COURT OF APPEALS
DECISION
DATED AND FILED

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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. 97-2240

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

TONY LIMBACH AND TRACY LIMBACH, D/B/A LIMBACH CONSTRUCTION,

PLAINTIFFS-RESPONDENTS,

V.

JOHN DONATH AND AMBER DONATH,

DEFENDANTS-APPELLANTS,

MUTUAL SAVINGS BANK S.A. AND GARY ZURN, D/B/A ZURN'S FLOOR COVERING,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Washington County: LAWRENCE F. WADDICK, Judge. *Affirmed.*

Before Brown, Nettesheim and Anderson, JJ.

PER CURIAM. John and Amber Donath appeal from a judgment for unpaid construction costs in favor of Limbach Construction, the contractor who built their home. We affirm.

The Donaths received a home construction bid from Tony and Tracy Limbach, d/b/a Limbach Construction (hereinafter Limbach). Limbach built the Donaths' home. After a trial to the court on Limbach's claims for the balance due it and various subcontractors, the trial court made the following findings of fact. Limbach estimated that it would cost $139,000 to build the home and made a proposal to that effect. The court found that the parties' construction contract consisted of an April 5, 1995 Proposal from Limbach (Donaths' Exhibit 5)[1] and an April 17, 1995 Building Construction Agreement (Limbach's Exhibit 7). The court did not agree that a list of elements in the house, the "specification sheet," (Limbach's Exhibit 5) signed by the Donaths on April 7 and Limbach on April 10, was incorporated in the parties' contract. Rather, the specification sheet was prepared at the request of the Donaths' lender as part of the documentation for the construction loan. The court characterized the specification sheet as "a rough estimate for the bank." The court found that the Building Construction Agreement was clear and precise as to only a few of the items contained in the $139,000 contract price, e.g., an allowance of $6000 for carpeting. The court criticized the parties' informal documenting of their construction agreement and the informal manner in which the project was documented as it progressed.

[1] Although Tony Limbach testified at trial that the Proposal was actually Limbach's Exhibit 4, a proposal dated April 1, 1995, the trial court found that the Proposal dated April 5 was actually part of the contract.

The parties' dispute arose when Limbach requested its third draw on the construction loan escrow account in December 1995. The court inferred that the Donaths refused to release payment to Limbach until the subcontractors were paid.[2] However, Limbach had already obtained construction lien waivers from the remaining subcontractors which should have permitted the payment on the third draw. The court found that the Donaths breached the contract when they withheld the third draw even though Limbach had substantially performed the construction contract. The court then calculated the amounts due various subcontractors for labor and materials and apportioned the subcontractors' interest and other delinquency charges between Limbach and the Donaths.[3]

On appeal, the Donaths argue that the trial court erred as follows: (1) excluding the specification sheet from the parties' contract; (2) determining that the Donaths, rather than Limbach, breached the construction contract; and (3) determining that the Donaths wrongfully withheld payment from Limbach and the subcontractors.

We turn first to the trial court's treatment of the parties' contract. The trial court concluded that the agreement consisted of the April 5 Proposal and the April 17 Building Construction Agreement. The court did not include the specification sheet in the contract. The Donaths contend on appeal that this was error. Limbach argues that the Donaths never made this argument in the trial

[2] Amber Donath testified that she wanted to be paid the allowances for items she had purchased directly from suppliers before she would authorize the third draw. As the finder of fact, the court was entitled to draw a different inference from the evidence before it. *See* ***Micro-Managers, Inc. v. Gregory,*** 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988).

[3] Even though the Donaths caused the subcontractors to go unpaid by refusing to authorize Limbach's third draw, the court found Limbach partially responsible for not advising the Donaths of the amount of accruing interest and finance charges.

court. Rather, they argued that the construction contract required written change orders and that Limbach could not claim payment for "extras" in the absence of change orders. In their reply brief, the Donaths concede that the specification sheet argument is new on appeal but ask this court to consider it anyway.

We generally do not consider arguments raised for the first time on appeal, *see* ***Meas v. Young,*** 138 Wis.2d 89, 94 n.3, 405 N.W.2d 697, 699-700 (Ct. App. 1987), particularly where, as here, the case is fact intensive and the trial court has not been asked to evaluate the evidence at trial. We decline to depart from this rule to decide de novo whether the parties' contract included another important document.

We turn to the trial court's determination that the Donaths breached the contract by refusing to approve the third draw.[4] Amber Donath directed the escrow agent not to issue a final (or third) payment to Limbach until the Donaths received payment on their allowances, even though there was a substantial amount of extras incorporated in the house at the Donaths' request for which Limbach was seeking payment. The Donaths argue that because there were no written change orders, they were not required to pay for "extras" or deviations from the original plans. In the alternative, they argue that some of the items deemed "extras" were actually included in the $139,000 bid.

The evidence at trial indicates that the parties did not adhere to the contractual provision that extras had to be reduced to writing.[5] Certain extras from

[4] We do not address the balance of the appellate arguments in the manner in which the parties have structured them. *See* ***State v. Waste Management of Wis., Inc.,*** 81 Wis.2d 555, 564, 261 N.W.2d 147, 151 (1977).

[5] This court appreciates court reporter Loretta Justman's exceptionally detailed index to the trial transcripts. The index was of great assistance to this court.

Kettle Moraine Electric (which the Donaths negotiated directly with the company) and Guenther Construction were reduced to writing. About those extras there was no dispute. Tracy Limbach testified regarding the extras for which Limbach Construction was charged by suppliers and subcontractors. She noted that extra charges were incurred for cabinets, doors, countertops, well drilling, windows, interior trim, staircase, siding, soffits, lumber and vents.

In her testimony, Amber Donath conceded that she requested a change in the plans for the windows and doors. She also testified that she agreed to install recessed and other lighting at an additional cost although she acknowledged that no written change order was prepared. She further acknowledged that she accepted changes in the type and location of exterior and interior doors without signing a change order. As to the $7162.50 in undocumented extras for which the Donaths were billed as part of the third draw request, the Donaths take refuge in the contractual requirement that changes in construction details be made in writing.

The trial court found that the parties did not adhere to the contractual requirement of written change orders and that their conduct varied the terms of the contract. The court concluded that the Donaths could not stand on the contract provision which required written change orders in order to avoid paying for extras they requested. The record supports these conclusions.

The Donaths claim that certain of the claimed extras were actually included in the price of the house.[6] This argument requires construction of the parties' contract.

While construction of a contract to ascertain the intent of the parties is normally a matter of law for this court, *see* ***Eden Stone Co. v. Oakfield Stone Co.***, 166 Wis.2d 105, 115-16, 479 N.W.2d 557, 562 (Ct. App. 1991), where a contract is ambiguous, the question of intent is for the trier of fact. *See* ***Armstrong v. Colletti***, 88 Wis.2d 148, 153, 276 N.W.2d 364, 366 (Ct. App. 1979). We will not disturb a trial court's findings of fact regarding the parties' intent unless they are contrary to the great weight and preponderance of the evidence, i.e., clearly erroneous. *See* ***id.***; *see also* ***Noll v. Dimiceli's, Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983) (the great weight and preponderance of the evidence standard is identical to the clearly erroneous standard). Whether a contract is ambiguous in the first instance is a question of law which we decide independently of the trial court. *See* ***Wausau Underwriters Ins. Co. v. Dane County***, 142 Wis.2d 315, 322, 417 N.W.2d 914, 916 (Ct. App. 1987). Ambiguity exists in a contract if it is reasonably susceptible to more than one meaning. *See* ***id***.

In order to determine the intent of the parties to an ambiguous contract, the trial court may consider extrinsic evidence of the parties' intent through their words and conduct. *See* ***Spencer v. Spencer***, 140 Wis.2d 447, 450, 410 N.W.2d 629, 630-31 (Ct. App. 1987). The trial court may consider the circumstances and words or conduct before and after the signing of the ambiguous agreement. *See* ***Board of Regents v. Mussallem***, 94 Wis.2d 657, 671, 289 N.W.2d 801, 808 (1980). As the

[6] The Donaths do not contest the individual amounts of the extras found by the trial court.

finder of fact, it was within the trial court's province to assess the credibility of the witnesses and weigh the evidence. *See* ***Micro Managers, Inc. v. Gregory***, 147 Wis.2d 500, 512, 434 N.W.2d 97, 102 (Ct. App. 1988). We will not overturn the trial court's findings unless they are clearly erroneous. *See* ***id***.

The parties' contract was ambiguous because it did not contain all of the terms needed to demonstrate the parties' intent regarding what was included in the $139,000 bid. The April 5 Proposal and April 17 Building Construction Agreement referred to attached plans and specifications. However, there were no specifications when the April 5 proposal was signed because the specification sheet was prepared later at the request of the Donaths' bank. Therefore, the trial court correctly consulted other evidence of the parties' intent, including the parties' conduct during the construction project.

Because the parties did not adhere to the written change order provision in their contract, the court was free to review the evidence relating to the extras. Its award of amounts due on the extras is supported by the record, and the specific amounts are not challenged on appeal.[7]

By the Court.—Judgment affirmed.

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

[7] We acknowledge that the Donaths argue that the judgment against them should be reduced to the balance due on the $139,000 contract plus extras they authorized, less credit for the allowances in the contract. Because we have upheld the trial court's other rulings relating to the manner in which extras were handled, we need not address this argument.