COURT OF APPEALS DECISION DATED AND FILED

April 2, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

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

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.

No. 97-0015

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

RULE CONSTRUCTION, LTD.,

PLAINTIFF-APPELLANT,

V.

NICHOLAS LADOPOULOS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Dane County: P. CHARLES JONES, Judge. *Affirmed in part; reversed in part and cause remanded.*

Before Vergeront, Roggensack and Deininger, JJ.

ROGGENSACK, J. Rule Construction appeals a judgment dismissing its collection action. Rule claims that the circuit court erroneously granted judgment on the pleadings. Rule argues that the circuit court erred because it found the motion for judgment on the pleadings was timely; because it

failed to conclude that Nicholas Ladopoulos waived arbitration; because arbitration clauses are insufficient, in and of themselves, to support the dismissal of a complaint; and further, because Rule asserts it had already received the approvals necessary for payment under ¶ 9.10 of the contract. Rule also requests sanctions, alleging that Ladopoulos's motion was filed in bad faith. Ladopoulos contends the circuit was correct in all respects. Because we agree that there are genuine issues of material fact which are unresolved by the pleadings, we reverse the dismissal of Rule's claim and the conclusion that Ladopoulos did not waive the arbitration provisions of the contract. However, for the reasons discussed below, we affirm the denial of sanctions.

BACKGROUND

In 1994, Rule agreed to install sanitary sewers and water mains for a subdivision which Nicholas Ladopoulos was developing. The original contract price was $283,020.00, but Rule sought final payment in the amount of $318,433.66. In September of 1995, after Ladopoulos had refused to pay more than $294,534.99, Rule filed this suit to collect the additional $23,898.67, plus interest, which it claimed was due. Ladopoulos filed an answer denying any amount was owed to Rule. He also counterclaimed for breach of contract, alleging that Rule had failed to perform to a reasonable standard of workmanship and that Ladopoulos had spent more than $40,000 removing and reinstalling a portion of a sewer which Rule had improperly installed on state land. Rule replied to the counterclaim, denying Ladopoulos's allegations and reasserting its right to payment as prayed for in the complaint.

After a status conference on June 14, 1996, the matter was set for trial on August 26, 1996, and Rule paid the requisite jury fee. On June 21, 1996,

in accord with the scheduling order, Rule filed an amended complaint which corrected a numerical error[1] in the original complaint. Sometime after receiving the amended complaint, defense counsel obtained opposing counsel's consent to a postponement of the trial because Ladopoulos would be out of the country until shortly before August 26th. Then, on July 16, 1996, in combination with his answer to the amended complaint, Ladopoulos moved for judgment on the pleadings, pursuant to § 802.06(3), STATS. The motion, which was based on the answer to the amended complaint, alleged that Rule had failed to assert that it had complied with certain contractual conditions which Ladopoulos maintained were conditions precedent to filing a claim in circuit court. The answer to the amended complaint did not contain a counterclaim and required no responsive pleading by Rule. Ladopoulos's motion was not supported by an affidavit.

Ladopoulos attached a copy of the parties' construction contract to his answer to the amended complaint. It contained several dispute resolution clauses. Specifically, ¶ 9.10 provided:

> ENGINEER will determine the actual quantities and classifications of Unit Price Work performed by CONTRACTOR. … ENGINEER'S written decision thereon will be final and binding upon OWNER and CONTRACTOR, unless, within ten days after the date of any such decision, either OWNER or CONTRACTOR delivers to the other and to ENGINEER written notice of intention to appeal …. Such appeal will not be subject to the procedures of paragraph 9.11.

Paragraph 9.11, in turn, stated:

[1] The original complaint had stated that the amount due for work performed was $311,979.16, although it also claimed $23,898.67 in damages.

> ENGINEER will be the initial interpreter of the requirements of the Contract Documents and judge of the acceptability of the Work thereunder. Claims, disputes and other matters relating to the acceptability of the Work or the interpretation of the requirements of the Contract Documents pertaining to the performance and furnishing of the Work and Claims under Articles 11 and 12 in respect of changes in the Contract Price or Contract Times will be referred initially to ENGINEER in writing with a request for a formal decision in accordance with this paragraph. Written notice of each such claim, dispute or other matter will be delivered by the claimant to ENGINEER and the other party to the Agreement promptly (but in no event later than thirty days) after the start of the occurrence or event giving rise thereto ….

Paragraph 9.12 stated in part:

> The rendering of a decision by ENGINEER pursuant to paragraphs 9.10 or 9.11 with respect to any such claim, dispute or other matter … will be a condition precedent to any exercise by OWNER or CONTRACTOR of such rights or remedies as either may otherwise have under the Contract Documents or by Laws or Regulations in respect of any such claim, dispute or other matter pursuant to Article 16.

Paragraph 16.3 provided in relevant part:

> Notice of the demand for arbitration will be filed in writing with the other party to the Agreement …. The demand for arbitration will be made within the thirty-day or ten-day period specified in paragraph 16.2 as applicable, and in all other cases within a reasonable time after the claim, dispute or other matter in question has arisen, and in no event shall any such demand be made after the date when institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statute of limitations.

And finally, ¶ 16.7 provided:

> OWNER and CONTRACTOR agree … they shall first submit any and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to the Contract Documents or the breach thereof ("disputes"), to mediation by The American Arbitration

> Association under the Construction Industry Mediation Rules of the American Arbitration Association prior to either of them initiating against the other a demand for arbitration pursuant to paragraphs 16.1 through 16.6, unless delay in initiating arbitration would irrevocably prejudice one of the parties.

Rule challenged the motion for judgment on the pleadings as untimely and as frivolous. The circuit court granted Ladopoulos's motion, reasoning that the arbitration clause was mandatory and required arbitration before a suit could be filed. Because it concluded that the time for exercising the arbitration clause under the contract had passed, it held that the amended complaint must be dismissed. It had no information before it in regard to whether there was a reason why neither party had sought mediation or arbitration under the contract. It did not acknowledge that the allegations in the answer to the amended complaint required no responsive pleading. Instead, it took those allegations as admitted for purposes of the motion and it denied Rule's motion for sanctions. This appeal followed.

DISCUSSION

Standard of Review.

The methodology for reviewing an order granting judgment on the pleadings approximates the first two steps followed in summary judgment cases. ***Schuster v. Altenberg***, 144 Wis.2d 223, 228, 424 N.W.2d 159, 161 (1988). Our review is *de novo*. We first examine the amended complaint to determine whether it states a claim, and then review the answer to the amended complaint to see whether it presents any material issue of fact. ***Id.*** Only if no genuine issue of material fact is in dispute may the moving party be entitled to judgment as a matter of law. ***Id.***

Rule's Contentions.

Rule contends that Ladopoulos should have been barred from raising the arbitration issue as a basis for judgment on the pleadings because: (1) the motion for judgment on the pleadings was not timely filed; (2) in Wisconsin, arbitration clauses are insufficient, standing alone, to support motions for judgment on the pleadings; (3) Ladopoulos waived any right he may have had to rely on the arbitration clause when he, himself, filed a counterclaim without first submitting it to arbitration; and (4) Rule had obtained the project engineer's approval for payment; therefore, it was Ladopoulos's obligation to seek arbitration if he disagreed with the payment Rule requested. Rule also maintains that Ladopoulos's motion was frivolous and that his counsel inappropriately cited an unpublished opinion of this court.

1. Timeliness of motion.

Section 802.06(3), STATS., allows any party to move for judgment on the pleadings "[a]fter issue is joined between all parties but within time so as not to delay the trial." Although nearly a year into an action does seem rather late to be bringing a motion for judgment on the pleadings, the circuit court was in the best position to judge whether the motion would actually have delayed the trial. We will not disturb its implicit factual finding that it would not have done so.

2. Effect of arbitration clauses.

In ***Schramm v. Dotz***, 23 Wis.2d 678, 127 N.W.2d 779 (1964), the Wisconsin Supreme Court noted that "[b]y providing for a stay pending arbitration, [the substantially similar predecessor to § 788.02, STATS.] implicitly denies the validity of a [contract] provision that no action may be brought until arbitration has been had." ***Id***. at 682, 127 N.W.2d at 781. In ***Saxauer v. Luebke***, 33 Wis.2d 56, 146 N.W.2d 385 (1966), the supreme court cited ***Schramm*** for the proposition that any express provision requiring a plaintiff to arbitrate before instituting suit is invalid and unenforceable in Wisconsin. ***Id***. at 59, 146 N.W.2d at 386 (holding that plaintiff's failure to invoke arbitration did not entitle defendant to a dismissal of the action). As recently as 1991, this court has confirmed that ***Schramm*** is still the law in Wisconsin. *See* ***Lynch v. American Family Mut. Ins. Co.***, 163 Wis.2d 1003, 1009-13, 473 N.W.2d 515, 518-19 (Ct. App. 1991) (distinguishing the appraisal process from arbitration in regard to the validity of conditions precedent to suit).

Ladopoulos cites no direct authority for the proposition that the remedy, for plaintiff's failure to allege in the complaint that it had complied with arbitration provisions of a contract, is dismissal of the action. And we could find none. Instead, he relies primarily on secondary authorities such as Williston's treatise for the general proposition that under contract law, "a condition precedent must be 'exactly fulfilled or no liability can arise on the promise which such condition qualifies.'" *See, e.g.,* ***Woodland Realty, Inc. v. Winzenried***, 82 Wis.2d 218, 224, 262 N.W.2d 106, 109 (1978) (also citing 5 Samuel Williston, A TREATISE ON THE LAW OF CONTRACTS § 675, at 184 (3rd ed. 1961)). However, arbitration clauses in construction contracts should be strictly construed to avoid forfeiture. ***Vangindertaelen v. Phenix Ins. Co.***, 82 Wis. 112, 119, 51 N.W. 1122,

1125 (1892). Moreover, "[a]n arbitration clause in a contract does not have vitality unless there is a controversy as to some matters falling within the scope of it." ***Quast v. Guetzkow***, 164 Wis. 197, 199, 159 N.W. 810, 811 (1916).

In this case, Ladopoulos claims that Rule's demand for final payment falls within the scope of arbitration provisions required by ¶ 9.11.[2] Ladopoulos points out that nothing in the record supports Rule's factual claim on appeal that the engineer had already approved each price along the way.[3] We agree. However, his point exemplifies the problems created when no factual record has been developed, and whether an owner has accepted the contractor's work is a factual question which affects the parties' rights and obligations under the contract. ***Quast***, 164 Wis. at 198, 159 N.W. at 810.

Here, the contract appears to require mediation prior to arbitration (see ¶ 16.7), and if a dispute is not required to be referred to the engineer under ¶ 9.11, arbitration of disputes can be requested "within a reasonable time after the claim, dispute or other matter in question has arisen." (See ¶ 16.3.) There is nothing in the contract which requires dismissal of an action if arbitration is not timely sought. There is nothing in the contract which requires the plaintiff in a collection action for work performed under the contract either to allege that the arbitration provisions of the contract have been complied with or to allege why plaintiff believes they do not apply in order to state a claim. Therefore, we

[2] If ¶ 9.10 applies to Rule's claim, ¶ 16.3 may permit a request for arbitration within a "reasonable" time. From the pleadings, we cannot determine whether any paragraph requires Rule to seek arbitration of his claim.

[3] A court could make certain inferences from the fact that Ladopoulos had already paid $294,534.00 for the construction, an amount, in and of itself, greater than the contract price.

conclude that neither the contract on its face, nor § 788.02, STATS., nor the applicable case law requires dismissal of Rule's claim.

3. Waiver of arbitration.

Whether conduct rises to the level of a waiver of a contractual right is a mixed question of fact and law. ***Meyer v. Classified Ins. Corp. of Wisconsin***, 179 Wis.2d 386, 396, 507 N.W.2d 149, 153 (Ct. App. 1993). A court may not resolve factual disputes in the course of a motion for judgment on the pleadings. *See* ***Schuster***, 144 Wis.2d at 228, 424 N.W.2d at 161.

Waiver was never pled by Rule because Ladopoulos's answer to Rule's amended complaint required no responsive pleading. Nor were other possible defenses pled, for the same reason. And, even though it has long been the law of this state that contract provisions may be waived by actions of the parties which are inconsistent with the provisions, ***Boden v. Maher***, 105 Wis. 539, 547, 81 N.W. 661, 664 (1900), it is equally true that one act is generally not sufficient for the court to find waiver, as a matter of law. ***Meyer***, 179 Wis.2d at 397, 507 N.W.2d at 154. Furthermore, whether the other party is prejudiced is a factor to consider, when determining whether the party seeking to enforce a contract provision has waived the right to do so. *See* ***Fritsche v. Ford Motor Credit Co.***, 171 Wis.2d 280, 295, 491 N.W.2d 119, 124 (1992).

Because Ladopoulos moved for judgment on the pleadings, we have only the amended complaint and the answer thereto in our review of the circuit court's decision that Ladopoulos did not waive his right to insist on arbitration by filing a counterclaim. We cannot determine on this record whether Rule was prejudiced by Ladopoulos's action or inaction. The record is simply insufficient

to determine this mixed question of fact and law at this stage of the proceeding and therefore, we conclude it was error for the circuit court to do so.

4. Engineer's approval.

Rule argues that, prior to filing suit, it had received the engineer's approval for payment pursuant to ¶ 9.10, so if Ladopoulos wished to arbitrate that decision, it was his obligation to initiate arbitration under the contract. Ladopoulos correctly points out that this fact appears nowhere in the pleadings. We agree the merits of Rule's contention are not correctly before us; therefore, we do not address them, except to note that it is not possible from the bare pleadings to determine with certainty which contractual provisions applied to Rule's claim when it commenced this action.

5. *Frivolousness of Ladopoulos's motion.*

Rule moved for sanctions at the circuit court level contending that Ladopoulos's motion for judgment on the pleadings was frivolous because it was filed in bad faith. Rule finds support for its position in Ladopoulos's motion and trial court brief, which failed to cite any legal authority to support the motion.

The party claiming that a motion is frivolous must overcome a presumption of non-frivolousness. *See* ***Kelly v. Clark***, 192 Wis.2d 633, 659, 531 N.W.2d 455, 464 (Ct. App. 1995). The issue is not whether the opposing party will prevail on the motion, but whether the position taken is so indefensible that it is frivolous and the party should have known it. ***Stoll v. Adriansen***, 122 Wis.2d 503, 517, 362 N.W.2d 182, 189 (Ct. App. 1984).

Here, Ladopoulos moved for judgment on the pleadings based on an arguably unenforceable arbitration provision which he may have previously

waived and which did not clearly apply to Rule's claim. Ladopoulos relies for his motion on the plain language of the contract and general principles of contract interpretation. Thus, while he did not prevail on any of his theories of law before this court, we do not consider his position to have been completely indefensible.

6. Unpublished opinion.

In response to Rule's contention that the motion to dismiss was frivolously filed, counsel for Ladopoulos stated in the reply brief:

> [W]e are aware of an unpublished Wisconsin Court of Appeals case directly on point with our motion as we have argued it, upholding a trial court decision, and on whose reasoning we relied in developing our motion and argument, but which we of course cannot and did not cite as authority directly for the purposes of that argument.… With reluctance and some uncertainty we cite the case here exclusively for the purpose of defending the good faith of our motion ….

Section 809.23(3), STATS., prohibits the citation of any unpublished appellate opinion "as precedent or authority, except to support a claim of res judicata, collateral estoppel, or law of the case." *See also* ***Kuhn v. Allstate Ins. Co.***, 181 Wis.2d 453, 467-68, 510 N.W.2d 826, 832 (Ct. App. 1993). Although Ladopoulos's reference to an unpublished case did not relate to claim or issue preclusion or to the law of the case at bar, the opinion was not cited "as precedent or authority." Rather, counsel was attempting to establish the basis for his good faith belief that his argument had legal merit. While we think the better practice would have been to rely solely on any reasoning or secondary sources cited in the unpublished opinion, we do not believe that § 809.23(3) was violated in this context. Therefore, that part of the circuit court's decision denying sanctions is affirmed.

CONCLUSION

On the state of the pleadings of record, the circuit court erred when it concluded that Rule's claim must be dismissed, and that Ladopoulos did not waive the contractual arbitration provisions. Therefore, we reverse those decisions. However, we affirm the circuit court's decision that Ladopoulos's motion was timely made and that Ladopoulos should not be sanctioned.

By the Court.—Judgment affirmed in part; reversed in part and cause remanded.

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