COURT OF APPEALS
DECISION
DATED AND FILED

January 20, 2010

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2009AP93 **Cir. Ct. No. 2007CV1061**

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

M&I MARSHALL & ILSLEY BANK,

PLAINTIFF-RESPONDENT,

V.

NEW ENGLAND BUILDERS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed*.

Before Curley, P.J., Brennan and Peterson, JJ.

¶1 BRENNAN, J. New England Builders, Inc. ("New England") appeals a summary judgment granted to M&I Marshall & Ilsley Bank ("M&I"). New England argues that material issues of fact exist regarding whether Advance Mechanical Contractors, Inc. ("AMC") fully performed its obligations under

contracts with New England. We agree, reverse the circuit court's decision, and remand the case back to the circuit court.

BACKGROUND

¶2 AMC, now defunct, was hired by New England to provide plumbing and fire protection services at the Harbor Park development in Kenosha, Wisconsin and the Bartlett Town Center development in Bartlett, Illinois. The agreement with respect to the Harbor Park development consisted of one contract for work, totaling $330,200; the agreement with respect to the Bartlett development consisted of two contracts for work, totaling $65,700. The contract provisions at issue here are identical in each of the three contracts.

¶3 The method of payment provision in each of the contracts permitted AMC to submit monthly payment requests to New England for completed work. If New England approved the completed work, it would pay AMC, and the contract balance would be reduced accordingly. Each contract also contained the following offset and deduction provision:

> Should Subcontractor [AMC] at any time … fail in any respect to perform the Work with promptness and diligence or fail in the performance of any of the agreements contained herein, Contractor [New England] shall have the right to provide or separately contract for any such labor, materials, and equipment, and deduct the costs thereof and fifteen (15) percent of all costs for Contractor's overhead and supervision from the next payments then due and from the retained percentage under this Subcontract.

¶4 During the course of the contract, AMC filed a petition for the appointment of a receiver under WIS. STAT. ch. 128 (2007-08).[1] Michael S.

[1] All references to the Wisconsin Statutes are to the 2007-08 version.

Polsky was appointed as the receiver. As the receiver, Polsky undertook collection of AMC's accounts receivable for disbursement to the creditors of the AMC receivership.

¶5 MorrisAnderson & Associates Ltd. ("MorrisAnderson"), a consulting firm, assisted Polsky and AMC during the receivership, creating a detailed database of all the amounts owed by and to AMC. As part of that accounting, MorrisAnderson divided AMC's accounts receivable into two categories: open jobs and active jobs. Open jobs were jobs that MorrisAnderson determined AMC completed before the receivership; active jobs were those that MorrisAnderson determined were not completed before the receivership. All of the accounts receivable designated as active jobs were purchased by R. Machata Construction, Inc. ("RMC"), a company formed by one of AMC's former employees.

¶6 Upon the conclusion of the AMC receivership, all receivables and related claims were assigned, by court order, from Polsky to M&I, as the principal secured lender of AMC. In June 2007, M&I filed a complaint in circuit court to collect the amounts purportedly owed to it (and previously to AMC) by New England for work completed on the Bartlett and Harbor Park developments. Specifically, M&I sought payment for those accounts receivable from New England designated as open jobs by MorrisAnderson; M&I did not seek payment for active jobs purchased by RMC.

¶7 In its answer, New England admitted that certain invoices it received from AMC had not been paid but asserted that it was not obligated to make those payments because AMC failed to fulfill its obligations under the parties' contracts. Because of that failure, New England was forced to hire Flannery Fire Protection

("Flannery") to complete work left undone and to correct work not satisfactorily completed. As a result, New England asserted that it incurred substantial expense, in excess of the amount claimed by M&I, and that under the contracts it was entitled to offset its damages against the amount claimed by M&I.

¶8 In August 2008, M&I filed a motion for summary judgment and supporting brief, on the grounds that: (1) AMC's obligations under the contracts were limited to those accounts receivable designated by MorrisAnderson as open jobs; (2) New England did not present evidence challenging MorrisAnderson's designation of accounts receivable as open and active jobs; and (3) New England admitted in its answer that it had not paid certain invoices received from AMC. As evidence, M&I submitted the affidavits of Jack Cochran, a consulting manager at MorrisAnderson; Dorris Dey, Polsky's lead attorney during AMC's receivership; and Christopher Schreiber, an attorney representing M&I.

¶9 Cochran's affidavit sets forth the accounting performed by MorrisAnderson during the receivership. Attached as exhibits to his affidavit are spreadsheets setting forth the amounts attributed to the open jobs on the Bartlett and Harbor Park developments, and therefore, allegedly due to M&I: $16,347.06 for work completed on the Harbor Park development and $34,053.50 for work completed on the Bartlett development. Dey's affidavit seconded Cochran's description of open jobs and active jobs. She also confirmed that RMC purchased the active jobs from AMC and that the receiver never collected any funds related to AMC's open jobs with New England, despite repeated attempts to collect those amounts deemed to be due.

¶10 Schreiber's affidavit included, in pertinent part, New England's response to Interrogatory #1, which asked New England to state with particularity

the factual basis for its affirmative defense that the work performed by AMC and/or RMC was defective. New England responded as follows:

> The defective work at issue was performed by the Receivership's replacement contractor [RMC].… The defects included incorrectly installed water supplies in two buildings in the Harbor Park project.… Approximately 60 supply units in 2 buildings in said project were replaced based upon the incorrect installation of a plastic supply line which was contradictory to the plans and specifications for the project. Additionally, improper valves were installed by [RMC] on the aforementioned units which was also inconsistent with the plans and specifications. Additionally, [RMC] failed to properly insulate the fire protection water lines associated with the sprinkler units which caused freezing pipes and damage to condominium units located in the project. Additionally, numerous bathtubs were improperly installed and drainage lines associated with the same suffered from continuous leaking and caused damage to the pertinent units including drywall repair and replacement.

¶11 In response to M&I's motion for summary judgment, New England filed a brief in opposition, asserting: (1) that the open and active jobs designations were creations of the receivership and had no legal bearing on AMC's actual obligations under its contracts with New England; (2) that AMC did not complete its obligations under the contracts; and (3) that New England was entitled to offset those damages it incurred as a result of AMC's failure to perform, pursuant to the terms of the parties' contracts. As evidence, New England submitted the affidavit of Joel Spaulding, New England's treasurer and secretary and the manager of the Bartlett and Harbor Park developments. Spaulding's affidavit, as summarized below, itemized the following damages allegedly incurred by New England as a result of AMC's failure to fulfill its obligations under the contracts:

- Bartlett Development, Building B: Per the parties' contract, AMC was to provide fire protection related work on Building B for $65,700. Due to AMC's failure to complete the work, New England was forced to pay Flannery $134,352.23 to complete AMC's contractual obligations—$68,652.23 more than the contracted price.

- Bartlett Development, Building 1: Per the parties' contract, AMC was to provide fire protection related work on Building 1 for $101,760. AMC completed the work and was paid prior to going out of business. However, New England had to pay Flannery $4,755.43 to provide corrective and revisionary work to the fire protection system installed by AMC.

- Bartlett Development, Building 2: Per the parties' contract, AMC was to provide fire protection related work on Building 2 for $116,400. AMC went out of business before performing any services with regard to Building 2. Flannery completed those services for $120,818.92—$4,418.92 more than the contracted price.

- Bartlett Development, Building 3: Per the parties' contract, AMC was to provide fire protection related work on Building 3 for $116,400. AMC went out of business before performing any services with regard to Building 3. Flannery completed those services for $126,346—$9,946 more than the contracted price.

- Harbor Park Development: Per the parties' contract, AMC was to provide plumbing related services at the Harbor Park development. There were numerous problems with the work done by AMC, including but not limited to ruptured water supply lines and

> significant damage caused by the rupture. New England was forced to utilize its own personnel, labor, and supplies to correct the problems: $1,020.84 to purchase faucet connectors and $9,843.21 in labor.

¶12 Following briefing and oral argument, the circuit court granted M&I's motion for summary judgment, stating as follows:

> **G.** After a careful review of the [Spaulding] Affidavit and the exhibits thereto, the Court finds that many of the exhibits were either incomplete and/or inaccurate, while others did not relate to the buildings that were involved in the Open Jobs. The conclusory statements contained in the [Spaulding] Affidavit were not adequately supported by its exhibits. Nothing contained in the [Spaulding] Affidavit refuted the methodology related to the amount calculated to be due and owing to M&I as set forth in the M&I Affidavits.
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> **H.** Furthermore, [New England] admitted in its answer to plaintiff's Interrogatory #1 that the defective work referred to in its answer to the Complaint – wherein [New England] affirmatively asserted that it did not owe the amount claimed due to said defective work – was performed by [RMC]. The Court finds that any alleged defective work performed by RMC is not at issue in this case and not a valid defense to [New England's] liability on the Open Jobs.

New England appeals.

DISCUSSION

¶13 On appeal, New England asserts that material issues of fact exist regarding whether AMC completed its obligations under the contracts. New England argues that AMC's obligations under the contracts were not limited to the accounts receivable designated by MorrisAnderson as open jobs, but rather that

the parties contracted for the work to be completed in its entirety and to the satisfaction of New England. New England asserts that the Spaulding affidavit presents sufficient evidence demonstrating that AMC did not complete its obligations under the contracts. Because the contracts allow for New England to offset the damages it necessarily incurred to complete AMC's duties, New England argues the circuit court erred in granting summary judgment in favor of M&I.

¶14 M&I argues there were no material facts at issue because the amounts due were on open accounts, representing work AMC had already performed, and because New England did not contradict the affidavits of Cochran and Dey, which set forth how MorrisAnderson designated accounts receivable as open or active jobs. M&I further argues that New England's assertion that work was not performed up to industry standards or was not completed at all is directed solely at the active jobs assigned to RMC, and therefore, not affecting M&I's ability to collect. We conclude that material questions of fact exist as to whether AMC is entitled to payment under the contracts, reverse the decision of the circuit court, and remand.

¶15 Whether AMC fully performed its obligations under the terms of its contracts with New England is a matter of contract interpretation. We interpret a contract *de novo*, without deference to the circuit court. ***Johnson v. Heritage Mut. Ins. Co.***, 188 Wis. 2d 261, 265, 524 N.W.2d 900 (Ct. App. 1994). Similarly, we review the denial or grant of a summary judgment motion *de novo*. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-17, 401 N.W.2d 816 (1987). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d

175 (Ct. App. 1995). We will reverse a decision granting summary judgment if the circuit court incorrectly decided legal issues or material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993). In our review we, like the circuit court, are prohibited from deciding issues of fact; our inquiry is limited to determining whether a material factual issue exists. ***Id.*** "Any reasonable doubts as to the existence of a factual issue must be resolved against the moving party." ***Maynard v. Port Publ'ns, Inc.***, 98 Wis. 2d 555, 563, 297 N.W.2d 500 (1980).

¶16 The circuit court seems to have implicitly accepted M&I's argument that AMC's obligations under the contracts were limited to those accounts receivable designated by MorrisAnderson as open jobs, by finding: (1) New England did not dispute the accounting which led to the designation of open and active jobs; (2) New England did not submit evidence demonstrating that AMC performed the open jobs unsatisfactorily or not at all; and (3) ultimately, New England owed the amounts designated on the open jobs. We disagree with the circuit court's finding that the contracts require payment for the so-called open jobs.

¶17 MorrisAnderson's designation of AMC's accounts receivable as open and active jobs has no legal relevance to AMC's actual obligations under the terms of the contracts. While the terms may be useful from an accounting standpoint, the contracts between AMC and New England do not break down AMC's obligations in that manner. The parties' contracts required AMC to provide plumbing and fire protection services for three projects for a fixed sum. The payments were to be made monthly, based upon the value of the work completed in the prior month, *as approved by New England*. Monthly payments were to be deducted from the total balance. The contracts never contemplated that

AMC's obligations would consist of multiple, small jobs but rather contemplated that AMC's obligations would consist of completion of all the work designated under the contracts. To the extent that the circuit court may have accepted the terms open and active jobs as legally determining AMC's obligations under the contracts, the circuit court was in error.

¶18 In an attempt to establish that AMC's obligations under the contracts were limited to MorrisAnderson's open jobs, M&I asserts that New England accepted RMC as AMC's successor. M&I contends that "a novation occurred when, by mutual agreement among AMC, RMC, and New England …, RMC was substituted for AMC and accepted its contractual liability to New England." A novation is defined as "[t]he act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party." BLACK'S LAW DICTIONARY 1094 (8th ed. 2004). In order to establish a novation, among others things, a party must establish the parties' consent to the substitution of obligations. *See* ***Navine v. Peltier***, 48 Wis. 2d 588, 594, 180 N.W. 2d 613 (1970). "'It is not required that acceptance of the terms of novation be shown by express words, but it may be implied from the facts and circumstances of the transaction and the conduct of the parties in relation thereto.'" ***Id.*** at 594-95 (citation omitted).

¶19 New England asserts that M&I's novation argument is raised for the first time on appeal. Our review of the record confirms that assertion. "It is the often-repeated rule in this State that issues not raised or considered in the [circuit] court will not be considered for the first time on appeal." ***Wirth v. Ehly***, 93 Wis. 2d 433, 443, 287 N.W.2d 140 (1980), *superseded on other grounds by statute*, WIS. STAT. § 895.52, *as recognized in* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 460 N.W.2d 830 (Ct. App. 1990). While there are certainly

exceptions to this general rule, those exceptions usually involve questions of law. ***Id.*** at 443-44. "'[W]here the question raised for the first time on appeal involves factual elements not raised by the pleadings or not brought to the attention of the lower court, this court … will not generally decide such questions.'" ***Id.*** at 444 (citations omitted; brackets and omission in ***Wirth***). Whether a novation occurred in this case is necessarily a fact intensive inquiry, and therefore, we decline to address the issue on appeal.

¶20 As a further attempt to establish that AMC was only required to perform those open jobs designated by MorrisAnderson, M&I states as follows:

> In ruling as it did, the [circuit] court also implicitly offered another independent reason to affirm its decision, in that New England Builders could not accept the benefits of a contract over a long period of time and then successfully contend that the contract was not binding. ***Phillips Petroleum Co. v. Taggart***, 271 Wis. 261, 274, 73 N.W.2d 482 (1956) [sic]. By accepting the role of RMC as replacement contractor to complete AMC's unfinished contracts, New England Builders [is] essentially estopped from assuming "the inconsistent position of affirming a contract in part by accepting or claiming its benefits, and disaffirming it in [sic] part by repudiating or avoiding its obligations or burdens." ***Id.*** at 275. Had the trial court framed its decision in this manner, it would have been proper to do so at summary judgment. ***Id.***

(Footnote omitted; fourth alteration in M&I's brief.) The problem with M&I's argument in this respect is two-fold: (1) the circuit court did *not* reference estoppel, either in its decision from the bench or in its following written decision, and we fail to see where it "implicitly" offered estoppel as a means to uphold its decision; and (2) M&I failed to raise the issue of estoppel before the circuit court. Consequently, we also decline to address this issue on appeal. *See* ***Wirth***, 93 Wis. 2d at 443-44.

¶21 Having established that AMC's obligations under the contracts were not limited to the accounts receivable designated as open jobs, we turn to whether the Spaulding affidavit raises material questions of fact regarding whether AMC met its obligations under the contracts. This question requires us to interpret the contracts to determine whether they permit New England to offset its costs against work not performed. We conclude that they do and that New England has raised sufficient material factual issues with regard to AMC's performance of the contracts to resist summary judgment.

¶22 The contracts provide that in the event AMC fails to perform the "Work," New England may deduct the cost of having someone else perform it *from the payments next due to AMC*:

> should [AMC] at any time … fail in any respect to perform the Work with promptness and diligence or fail in the performance of any of the agreements contained herein, [New England] shall have the right to provide or separately contract for any such labor, materials, and equipment, and deduct the costs thereof and fifteen (15) percent of all costs for [New England's] overhead and supervision from the next payments then due and from the retained percentage under this Subcontract.

Further, the contracts provide that if "a petition in bankruptcy is filed … [New England] … may avail itself to such remedies under this Agreement as are reasonably necessary to[] maintain the Schedule of Work, including but not limited to right of offset against sums due or to become due the Subcontractor."

¶23 So, the question then becomes whether New England has provided sufficient evidence to present, at the minimum, a material factual dispute of AMC's failure to perform the work under the contracts that would justify New England's payment offsets. We conclude it has, through the affidavit of Spaulding, the treasurer and secretary of New England and the project manager on

both the Bartlett and Harbor Park developments. Spaulding details in his affidavit damages incurred by New England as a result of AMC's alleged failure to fulfill its obligations. Attached to Spaulding's affidavit, are numerous invoices purporting to support his allegations. Upon reviewing those documents attached to the Spaulding affidavit, we share the circuit court's concern that a number of the documents are unsigned and appear unrelated to the work for which New England claims a right to offset; however, there are also a number of documents attached which do support New England's position. We conclude these are sufficient to create a material factual issue as to whether AMC failed to perform its contractual obligations.

¶24 Because the contracts do not obligate New England to pay M&I for the "open jobs" and because the Spaulding affidavit creates a material issue of fact regarding whether AMC completed its contractual obligations, we reverse and remand for further proceedings in the circuit court.

By the Court.—Judgment reversed.

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