COURT OF APPEALS DECISION DATED AND FILED	NOTICE
February 22, 2006	This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.
Cornelia G. Clark Clerk of Court of Appeals	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. 2005AP1366 — Cir. Ct. No. 2004CV514

STATE OF WISCONSIN — **IN COURT OF APPEALS DISTRICT II**

WAREHOUSE SPECIALISTS, INC. AND VHE II-1, LLC,

PLAINTIFFS-APPELLANTS,

NATIONWIDE MUTUAL INSURANCE COMPANY,

INTERVENOR,

V.

THERM-ALL, INC.,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Fond du Lac County: PETER L. GRIMM, Judge. *Affirmed*.

Before Snyder, P.J., Brown and Nettesheim, JJ.

¶1 BROWN, J. This is a review of a summary judgment dismissing a complaint for breach of contract against Therm-All, Inc. on the grounds that the action was commenced after the six-year statute of limitations pursuant to WIS. STAT. § 893.43 (2003-04).[1] Warehouse Specialists, Inc. and VHE II-1, LLC appeal this judgment. They rely on WIS. STAT. § 893.45,[2] which allows an extension of the statute of limitations for contract actions if the allegedly breaching party made a new and unqualified promise to perform the contract. We agree, however, with the trial court that Therm-All, Inc. did not make a new and unqualified promise to perform based on the undisputed facts before the court. We affirm.

¶2 Briefly, the facts are that Therm-All entered into a contract with Warehouse Specialists to install an "elaminator system" consisting of a vapor barrier and insulation on the roof of a warehouse. Once completed, problems developed, and numerous repairs did not resolve them. Eventually, Warehouse Specialists and VHE, the owner of the building, brought a breach of contract action. The date of the contract was July 31, 1996, and the date this action was

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[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted. WISCONSIN STAT. § 893.43 reads as follows:

> **Action on contract.** An action upon any contract, obligation or liability, express or implied, including an action to recover fees for professional services, except those mentioned in s. 893.40, shall be commenced within 6 years after the cause of action accrues or be barred.

[2] WISCONSIN STAT. § 893.45 reads as follows:

> No acknowledgement or promise shall be sufficient evidence of a new or continuing contract, whereby to take the cause out of the operation of this chapter, unless the same be contained in some writing signed by the party to be charged thereby.

commenced was August 25, 2004, well beyond the six-year statute of limitations for contract actions. *See* WIS. STAT. § 893.43. Therm-All answered the complaint, alleged statute of limitations as a defense and then brought a motion for summary judgment alleging the same defense. In response to the motion for summary judgment, Warehouse and VHE submitted that a letter, written by Therm-All on December 28, 1999, contained a new and unqualified promise to perform and therefore WIS. STAT. § 893.45 acted to extend the statute of limitations. They also submitted other writings purporting to support and reaffirm this alleged promise. The trial court disagreed, and this appeal resulted.

¶3 We review the trial court's grant of summary judgment using the same methodology as the circuit court. ***City of Beaver Dam v. Cromheecke***, 222 Wis. 2d 608, 613, 587 N.W.2d 923 (Ct. App. 1998). There is no need to repeat the well-known methodology; the controlling principle is that when there is no genuine issue of material fact and the moving party is entitled to summary judgment as a matter of law, summary judgment is appropriate. ***Id***.; *see also* WIS. STAT. § 802.08(2).

¶4 The parties agree that to constitute a new and binding agreement, there must exist a writing containing a *new* and *unqualified* promise to perform. A mere acknowledgement of the prior obligation is insufficient; instead, there must also be an unqualified promise to perform. ***Pierce v. Seymour***, 52 Wis. 272, 276-77, 9 N.W. 71 (1881); ***Kurt Van Engel Comm'n Co., Inc. v. Zingale***, 2005 WI App 82, ¶¶12-13, 280 Wis. 2d 777, 696 N.W.2d 280, *review denied*, 2005 WI 136, ___ Wis. 2d ___, 703 N.W.2d 379 (Jul 28, 2005) (2004AP1900). Here, the facts

are not in dispute and center on one main question: did the December 28, 1999 letter constitute a new and unqualified promise?[3]

¶5 In the letter, Therm-All referred to the allegation that the vapor retarder material was damaged during installation and was installed improperly. When referring to the past history of Warehouse's complaints, Therm-All wrote:

> We apologize if it was not made clear that even after these repairs, we were willing to return at any time if additional problems arose due to damage of the vapor retarder during installation or improper installation by ThermAll….
>
> ….
>
> It is in these areas that ThermAll recognizes that there were areas that were damaged during installation and have been and will continue to make every effort to repair this damage.

This is the language seized upon by Warehouse and VHE for the proposition that a new and unqualified promise to perform was made.

¶6 But we cannot and will not read the letter in a vacuum. Our reading of the *totality* of the letter convinces us that the above language did not constitute a new and unqualified promise to perform. Instead, read in context, the language above quoted was simply part of a rehash of some ongoing, specific complaints about the roof ("It is in these areas….") and simply recited Therm-All's willingness to continue its efforts to correct the problems ("will continue to make every effort to repair this damage.") Moreover, put in its proper context, this letter was written in response to a roof inspection report from a third party hired by Warehouse. Importantly, the Therm-All letter also referred to its belief that the

[3] Therm-All argues, in the alternative, that WIS. STAT. § 893.45 ought not be applicable to construction contracts. We need not and do not reach this issue.

problems with the roof "were more of a design problem of the building manufacturer … than from improper installation of the insulation system." In our view, this hardly supports Warehouse and VHE's contention that the letter was an unequivocal and unqualified mea culpa. Rather, it shows a reluctance to accept full responsibility or even partial responsibility for the problems. We view the language cited by Warehouse and VHE as nothing more than Therm-All's attempt to make its customer happy in light of the customer's belief that Therm-All's prior repair work was insufficient.

¶7 Warehouse and VHE also claim that subsequent written acknowledgements and promises were made within the original statute of limitations. But none of them contain a new and unqualified promise by Therm-All. The March 28, 2000 letter states that Therm-All believed it had solved the problems it had addressed once and for all but also states that any continuing problems with the roof were due to design defects and it would no longer be performing work on the roof without charging for the work. Thus, there were numerous qualifications contained within the four corners of that writing. The March 27, 2001 letter detailed the steps it would be willing to take to make additional repairs, but shows no new and unconditional promise. The April 2002 letter again related Therm-All's serious doubts as to whether it was even responsible for most of the areas that it did repair but was open to discussing contribution to the cost of a new roof as a means to resolve the dispute. These supplementary exhibits are not at all helpful to Warehouse and VHE.

¶8 We conclude that the undisputed summary judgment record shows no new and unqualified promise to perform. Thus, WIS. STAT. § 893.45 is inoperable, the six-year statute of limitations has long passed and the trial court properly dismissed the complaint.

By the Court.—Judgment affirmed.

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