COURT OF APPEALS DECISION DATED AND FILED

January 20, 2005

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. 04-1266

Cir. Ct. No. 02SC003374

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

BEVERLY HEEBSH,

PLAINTIFF-APPELLANT,

V.

JENKS HOME MAINTENANCE AND ZURICH NORTH AMERICA,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for La Crosse County: RAMONA A. GONZALEZ, Judge. *Affirmed*.

¶1 VERGERONT, J.[1] Beverly Heebsh initiated this small claims action alleging that the fence erected by Jenks Home Maintenance (Jenks) was deficient in a number of ways. She appeals the judgment in her favor for $58.62,

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

contending that the circuit court erred in determining that Jenks did not breach the contract, in applying the doctrine of quantum meruit to determine Jenks' damages, and in concluding she was not entitled to remedies under WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.07 (Nov. 2004). We conclude: (1) the evidence supports the circuit court's determination that Jenks did not breach the contract because Heebsh, without sufficient justification, directed that all work stop before work was completed; (2) the court's use of the doctrine of quantum meruit to compute Jenks' damages was proper; and (3) Heebsh is not entitled to remedies under § 100.20(5) and § ATCP 110.07. We therefore affirm.

¶2 We also conclude the appeal is not frivolous, as Jenks contends. Therefore, Jenks is not entitled to attorney fees under WIS. STAT. § 809.25(3).

BACKGROUND

¶3 On October 4, 2002, Heebsh signed two proposals prepared by Jenks, one for the construction of a chainlink fence on her residential property and the other for handrailing on the steps and for gutters with downspouts on the north side of her house. The fence proposal stated that the cost of labor and materials would be $1195.22, with $797.22 due on the start of the job and the balance upon completion; the railing/gutter proposal stated that the cost for labor and materials would be $1113.38, with $742.38 due at the start of the job and the remainder due upon completion. Heebsh paid $1500 by check to Jenks on October 4.

¶4 Bert Jenks along with his brother began work on the fence approximately eight to eleven days after the proposal was signed. According to Heebsh's testimony at trial, after about a week she told Bert's brother they were to stop work and they did; at that point they had started work on the railings. Heebsh

testified that she told them to stop work because there were a number of problems with the fence.

¶5 Heebsh filed a complaint with the Agriculture and Consumer Protection Agency, seeking a return of her down payment, removal of all materials, and repair of the cement on the sidewalk. When she was unable to reach a resolution with Jenks as a result of that complaint, she initiated this action, seeking $3000. Jenks answered, alleging that it had not completed the work when Heebsh directed that work stop, and it counterclaimed for $641, allegedly the cost in excess of $1500 for labor and materials before work stopped.

¶6 At the trial, Heebsh presented the testimony of John Kamprud, a contractor who installs chainlink fences and who had inspected this fence about five or six months after Jenks had stopped working on it. Kamprud testified to a number of ways in which, in his opinion, the work on the fence was not properly done.

¶7 Bert testified that the fence had not been completed when Heebsh directed them to stop working. When his brother told him that they were to stop working, Bert asked Heebsh what the problems were; when she told him the problems she had with the fence, he explained the fence was not finished. Bert testified that they still needed to tighten the fence and patch the sidewalk, for which he had already purchased the concrete, and still needed to finish the railing, which they had already begun, and put up the gutters. He estimated this would take about a day. Bert also testified that the problems Kamprud described with the fence would be able to be fixed in about two hours.

¶8 Heebsh testified that she assumed the brothers were done with the fence, although neither told her they were, because they had started to work on the

railing. She agreed that after she told them to stop work, Bert asked to be able to finish the work but she did not allow it. Nothing further was done on either of the projects by anyone.

¶9 The circuit court found that Jenks had not completed the fence when Heebsh directed that work stop and that, although there were some problems with the fence at that time that needed to be fixed, they were not as serious as Heebsh contended. Because Heebsh prevented Jenks from completing the two projects without an adequate basis, the court determined that Jenks was entitled to relief based on the doctrine of quantum meruit—compensation for the labor provided and materials purchased. The court determined that the materials used or purchased for both projects cost $839.69 and that $500 was fair compensation for the work already performed. The court then deducted that sum of $1359.69 from the $1500 that Heebsh had already paid, finding that Heebsh was due the difference. Ultimately, however, the judgment entered in favor of Heebsh was for only $58.62 because of costs assessed against her for the motion for reconsideration, which the court denied.

¶10 Both after trial and in denying the motion for reconsideration, the court rejected Heebsh's position that the failure of the two proposals to contain start and completion dates entitled her to double damages and attorney fees under WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.07. The basis for this ruling was the court's determination that there was no evidence that the failure of the two proposals to contain all the information required by WIS. ADMIN. CODE § ATCP 110.05(2) caused any pecuniary damage to Heebsh.

DISCUSSION

¶11 Heebsh contends on appeal that the circuit court erred by (1) determining that Jenks did not breach the contract; (2) applying the doctrine of quantum meruit; and (3) concluding that the remedies of WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.07 did not apply.

¶12 When we review the findings of fact made by a court sitting as trier of fact, we accept those findings unless they are clearly erroneous. WIS. STAT. § 805.17(2). The credibility of witnesses and weight of the evidence, as well as the inferences to be drawn from the evidence, are for the circuit court to make, not this court. ***Rivera v. Eisenberg***, 95 Wis. 2d 384, 388, 290 N.W.2d 539 (Ct. App. 1980). We affirm the circuit court's determination if, accepting the reasonable inferences from the evidence drawn by the fact finder, a reasonable fact finder could have come to the same conclusion. ***Id.*** However, whether the circuit court applied the correct legal standard presents a question of law, which we review de novo. ***Carney v. Mantuano***, 204 Wis. 2d 527, 532, 554 N.W.2d 854 (Ct. App. 1996). That is also the standard of review for construing and applying statutes and regulations to the facts as found by the circuit court or to undisputed facts. ***Moonlight v. Boyce***, 125 Wis. 2d 298, 303, 372 N.W.2d 479 (Ct. App. 1985).

¶13 We first address Heebsh's contention that it was undisputed that Jenks materially breached the contract by erecting a defective fence. We do not agree that the evidence on this issue was undisputed. The court credited Bert's explanation that the fence was not completed and that, had he and his brother been allowed to complete it, the problems Heebsh observed would have been remedied. Heebsh points to Kamprud's testimony on how he constructed a fence, based upon which he opined that Jenks had completed construction. However, Kamprud also

acknowledged that it was possible to put up a fence using a different order of tasks and that there were adjustments that still could be done to stretch the fence. In addition, Bert explained why he performed the tasks in the order he did and what he still intended to do. To the extent that Kamprud's testimony and Bert's testimony was in conflict, the circuit court could properly choose to credit the latter rather than the former. We conclude there is sufficient evidence to support the circuit court's determination that Jenks did not materially breach the contract because Heebsh prevented Bert and his brother from completing the fence without an adequate basis.

¶14 We next address Heebsh's contention that the court erred in applying the doctrine of quantum meruit to compensate Jenks. Heebsh points to the court's comment that "[t]he contract itself is silent on several significant issues and therefore is not subject to enforcement in its specific terms. The court will rely on quantum meruit with regard to the appropriate amounts due in this case." Heebsh contends this was error because there was an enforceable contract and the court was not free to set it aside.

¶15 Heebsh's position on this point is apparently based on a misunderstanding of the court's comments. The sentence preceding the two quoted above is: "Miss Heebsh violated the contract by ceasing the contract without any warning or prior knowledge or notice to Mr. Jenks." It is evident from this sentence and the findings the court had already made that the court meant that the terms of the contracts were not specific enough to provide a basis for compensating Jenks for the work it had done and, therefore, the court was going to apply the doctrine of quantum meruit. The court was not setting aside the contracts, but, rather, having determined that Heebsh, not Jenks, had breached the

contracts, the court was deciding on the method of computing Jenks' damages for Heebsh's breach.

¶16 The court was correct that, because it had found that Heebsh had prevented Jenks from completing the contracts, Jenks was entitled to compensation for any damages it sustained. When one party to an executory contract prevents the performance of it, the other party may regard it as terminated and demand whatever damages he has sustained thereby. ***Merrick v. Northwestern Nat'l Life Ins. Co.***, 124 Wis. 221, 226, 102 N.W. 593 (1905). The court was also correct that quantum meruit was a proper basis on which to compute damages. When the owner wrongfully prevents a contractor from completing the work, after the contractor has gone to substantial expense in partial performance, the contractor may elect either to complete the contract and recover damages for the breach or may recover under the doctrine of quantum meruit for the reasonable value of the work already performed. ***George Newhall Eng'g Co., Ltd. v. Daly***, 116 Wis. 256, 262-63, 93 N.W. 12 (1903). We conclude the circuit court did not error in applying the doctrine of quantum meruit to determine Jenks' damages.

¶17 Finally, we turn to Heebsh's contention that she was entitled to the remedies under WIS. STAT. § 100.20(5) and WIS. ADMIN. CODE § ATCP 110.07. We conclude the circuit court correctly decided she was not.

¶18 WISCONSIN STAT. § 100.20(5) provides that a person "suffering pecuniary loss because of a violation … of any order issued under this section may sue for damages … in any court … and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorney's fee." WISCONSIN ADMIN. CODE ch. ATCP 110, governing home improvement practices,

was adopted under § 100.20(2). *See* note to ch. ATCP 110. WISCONSIN ADMIN. CODE § ATCP 110.05(2)(d) provides that if the "buyer" signs a written contract, the contract shall set forth "[t]he dates or time period on or within which the work is to begin and be completed by the seller."

¶19 Heebsh contends that because the two proposals she signed did not contain start and completion dates for the work, she is entitled to double damages and attorney fees under WIS. STAT. § 100.20(5) and to the remedies under WIS. ADMIN. CODE § ATCP 110.07. Under § ATCP 110.07(1)(c), if the "buyer believes that the seller has failed to provide the materials or services in a timely manner, and the home improvement contract specifies no deadline for the seller to provide the materials or services," the buyer may cancel the contract and demand return of all payments the seller has not yet expended on the home improvement project. § ATCP 110.07(2)(a) and (b).

¶20 Addressing WIS. ADMIN. CODE § ATCP 110.07 first, we conclude the evidence supports the court's determination that Heebsh was dissatisfied with the work itself, not with the date on which Jenks began work nor with the time it took Jenks to do the work. Based on this finding, the court correctly concluded that Heebsh did not meet the requirement in § ATCP 110.07(1)(c).[2]

¶21 Addressing WIS. STAT. § 100.20(5) next, we agree with the circuit court that Heebsh did not establish that she suffered a pecuniary loss caused by the absence of start and completion dates in the two proposals. Heebsh first argues

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[2] The circuit court relied in part on our discussion of WIS. ADMIN. CODE § ATCP 110.05(2)(d) in ***Snyder v. Badgerland Mobile Homes, Inc.***, 2003 WI App 49, 260 Wis. 2d 770, 659 N.W.2d 887. The parties debate the applicability of this case. However, a discussion of the case is unnecessary to a resolution of this appeal.

that the lack of a completion date allowed Jenks to "retain indefinitely some or all of the deposit that did not belong to [it]." However, based on the facts as found by the circuit court, which are supported by the record, it was Heebsh's direction to stop work that caused Jenks to retain a portion of the deposit that had not yet been earned. Heebsh also argues that the extra funds that she will have to expend to have the defective fence remedied are a pecuniary loss. Again, however, based on the circuit court's findings, which are supported by the record, it was Heebsh's unjustified direction to stop work that resulted in a fence that was not completed or not properly completed; the lack of a completion date in the two proposals did not cause this result.

¶22 Although we affirm the judgment, we deny Jenks' request for attorney fees under WIS. STAT. § 809.25(3). The law under WIS. ADMIN. CODE §§ ATCP 110.05(2)(d) and 110.07(1)(c) is not sufficiently developed to permit us to conclude that Heebsh's arguments on these provisions are frivolous.

By the Court.—Judgment affirmed.

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