COURT OF APPEALS DECISION DATED AND FILED

November 29, 2011

A. John Voelker
Acting 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. 2011AP1321

Cir. Ct. No. 2009SC26691

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

BURKHART CONSTRUCTION CORPORATION OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

MIDWESTERN ROOFING & CONSTRUCTION, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: CHARLES F. KAHN, Judge. *Affirmed*.

¶1 BRENNAN, J.[1] Midwestern Roofing & Construction, Inc., *pro se*, appeals from a judgment entered after the trial court found Burkhart Construction

[1] This appeal is decided by one judge, pursuant to WIS. STAT. § 752.31(2) (2009-10). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

Corporation of Milwaukee entitled to summary judgment on its unjust enrichment claim. For the reasons which follow, we affirm.

BACKGROUND

¶2 In March 2007, Burkhart, the prime contractor performing work on the Milwaukee County Parks North Point Light Station Restoration Project, entered into a construction contract with Midwestern, subcontracting the roofing and sheet metal work on the project. As pertinent here, the contract provided Midwestern a remedy if Burkhart failed to pay Midwestern for work done in accordance with the terms of the contract. Section 4.7.1 of the contract states:

> If the Contractor does not pay the Subcontractor through no fault of the Subcontractor, within seven days from the time payment should be made as provided in this Agreement, the Subcontractor may, without prejudice to other available remedies, upon seven additional days' written notice to the Contractor, stop the Work of this Subcontract until payment of the amount owing has been received. The Subcontract Sum shall, by appropriate adjustment, be increased by the amount of the Subcontractor's reasonable costs of shutdown, delay and start up.

¶3 Several months after entering into the contract, in September 2007, Midwestern notified Burkhart that Midwestern would be stopping work on the project for non-payment, as permitted by section 4.7.1. Thereafter, in January 2008, Midwestern filed a claim for a public improvement lien against Burkhart, pursuant to WIS. STAT. § 779.15,[2] for the amount Midwestern claimed it was owed

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[2] WISCONSIN STAT. § 779.15 states, in pertinent part:

> Public improvements; lien on money, bonds, or warrants due the prime contractor; duty of officials.

(continued)

by Burkhart, including the cost of the work stoppage. As best we can tell from the record and the briefs, the parties agree that, pursuant to the lien, Midwestern received a check from Milwaukee County in the amount of $11,468.55, the full amount of its claim.

¶4 In August 2009, Burkhart filed a small claims action against Midwestern, asserting claims for unjust enrichment and breach of contract. Burkhart alleged that Midwestern had been unjustly enriched by Milwaukee County's payment pursuant to the lien because Midwestern had included in the lien money it was to credit back to Burkhart for materials Burkhart had purchased on Midwestern's behalf. Burkhart further alleged that Midwestern's failure to credit Burkhart for the materials was a breach of the parties' contract. In total, Burkhart alleged Midwestern was conferred a benefit of $7977 to Burkhart's detriment, and requested $5000 in damages.[3]

> (1) Any person who performs, furnishes, procures, manages, supervises, or administers any labor, services, materials, plans, or specifications used or consumed in making public improvements or performing public work, to any prime contractor, except in cities of the 1st class, shall have a lien on the money or bonds or warrants due or to become due the prime contractor therefor, if the lienor, before payment is made to the prime contractor, serves a written notice of the claim on the debtor state, county, town, or municipality. The debtor shall withhold a sufficient amount to pay the claim and, when it is admitted by the prime contractor or established under sub. (3), shall pay the claim and charge it to the prime contractor.…

While the court questions the applicability of § 779.15(1) to the facts of this case, given the statute's exemption for work performed in "cities of the 1st class," we accept its application at face value because the parties do not challenge its applicability on appeal.

[3] At the time Burkhart filed its claim, the recovery limit on small claims actions in Wisconsin was $5000. *See* WIS. STAT. § 799.01(d). The legislature has since raised the recovery limit to $10,000. 2011 Wis. Act 32, § 3484n (effective July 1, 2011).

¶5 A Milwaukee County Court Commissioner found for Burkhart and awarded Burkhart $5000. Midwestern filed a demand for a jury trial pursuant to WIS. STAT. § 799.21. The jury found that Midwestern breached the contract, but that the breach did not result in any damages to Burkhart. The jury could not reach a verdict on the unjust enrichment claim. The trial court accepted the jury's verdict with regards to the breach of contract claim and set the case for a future hearing to discuss resolution of the unjust enrichment claim.

¶6 Prior to the hearing, Burkhart filed a motion to amend the complaint and for a new trial on the unjust enrichment claim. The trial court denied the motion to amend, but granted the motion for a new trial. Trial was set for April 2011.

¶7 In January 2011, in preparation for the second trial, Burkhart served upon Midwestern a document entitled, "Plaintiff, Burkhart Construction Corporation of Milwaukee's Request to Admit and First Set of Interrogatories and First Request for Production of Documents." (Some capitalization omitted.) Midwestern did not respond to or object to any of Burkhart's discovery requests. Consequently, Burkhart filed a motion asking that the unanswered requests to admit be deemed admitted for Midwestern's failure to respond.

¶8 The trial court heard arguments on Burkhart's motion to deem the unanswered requests to admit admitted. Midwestern conceded that it did not respond to Burkhart's discovery requests or otherwise object to the requests because it believed that the deadline to make such requests had passed. However, the trial court had not issued a scheduling order setting a discovery deadline, and Midwestern could not point to any statute or order otherwise setting forth a discovery deadline. Consequently, in the absence of any reasonable basis for

Midwestern's failure to respond to discovery, the trial court granted Burkhart's motion to admit the unanswered requests to admit, relying on WIS. STAT. § 804.11(1)(b).[4]

¶9 Following the trial court's order granting Burkhart's motion to admit the unanswered requests to admit, Burkhart moved for summary judgment on the unjust enrichment claim on the grounds that there were no longer any material factual matters in dispute. The trial court granted the motion, stating as follows:

> Number one, the requests to admit leave in dispute nothing which is a genuine issue of material fact. In other words, there is nothing else for the jury to decide. Once these admissions are established, which they have been this afternoon, there is no more for consideration by the jury because, as [Midwestern] points out, they have no way to respond because the admissions have been established.
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> Number two, as a sanction for failure to respond to discovery, there are some times when -- I mean, it's quite normal that a judge would impose some serious costs against the side who fails to participate in discovery, but if I would order the costs to be paid, we are talking it's in the nature of four figures anyway, and then it would also cause an additional delay, and the plaintiff would be entitled to compensation for basically the time that they have missed at work for coming here for the trial today, for everything they have done to prepare for the trial, for dealing with the discovery issues, for writing up the motion, and it gets up there, in addition to the fact that there are no genuine issues.
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> In other words, there comes a point in time where any lesser sanction other than judgment for the plaintiff is really worse for the defendant.

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[4] WISCONSIN STAT. § 804.11(1)(b) directs that a "matter *is admitted* unless, within 30 days after service of the request, … the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter." (Emphasis added.)

¶10 Following the trial court's oral ruling, Midwestern filed a written motion objecting to the entry of judgment on the grounds that the trial court had erred in not entering a scheduling order setting forth a discovery deadline. Implicitly denying the motion, the trial court entered judgment in Burkhart's favor for $5000, plus costs, for a total of $5844.30. Midwestern appeals.

DISCUSSION

¶11 On appeal, Midwestern alleges that: (1) the trial court erroneously exercised its discretion in granting Burkhart's motions to admit the unanswered requests to admit and for summary judgment; and (2) Burkhart should not have been permitted to proceed with its action because it failed to respond to Midwestern's public improvement lien. We address each in turn.

I. The trial court properly exercised its discretion.

¶12 As best we can tell, Midwestern complains that the trial court erroneously exercised its discretion when it deemed admitted the unanswered requests to admit and entered summary judgment as a sanction. Midwestern's argument is without merit.

¶13 When a party fails to respond to a request to admit within thirty days of service, the matter is deemed admitted. WIS. STAT. § 804.11(1)(b). That matter is conclusively established unless the trial court permits withdrawal of the admission. WIS. STAT. § 804.11(2). A trial court *may* permit withdrawal if it determines that the merits of the action will be subserved and if the party who benefits from the admission fails to satisfy the court that withdrawal will prejudice the benefiting party. ***Mucek v. Nationwide Commc'ns, Inc.***, 2002 WI App 60, ¶26, 252 Wis. 2d 426, 643 N.W.2d 98.

¶14 Whether to permit withdrawal of the admission is a decision within the trial court's discretion. ***Id.***, ¶25. "We will uphold a trial court's discretionary [decision] if the court examined the relevant facts, applied a proper standard of law, and, demonstrating a rational process, reached a conclusion that a reasonable judge could reach." ***Id.***

¶15 Midwestern concedes that it never responded to or objected to Burkhart's discovery demands after the first trial, contending that it did not believe it was obligated to do so. The crux of Midwestern's argument appears to be that it believes that the trial court was required to issue a scheduling order setting time limits on discovery. However, Wisconsin law imposes no such obligation upon the trial court. *See* WIS. STAT. § 802.10(3)(d). To the contrary, § 802.10(3)(d) only states that the trial court "*may* enter a scheduling order … address[ing] … [t]he time to complete discovery." (Emphasis added.)

¶16 Because there was no scheduling order limiting discovery, the parties were required to abide by the statutory timelines, permitting Midwestern thirty days after service to respond to Burkhart's requests to admit. *See* WIS. STAT. § 804.11(1)(b). Midwestern, concededly, failed to respond within thirty days, arguing that it did not know it had to respond because there was no scheduling order and that it believed Burkhart "should have asked [for the admissions] way back in the beginning."

¶17 The trial court properly exercised its discretion when it denied Midwestern's request to withdraw the admissions and entered judgment accordingly. The trial court noted that the case had been pending for some time, that Midwestern did not provide a good reason for failing to respond, and that if it permitted Midwestern more time to respond to the discovery, it would impose

sanctions against Midwestern that would very likely be *more* costly to Midwestern than simply entering judgment on the unjust enrichment claim.[5] The court's decision was reasonable given the law and facts of this case. *See* ***Mucek***, 252 Wis. 2d 426, ¶25.

II. Midwestern did not raise its claim that Burkhart failed to properly respond to the public improvement lien before the trial court.

¶18 Midwestern also submits that Burkhart's complaint should have been dismissed because Burkhart never responded to Midwestern's claim for a public improvement lien. However, Midwestern raises this issue for the first time on appeal; therefore, we will not consider it. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (We need not address arguments raised for the first time on appeal.).[6]

By the Court.—Judgment affirmed.

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

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[5] We note that while Midwestern disputed the trial court's exercise of discretion in not giving it more time to answer discovery, it did not dispute the trial court's legal conclusion that the facts admitted constituted unjust enrichment. Accordingly, we do not address the merits of that legal conclusion.

[6] Burkhart contends that it did respond to and dispute Midwestern's claim to collect on the public improvement lien within the time frame set forth in WIS. STAT. § 779.15(1), citing to a letter attached to its complaint. We need not rule upon the sufficiency of Burkhart's response to the claim because, as set forth above, Midwestern raises this issue for the first time on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727.