Geigers to make their claim both within one year of when they reasonably knew or should have known about it and within six years of when Coleman completed its services. Accordingly, the circuit court did not err by concluding the contract unambiguously required the Geigers to "make their claim within one year of when they had notice of the existence of the claim."

Coleman's summary judgment motion

¶17 Based on the record before it, the circuit court determined the Geigers did not make their claim within one year after they reasonably knew or should have known that it existed. We agree with the Geigers that the court erred by making this determination because Coleman did not provide sufficient evidentiary support for its summary judgment motion.

¶18 Coleman supported its summary judgment motion with the affidavit of its president, John Garske. Garske's affidavit recites a number of dates when certain events in the litigation between the Geigers and the Gilberts purportedly occurred. Coleman apparently contends these dates show that the Geigers had notice of their claim against Coleman more than one year before they filed suit.

¶19 However, the assertions in Garske's affidavit are made "on information and belief, and according to [c]ourt records." An affidavit in support of summary judgment must be "made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). An affidavit made on information and belief does not satisfy this requirement. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 571, 278 N.W.2d 857 (1979). Furthermore, "[c]opies of all papers or parts thereof

referred to in an affidavit shall be attached thereto and served therewith, if not already of record." WIS. STAT. § 802.08(3). No copies of any "court records" are attached to Garske's affidavit, and Coleman has not pointed to any place in the record where these "court records" otherwise appear.

¶20 Additionally, although Coleman contends on appeal that "the pleadings, depositions, and other items within the court record" support summary judgment, a party seeking summary judgment must specify the particular parts of the record on which it relies. *See* ***Wagner v. Dissing***, 141 Wis. 2d 931, 945, 416 N.W.2d 655 (Ct. App. 1987). "[U]ncited references to depositions and other materials are inadequate" to support summary judgment. ***Id.*** Coleman has therefore failed to provide adequate evidentiary support for its summary judgment motion. As a result, the circuit court erred by granting summary judgment in Coleman's favor.

By the Court.—Judgment reversed.

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