COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

NOTICE

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.

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

No. 94-1510

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

RAWSON CONTRACTORS, INC.,

Plaintiff-Appellant,

v.

LISBON SANITARY DISTRICT NO. 1,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed*.

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

PER CURIAM. Rawson Contractors, Inc. appeals from a judgment against Lisbon Sanitary District No. 1 arising out of a contract dispute. Although Rawson recovered some damages against the sanitary district, Rawson contends that the trial court erred in declining to award additional damages. We disagree and affirm.

Rawson bid for a sanitary sewer installation contract in the Town of Lisbon. The contract required Rawson to install approximately 20,000 lineal

feet of sanitary sewer mains and laterals to provide sanitary sewer service to existing homes in the sanitary district. The contract required Rawson to excavate streets, install the sanitary sewer pipe, backfill the trenches, install the laterals to the lot line and repave the portions of the street disturbed by the excavation. The bids on the project were opened on March 15, 1989; Rawson was the low bidder on the project. Pursuant to the bid documents, Rawson held its bid open for 150 days or until August 12, 1989.

The district's proposal documents authorized it to issue addenda or amendments to the project. On August 11, 1989, the district issued Addendum No. 5, which revised the specifications and drawings to accommodate two scenarios. First, if sewers were deleted for Jeanine Lane, Hamilton Drive and Alta Vista, the total contract price would be reduced from Rawson's bid price of $869,851 to $832,421. The second scenario involved deleting sewers only for Alta Vista. In that case, Rawson's bid price would be reduced from $869,851 to $850,027. The modifications in the contract price were achieved by adjusting the lineal foot price by $2. If Jeanine, Hamilton and Alta Vista were deleted, the lineal foot price would be $25.50. If only Alta Vista was deleted, the price would be $23.50.

Addendum No. 5 also stated:

> At the present time, the sanitary district is not sure if the sewer in Jeanine Lane and Hamilton Drive will be installed. This Addendum establishes the contract amount for either alternative. The Sanitary District will resolve this problem by September 15, 1989 and advise the Contractor.

On August 11, 1989, Rawson received written notice that it had been awarded the contract and that Addendum No. 5 modified the bid. The notice restated the two scenarios under which the contract price would be adjusted. Rawson had ten days to provide an executed agreement to the district. On September 6, 1989, the district notified Rawson to proceed with the contract. The notice stated:

> You are notified that the Contract Time under the above contract will commence to run on September 11, 1989. By that date, you are to start performing your obligations under the Contract Documents. In accordance with Article 3 of the Agreement, the date of Final Completion shall be September 11, 1990.

Rawson began construction on October 3. The district ultimately decided that Jeanine and Hamilton would receive sewers.

A dispute arose regarding the circumstances under which Rawson would receive an additional $2 per lineal foot as provided in Addendum No. 5. Kenneth Servi, Rawson's president, testified that the additional $2 per lineal foot was consideration for Rawson's agreement to extend the 150-day contract award period specified in the bid proposal. However, James Vincent, the district's president, testified that although Rawson was asked to extend the 150-day contract award period, it had refused to do so. Vincent further testified that the purpose of the additional $2 per lineal foot provision was to compensate Rawson in the event that Jeanine and Hamilton residents did not join the sewer project.

Rawson also claimed that it was entitled to the additional $2 per lineal foot because the district delayed in informing it that Jeanine and Hamilton would receive sewers. Rawson found support for this claim in the fact that it had received two progress payments calculated at $25.50 per lineal foot. Rawson argued that this was evidence that the additional $2 per foot was linked to the delay in deciding the fate of Jeanine and Hamilton.

The trial court ruled that Addendum No. 5 did not require the district to notify Rawson by September 15, 1989, if Jeanine and Hamilton would receive sewers. Therefore, the fact that Rawson did not begin work on the project until October 3, ostensibly because of Rawson's lack of notice regarding the status of these streets, was not the cause of the delay and additional cost to Rawson.

The trial court also found that the contract price depended upon how many streets received sewers—not when Rawson received notice regarding the number of streets to be included.[1] The trial court found no damage attributable to the date Rawson learned that Jeanine and Hamilton would get sewers.

A second dispute arose related to restoration of the road surface as specified in the contract. Under the contract, Rawson was required to repave those street areas disturbed by the sewer installation. On November 2, 1989, Rawson suggested to the district that in lieu of paving the disturbed portions of the roadways, which would yield a patched effect, Rawson could install two inches of asphalt binder over the trenches, flush with the existing road surface, and resurface the entire roadway the following spring or summer. The district issued Change Order No. 1, which required Rawson to perform initial pavement restoration by installing eight inches of crushed limestone and two inches of binder flush with the adjacent existing pavement. The change order provided that final restoration of the road surface would be resolved between the district and Rawson on or before June 1, 1990.

The parties were unable to reach an agreement as to the manner in which the roads should be restored, and the district determined that some of Rawson's patchwork from fall/winter of 1989 and other road surfaces had settled several inches below the preconstruction road surface. In the summer of 1992, the district hired a substitute contractor to resurface the entire road. At that time, the district discovered that the road surface was not the width specified in Rawson's contract. The district deducted $23,895 from Rawson's final contract payment as a result of the pavement restoration dispute.

The trial court found that Rawson did not substantially perform its contractual obligation to repave the roadway and concluded that the change order was an agreement to agree regarding restoration of the pavement. Because Rawson failed to finish the restoration as it was obligated to do under the contract, the court also found that the district properly employed another

[1] By this finding, the trial court implicitly rejected Rawson's claim that the $2 per lineal foot was in consideration for the district having more than 150 days to award the project. The trial court found that the project was awarded to Rawson on August 11, one day before the 150-day period expired.

contractor to restore the pavement and that the amounts expended by the district were properly withheld from Rawson.[2]

Rawson argues on appeal that Addendum No. 5 is ambiguous and the trial court's factual findings regarding the significance of the dates in the document are clearly erroneous. The construction of a written contract presents a question of law which we review independently of the trial court. ***Eden Stone Co. v. Oakfield Stone Co.,*** 166 Wis.2d 105, 115, 479 N.W.2d 557, 562 (Ct. App. 1991). The goal of contract interpretation is to ascertain the parties' intent. ***Id.*** at 116, 479 N.W.2d at 562. If the parties' intent can be determined with reasonable certainty from the language of the contract itself, there is no need to resort to extrinsic evidence.

Here, the trial court permitted evidence of the parties' intent in entering into Addendum No. 5. We will assume for purposes of this opinion that the addendum was ambiguous. We turn to whether the trial court's findings of fact regarding the parties' intent are clearly erroneous. *See* § 805.17(2), STATS. We conclude they are not.

The trial court was required to resolve conflicting testimony regarding the purpose of Addendum No. 5. When the trial court acts as the finder of fact, it determines the weight of the evidence and the credibility of the witnesses. ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). Here, Rawson presented evidence that the additional $2 per lineal foot was intended to compensate it either for extending the contract award period beyond the previously specified 150 days or for the delay in receiving notice of the status of Jeanine and Hamilton. The district presented testimony that the additional $2 per lineal foot was to be paid only if Jeanine and Hamilton were excluded from the project. It was for the trial court to assess the credibility of the witnesses and weigh the evidence. The trial court's finding that the $2 per lineal foot was related to the number of streets getting sewers is not clearly erroneous.

[2] The trial court did award Rawson $8000 for work in excess of the contract price relating to overpavement, saw cutting, widening of trenches and intersection work.

The trial court's finding that Rawson failed to substantially perform road surface restoration is also not clearly erroneous. Whether a party has substantially performed requires determining whether the party "has met the essential purpose of the contract." ***M & I Marshall & Ilsley Bank v. Pump***, 88 Wis.2d 323, 333, 276 N.W.2d 295, 299 (1979). This inquiry is a factual one. *See* ***id***. at 333-34, 276 N.W.2d at 299-300.

The trial court found that a videotape of the roads in question showed that the areas Rawson worked on were not properly saw cut and finished when compared with those areas completed by the substitute contractor. The trial court also found that Rawson did not complete the restoration work pursuant to the parties' agreement to agree on restoration by June 1, 1990.

In support of its claim that it substantially performed under the contract, Rawson points to the testimony of its expert witness, engineer Paul Schmidt. Schmidt testified that seven of his ten core boring samples had the asphalt thickness required by the contract. However, the other three samples did not have the required thickness. This evidence is sufficient to uphold the trial court's finding that Rawson did not substantially perform under the contract.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.