COURT OF APPEALS
DECISION
DATED AND RELEASED

July 23, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

Nos. 95-0676
95-1597

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

T.C. #94-CV-003156 (CONSOLIDATED)

PORTIA FRAZIER,

Plaintiff,

v.

THE HOME INDEMNITY COMPANY, AMERILINK CORPORATION, d/b/a NACOM, JOHN L. BURROUGHS and VIVA J. CRAPE,

Defendants.

NICOLE R. WALTON,

Plaintiff-Appellant,

COUNTY OF MILWAUKEE,

Involuntary-Plaintiff,

v.

THE HOME INDEMNITY COMPANY
and AMERILINK CORPORATION,
d/b/a NACOM,

Defendants-Respondents,

JOHN BURROUGHS
and VIVA J. CRAPE,

Defendants.

APPEAL from a judgment and orders of the circuit court for Milwaukee County: GEORGE A. BURNS, JR., Judge. *Affirmed*.

Before Wedemeyer, P.J., Sullivan and Schudson, JJ.

SULLIVAN, J. Nicole R. Walton appeals from a summary judgment dismissal of her complaint, an order denying her motion to reconsider, and an order denying her motion to vacate the judgment under § 806.07, STATS. Walton argues that conflicting inferences of material facts made summary judgment inappropriate. Walton also argues that the trial court either erred as a matter of law or erroneously exercised its discretion in denying her motion to reconsider. Finally, Walton asserts that the trial court erroneously exercised its discretion in denying her motion for relief from the judgment pursuant to § 806.07, STATS. We affirm.

I. BACKGROUND.

On April 6, 1991, Walton was a passenger in a vehicle that collided with John Burroughs. At the time of the collision, Burroughs was installing cable for Amerilink, d/b/a/ NaCom. A contract and a Memorandum of Understanding outlined the relationship between Burroughs and NaCom. Walton contended that Burroughs was an employee of NaCom, and sought to hold NaCom liable for any negligence on the part of Burroughs under the doctrine of respondeat superior. *See* ***Pamperin v. Trinity Memorial Hosp.***, 144 Wis.2d 188, 198, 423 N.W.2d 848, 852 (1988). NaCom contended that the contract clearly spelled out Burroughs's subcontractor status and that no liability existed with respect to his collision with Walton.

On NaCom's motion for summary judgment, the trial court concluded that no master-servant relationship existed between Burroughs and NaCom as a matter of law. It therefore granted summary judgment in favor of NaCom, holding that the evidence submitted was insufficient to raise a factual question as to Burroughs's employment status. The trial court based its ruling in large part on the contract between Burroughs and NaCom, which provided in relevant part:

> 1. SUBCONTRACTOR warrants that it has inspected and is familiar with the proposed installation areas, has the necessary technical skill and expertise to perform each installation project .... SUBCONTRACTOR further warrants that it will comply with SYSTEM'S contractual conditions and installation specifications and standards ....
>
> 2. SUBCONTRACTOR shall have sole control of the means, methods and timing of performing each installation project, including the selection of persons to perform the work involved and each work order hereunder, CONTRACTOR being concerned only with the results contracted for.
>
> ....

6. This agreement in no way creates an employer-employee relationship between CONTRACTOR and SUBCONTRACTOR.

II. ANALYSIS.

A. Summary Judgment.

Walton challenges the trial court's granting of summary judgment on the ground that there were conflicting inferences as to material facts. She claims that the summary judgment materials raised a genuine issue of material fact whether Burroughs was an employee of NaCom or an independent contractor. She also claims that the degree of control over Burroughs was in question because paragraphs One and Two of the contract conflicted, thereby creating ambiguity.

When reviewing a grant of summary judgment, we apply the same methodology as the trial court. ***Hoglund v. Secura Ins.***, 176 Wis.2d 265, 268, 500 N.W.2d 354, 355 (Ct. App. 1993). Our first step is to determine whether the plaintiff has stated a claim for relief. ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 317, 401 N.W.2d 816, 821 (1987). If the plaintiff has stated a claim for relief, we determine "whether the moving party has made a *prima facie* case for summary judgment under sec. 802.08(2)." ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-477 (1980). If the moving party has made the prima facie case, summary judgment should be granted where "there is no genuine issue as to any material fact and ... the moving party is entitled to judgment as a matter of law." Section 802.08(2), STATS. The moving party has the burden of establishing the absence of a disputed issue as to any material fact. ***Grams***, 97 Wis.2d at 338, 294 N.W.2d at 477.

As to cases involving contract claims, summary judgment is appropriate when the contract is unambiguous and the intent of the parties to the contract is not in dispute. ***Energy Complexes, Inc. v. Eau Claire County***, 152 Wis.2d 453, 466-67, 449 N.W.2d 35, 40 (1989). A contract is ambiguous if it is

"reasonably susceptible to more than one meaning." ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). We decide the question of ambiguity without deference to the trial court. ***Id***.

Our examination of the summary judgment materials in this case shows that the parties to the contract, Burroughs and NaCom, are not in dispute as to the intent of their contract. Both agree that no master-servant relationship existed. We are also satisfied that the contract is reasonably susceptible to only one meaning—that Burroughs was not an employee of NaCom.

Paragraph Two of the contract grants Burroughs the "sole control of the means, methods and timing of performing each installation project." Burroughs's right to control his work satisfies the dominant test in determining whether an individual is an independent contractor. ***Pamperin***, 144 Wis.2d at 198-99, 423 N.W.2d at 852. Walton argues that Paragraph One raises an inference that NaCom reserved the right to control each and every detail of Burroughs's work. Paragraph One contains warranties that Burroughs will comply with NaCom's contractual conditions, installation specifications, and quality standards. We perceive no inconsistency between Burroughs's warranties and his explicit right to control the details of his work granted in Paragraph Two. NaCom's right to select materials, as provided in Paragraph Five, likewise does not impinge upon Burroughs's right to control the details of his work. The requirement that Burroughs name NaCom as an additional insured also does not raise an inference that Burroughs was an employee, but merely serves to protect NaCom from any possible liability risks.

Walton also argues that the Memorandum of Understanding submitted on the motion for summary judgment evidences NaCom's right to control Burroughs's work. We disagree that a requirement that Burroughs wear a shirt identifying him as a cable TV installer raises a genuine issue of control over the details of his work. After examining the documents regarding Burroughs's relationship to NaCom, we conclude that no ambiguity exists, and that there is no genuine issue as to any material fact. Therefore, the trial court properly granted summary judgment dismissal to Amerilink.

B. Motion to Reconsider.

Walton argues that the trial court either erred as a matter of law or erroneously exercised its discretion in denying her motion to reconsider. She argues both points because she is uncertain whether the trial court denied her motion on the merits or failed to entertain her motion. We determine that the trial court did not entertain Walton's motion because she failed to follow proper procedure. Because we agree with the trial court, there is no need to discuss the merits of her motion, or her argument that the court erred as a matter of law.

Section 802.08(4), STATS., provides that a party opposing a summary judgment motion may, in affidavit form, state "the reasons why it cannot present facts essential to justify its opposition to the summary judgment motion." ***Van Straten v. Milwaukee Journal Newspaper-Publisher***, 151 Wis.2d 905, 919-920, 447 N.W.2d 105, 111 (Ct. App. 1989), *cert. denied*, 496 U.S. 929 (1990). Here, the trial court noted that Walton failed to file an affidavit requesting that the court allow her to file additional documentation that was not available at the time of the hearing. We conclude that the trial court did not erroneously exercise its discretion in refusing to entertain Walton's motion. ***Van Straten***, 151 Wis.2d at 920, 447 N.W.2d at 111.

C. Motion for Relief.

Walton also argues that the trial court erred in not granting her motion for relief from the judgment, under § 806.07, STATS. Walton first asserts that she is entitled to relief because of mistake, inadvertence or excusable neglect. Section 806.07(1)(a), STATS. Secondly, Walton asserts that relief from the judgment was appropriate because she had newly-discovered evidence. Section 806.07(1)(b), STATS.

Excusable neglect under § 806.07(1)(a), STATS., is "neglect which might have been the act of a reasonably prudent person under the same circumstances, and is not synonymous with neglect, carelessness or inattentiveness." ***Price v. Hart***, 166 Wis.2d 182, 194-195, 480 N.W.2d 249, 254 (Ct. App. 1991). We will reverse a trial court's decision denying a motion for relief under § 806.07, STATS., only if the trial court has erroneously exercised its discretion. ***Nelson v. Taft***, 175 Wis.2d 178, 187, 499 N.W.2d 685, 689 (Ct. App. 1993).

Walton concedes that her trial counsel ought to have brought a formal motion for continuance of the summary judgment motion under § 802.08(4), STATS. The trial court noted that the trial counsel was given the opportunity to adjourn the summary judgment motion if he were not prepared to oppose it. This is not excusable neglect under § 806.07(1)(a), STATS. We conclude that the trial court did not erroneously exercise its discretion in refusing Walton's motion for relief from judgment under § 806.07(1)(a), STATS.

Walton also argues that she is entitled to relief from judgment based on newly-discovered evidence consisting of an affidavit of a former cable installer, Joseph A. Tickles. It related to dress code, truck identification, number of passengers in trucks, and similar requirements imposed by NaCom upon its subcontractors. Newly-discovered evidence entitles a party to a new trial under § 805.15(3). We will apply the standard of newly discovered evidence under 805.15(3) although there has not been a "trial." *See* ***Kocinski v. Home Ins. Co***., 147 Wis.2d 728, 743, 433 N.W.2d 654, 660 (Ct. App. 1988), *modified on other grounds*, 154 Wis.2d 56, 452 N.W.2d 360 (1990). Walton must establish the four conjunctive conditions of § 805.15(3): (1) the evidence came to her notice after the summary judgment hearing; (2) the moving party's failure to discover the evidence did not arise from a lack of diligence in seeking to discover it; (3) the evidence must be material and not cumulative; and (4) the new evidence would probably change the result of the summary judgment ruling. ***Id***.

As to the first element, it appears that the evidence was discovered after the summary judgment hearing. As to the second element, we are not satisfied that Walton has demonstrated that the failure to discover Mr. Tickles "did not arise from a lack of diligence." ***Id***. at 744, 433 N.W.2d at 661 (quoting RULE 805.15(3)(b)).

The evidence is also cumulative. It does not refute the language of the contract which established the contractor-subcontractor relationship. The trial court concluded that the Tickles evidence would not change the result of its decision to grant summary judgment. Implicit in this conclusion was the finding that it did not create a question of material fact. Therefore, we conclude that the trial court did not erroneously exercise its discretion in finding that Walton did not satisfy her burden under § 806.07(1)(b), STATS.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.

SCHUDSON, J. (*dissenting*). The majority fails to recognize that in determining whether a person is an agent or an independent contractor the "designation" in the contract "is an element to be taken into consideration," but it "is not controlling." ***Bond v. Harrel***, 13 Wis.2d 369, 375, 108 N.W.2d 552, 555 (1961). Thus, even if the majority's analysis of the contract is correct, the contract's specification of Burroughs as a "subcontractor" is but one "element to be taken into consideration." ***Id.***

The record is replete with references to specific items relating to NaCom's control of the details of Burroughs's work—from the required materials and installation standards to his apparel and identification badge. The majority acknowledges some of these but, ignoring ***Bond***, dismisses them because of the contract. Thus, misapplying the law, the majority fails to recognize the material factual dispute in this case.

Clearly, this case is appropriate for a fact-finder's evaluation of the contract and all other "element[s] to be taken into consideration" in determining whether Burroughs was NaCom's agent or subcontractor. Summary judgment should have been denied. Accordingly, I respectfully dissent.