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DISTRICT II/IV

October 8, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2609 Steven R. Spitzer v. AZAR, LLC and Sam Azarian Wrecking Co. (L.C. # 2011CV2113)

Before Blanchard, P.J., Lundsten and Kloppenburg, JJ.

AZAR, LLC and Sam Azarian Wrecking Co. (collectively "Azarian") appeal a judgment awarding damages to Steven Spitzer for breach of an implied warranty to install concrete in a workmanlike manner. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).[1] We reject Azarian's arguments, and summarily affirm the judgment.

Spitzer and W.H. Pugh Oil Company were joint tenants of Elkhorn real estate upon which a pharmacy owned by Spitzer and a gas station owned by Pugh were located. Pursuant to

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[1] All references to the Wisconsin Statutes are to the 2011-12 version.

an Executory Settlement Agreement ("Agreement"), Pugh sold its interest in the property to Spitzer in October 2007. Under the Agreement, Pugh was obligated to remove all gasoline dispensing equipment. To satisfy this obligation, Pugh entered into a contract with Azarian that was incorporated by reference into the Agreement. Under the incorporated contract, Azarian agreed to remove the underground tanks, the canopy and islands, and to replace concrete in the tank area and under the canopy. The Agreement stated:

> [Pugh] shall warrant that all work in the removal and disposal of the gasoline dispensing equipment, and the installation of concrete shall be promptly undertaken in a workmanlike manner and shall be in accordance with all applicable federal, state and local regulations applicable to the removal and disposal of gasoline and gasoline dispensing equipment, and the removal and installation of the concrete.

The Agreement further provided:

> Upon completion of the removal of the gasoline dispensing equipment as required by the terms of this Agreement, and upon [Pugh]'s payment of the sum of $11,000.00 and the conveyance of its interests in the Elkhorn Property by Quit Claim Deed ….
>
> ....
>
> Spitzer accepts the Elkhorn Property in its AS IS—WHERE IS PHYSICAL CONDITION, INCLUDING ITS ENVIRONMENTAL CONDITION WITHOUT WARRANTY OF ANY KIND.

In 2010, Pugh assigned Spitzer any rights, claims, and causes of action Pugh might have against Azarian. In turn, Spitzer filed the underlying suit, alleging the concrete was not installed in a workmanlike fashion and seeking damages for the cost of replacing the concrete. After a trial, the circuit court concluded that Azarian breached an implied warranty of workmanship and awarded Spitzer $8,715, representing half of the replacement cost for the concrete, plus costs. This appeal follows.

Azarian argues that there could not have been an implied warranty of workmanship on the construction contract because "Wisconsin has only recognized an implied warranty of workmanship on residential construction." Azarian, however, provides no support for its legal proposition. This court will not consider arguments unsupported by legal authority. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46 & n.3, 292 N.W.2d 370 (Ct. App. 1980).

Azarian also contends that Spitzer had no cause of action in the absence of damage to Pugh. Azarian appears to argue that, because the property was sold "as is" under the Agreement, Pugh retained no obligations and did not suffer any damages with respect to the property. Therefore, according to Azarian, if Pugh had no cause of action, there was nothing to assign to Spitzer. Azarian's theory, however, hinges on the proposition that the Agreement's "as is" clause released Pugh from all obligations to the property after its transfer. We do not agree with that underlying proposition.

Azarian's argument requires interpretation of the Agreement, a question of law that this court determines independently. *See* ***Tufail v. Midwest Hospitality, LLC***, 2013 WI 62, ¶22, 348 Wis. 2d 631, 833 N.W.2d 586. If the terms of a contract are unambiguous, we construe the contract as it stands. ***BV/B1, LLC v. InvestorsBank***, 2010 WI App 152, ¶19, 330 Wis. 2d 462, 792 N.W.2d 622. If we determine that a contract is ambiguous, we look to extrinsic evidence to determine the contract's meaning. ***Id.*** Here, the Agreement provided that the property was sold "as is," without warranty of any kind. The sale, however, was conditioned upon removal of the gasoline dispensing equipment. In turn, the specific portion of the Agreement governing that removal also *warrants* that the removal and attendant concrete installation would be "undertaken in a workmanlike manner." Thus, by the Agreement's terms, Pugh's obligations survived the sale.

Even assuming there is some ambiguity created under the Agreement's terms, that ambiguity is resolved in Spitzer's favor. The assignment from Pugh to Spitzer evinces the parties' belief that the Agreement left Pugh with an obligation to have the concrete installed in a workmanlike manner. As far as we can tell, the assignment has no meaning unless the parties believed Pugh had an ongoing obligation to Spitzer with regard to the concrete work. Thus, under this interpretation of the Agreement, Spitzer could have sued Pugh for its failure to ensure that the concrete was installed in a workmanlike manner and, in turn, Pugh could have sued Azarian for failing to install the concrete in a workmanlike manner.

We note that it is not helpful to think about this case in terms of what would have happened if Pugh had retained ownership of the property, as argued by Azarian. The question, as far as we understand it, is whether Pugh had an obligation to Spitzer that survived the sale. As explained above, Pugh did have such an obligation. Because Azarian's argument hinges on a proposition that we reject, Azarian's challenge to the assignment fails. To the extent Azarian attempts to make any other argument regarding its liability, we are unable to discern it.

Finally, Azarian contends that there was a failure of proof regarding the amount of damages. Specifically, Azarian argues that the circuit court could not have awarded any damages under the facts of this case because the court was unable to ascertain with reasonable certainty which portion of the damages suffered was attributable to Azarian. Damages need to be calculated with a reasonable degree of certainty. *See* ***Thorp Sales Corp. v. Gyuro Grading Co.***, 107 Wis. 2d 141, 152, 319 N.W.2d 879 (Ct. App. 1982), ***aff'd***, 111 Wis. 2d 431, 331 N.W.2d 342 (1983). As Azarian acknowledges, however, "damages need not be ascertainable with absolute exactness or mathematical precision." ***Id.*** at 152-53. "The evidence is sufficient if it enables the trier of fact to make a fair and reasonable approximation." ***Id.*** at 153.

Here, the record supports the circuit court's damages award. The court explained that the damages were equally attributable to Azarian and to causes beyond Azarian's control. The court identified likely winter factors, such as salting and plowing, that would have caused spalling on the concrete's surface. The court concluded, however, that Azarian's failure to use rebar between the new and existing concrete slabs caused the concrete to settle and heave. We are persuaded by our review of the record that the court reasonably deduced Azarian was responsible for roughly half of the damage to the concrete. The court, therefore, reasonably awarded damages representing half of the cost for repairing the concrete.

Upon the foregoing,

IT IS ORDERED that the judgment is summarily affirmed pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals