COURT OF APPEALS
DECISION
DATED AND FILED

July 6, 1999

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. 98-2286-FT

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

LOSS PREVENTION SYSTEMS,

PLAINTIFF-RESPONDENT,

V.

ALPHA OMEGA SECURITY, INC. AND
MILWAUKEE LISBON LIMITED PARTNERSHIP,
D/B/A LONDON SQUARE APARTMENTS,

DEFENDANTS-THIRD-
PARTY PLAINTIFFS,

PAULA WASHOW,

DEFENDANT-APPELLANT,

A AND J ELECTRIC,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Milwaukee County: PATRICIA D. McMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Paula Washow (Washow) appeals from a judgment of the circuit court holding her personally liable to Loss Prevention Systems (Loss Prevention) under § 779.02(5), STATS., the theft by contractor statute, in the amount of $26,219.23, plus certain costs and interest. Because we conclude that the trial court properly granted summary judgment to Loss Prevention on its claim, we affirm.[1]

BACKGROUND

Washow, president and sole proprietor of Alpha Omega Security, Inc., (Alpha Omega) entered into a written contract with London Square Apartments (London Square) on May 26, 1995, for the installation of a video security system. Alpha Omega agreed to provide the labor and material for the project. The contract stated in part that Alpha Omega "agrees to install the system as ordered on the reverse side of this Agreement in a workmanlike manner."

Alpha Omega then turned to Loss Prevention and certain other subcontractors to install the system. The installation process took approximately fifteen months to complete due to alleged errors by a subcontractor hired to lay the in-ground cable. After the cable installation error was discovered in the spring of 1996, Alpha Omega hired Loss Prevention to reinstall the cable. Loss Prevention finished the job on August 22, 1996, and the system was finally up and running.

[1] This is an expedited appeal under RULE 809.17, STATS.

The record submitted to the trial court showed that London Square paid Alpha Omega for the security system in partial payments stretching over the course of the fifteen-month period of construction:

Check # 69952	6/16/95	$25,000.00
Check # 72939	8/2/95	$13,359.00
Check # 72938	8/2/95	$20,000.00
Check # 77369	9/6/95	$ 5,000.00
Check # 79724	11/15/95	$ 4,000.00
Check # 81388	12/12/95	$ 4,000.00
Check # 2102	1/24/96	$ 9,300.00
Check # 86565	2/20/96	$ 8,900.00
Check # 88291	3/15/96	$ 6,066.20
Check #100345	9/5/96	$10,876.80

Alpha Omega admitted that it "received all payments from amounts billed on the London Square Apartments project."

Loss Prevention billed Alpha Omega for its work in six invoices dated on or before August 28, 1996. The total amount due was $26,219.23 for labor and materials. The invoices were marked "due on receipt." Alpha Omega did not object to the invoices; nor did it pay them. Loss Prevention sent the invoices out on a monthly basis and added finance charges as they accrued.

The undisputed record showed that Alpha Omega received payments totaling $106,502.00 from London Square for the installation of a working video security system over the fifteen-month period. It was further undisputed that Alpha Omega paid out $66,212.71 over this time period to various subcontractors who provided labor and materials for the project.

Loss Prevention sued Alpha Omega, claiming that an "account stated" existed between the parties and that Alpha Omega owed Loss Prevention $26,219.23. Loss Prevention also claimed that Washow was personally liable for

the unpaid invoices under § 779.02(5), STATS., the theft by contractor statute.[2] The trial court granted summary judgment to Loss Prevention on both claims and Washow appeals from the judgment entered against her.[3]

DISCUSSION

Our review of a trial court's grant of summary judgment is *de novo*. ***Green Spring Farms v. Kersten,*** 136 Wis.2d 304, 315-16, 401 N.W.2d 816, 820 (1987). We use the same summary judgment methodology as the trial court. *See* ***id.*** That methodology has been described in many cases, *see*, *e.g.*, ***Grams v. Boss***, 97 Wis.2d 332, 338, 294 N.W.2d 473, 476-77 (1980), and need not be repeated here. Summary judgment must be granted if the evidentiary material demonstrates

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[2] Section 779.02(5) provides in part:

> THEFT BY CONTRACTORS. The proceeds of any mortgage on land paid to any prime contractor or any subcontractor for improvements upon the mortgaged premises, and all moneys paid to any prime contractor or subcontractor by any owner for improvements, constitute a trust fund only in the hands of the prime contractor or subcontractor to the amount of all claims due or to become due or owing from the prime contractor or subcontractor for labor and materials used for the improvements, until all the claims have been paid, and shall not be a trust fund in the hands of any other person. The use of any such moneys by any prime contractor or subcontractor for any other purpose until all claims, except those which are the subject of a bona fide dispute and then only to the extent of the amount actually in dispute, have been paid in full or proportionally in cases of a deficiency, is theft by the prime contractor or subcontractor of moneys so misappropriated and is punishable under s. 943.20. If the prime contractor or subcontractor is a corporation, such misappropriation also shall be deemed theft by any officers, directors or agents of the corporation responsible for the misappropriation.

[3] Alpha Omega appealed the trial court's grant of summary judgment on Loss Prevention's claim that an "account stated" existed between the parties. This court recently affirmed the trial court's judgment in ***Loss Prevention Systems v. Alpha Omega Security, Inc.,*** No. 97-3327, unpublished slip op. (Wis. Ct. App. June 8, 1999).

"that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS. A genuine issue of material fact exists where material facts are in dispute or "the record reveals there are competing inferences [from undisputed material facts] that could be considered *reasonable*." ***Lecus v. American Mut. Ins. Co. of Boston***, 81 Wis.2d 183, 189-90, 260 N.W.2d 241, 244 (1977) (emphasis added).

Washow's appeal turns on three central assertions: (1) Loss Prevention's remedial work performed in the spring and summer of 1996 was warranty work not subject to § 779.02(5), STATS.; (2) London Square never paid Alpha Omega for this warranty work; and (3) no evidence was submitted showing that Alpha Omega used funds paid by London Square for a purpose other than the payment of subcontractors.

We begin with Washow's argument that the remedial cable work done by Loss Prevention during the spring and summer of 1996 was warranty work requested well after the project was completed. Washow argues in her brief-in-chief that § 779.02(5), STATS., does not create an "obligation for a contractor to hold back funds in anticipation of future warranty work that may or may not need to be performed on a project." Washow explains that such an obligation would impose an unreasonable burden on a contractor to hold back funds "until the expiration of whatever warranty they provided to an owner had expired." Washow points out that such an interpretation might result in an absurdity, a construction courts are cautioned to avoid. *See* ***Walag v. Town of Bloomfield***, 171 Wis.2d 659, 663, 492 N.W.2d 342, 344 (Ct. App. 1992) (court must accept reading of statute that avoids absurdity). Accordingly, Washow requests this court to exempt contractors from the obligations imposed by § 779.02(5) with respect to funds paid to them by property owners for warranty work.

We reject Washow's position on this issue because it is predicated on an unreasonable and unsupported view of the record: the remedial work done in 1996 was warranty work performed after the contract work had been completed. Rather, the evidence shows that Loss Prevention supplied labor and materials to Alpha Omega during the spring and summer of 1996 in order for Alpha Omega to perform the original contract it signed with London Square in May 1995. The record indicates without contradiction that the video security system was plagued with problems from the outset and failed to operate at all until August 1996, when Loss Prevention completed its work on the system's network of cable. We note further that the undisputed evidence shows that London Square made installment payments to Alpha Omega from June 1995 through September 1996, pursuant to the May 28, 1995 contract. Accordingly, Loss Prevention's labor and materials were supplied to Alpha Omega so that it could perform its obligations with respect to the original construction contract between Alpha Omega and London Square. It follows that the funds paid by London Square to Alpha Omega pursuant to its original contract obligation should have been held by Alpha Omega pursuant to § 779.02(5), STATS., to satisfy the claims of subcontractors such as Loss Prevention. As our supreme court observed, § 779.02(5) was enacted for the '"protection of the person who furnished services or material to enable the contractor to carry out his public contract.'" ***Wisconsin Dairies Coop. v. Citizens Bank & Trust***, 160 Wis.2d 758, 768, 467 N.W.2d 124, 128 (1991).

Washow's second argument is that the trial court erred in imposing liability because the record was devoid of evidence that Alpha Omega received any payment for the work performed by Loss Prevention in the spring and summer of 1996: "Alpha [Omega] had not been paid by the owner. Since no funds were paid, there were no funds to misappropriate." This court has reviewed the record

references ("R15-1; AP209") supplied by Washow early in her brief-in-chief to support this assertion. Both record references identify the same document, an affidavit submitted by Kevin Gierarch, an employee of Alpha Omega during the time period relevant to this lawsuit. Gierarch states in the affidavit that "the video camera surveillance system installed by Alpha Omega Security, Inc. for Milwaukee Lisbon Limited Partnership did not work from the beginning." Gierarch's affidavit explains that throughout the three months following the original installation, Alpha Omega was trying to figure out why the system would not operate. Gierarch's affidavit states that he was contacted by Sewellyn Cate of London Square who told him "she wanted the [cable] problem fixed ... at no additional cost." Gierarch stated that he agreed to repair the cable problem "at no additional charge" to London Square. His affidavit concludes, "[i]n the end, after months of delay, Milwaukee Lisbon Limited Partnership received what it paid for—a working system."

Gierarch's averments do not reasonably support Washow's contention that Alpha Omega was never paid for the work Loss Prevention performed. Instead, his statements suggest that Alpha Omega agreed that its contract with London Square was intended to cover a working system, even if it took an unforeseen amount of time and effort to get the system up and running. Accordingly, we reject Washow's contention that Alpha Omega was not paid by London Square for the work performed by Loss Prevention in the spring and summer of 1996.

Washow's final argument is that the trial court erred in imposing liability on her under the theft by contractor statute because Loss Prevention failed to show that she used the funds paid to Alpha Omega by London Square for some

purpose other than the payment of subcontractors.[4] We disagree. It was undisputed, by the time of the hearing on the summary judgment motion, that Alpha Omega no longer had funds available to satisfy Loss Prevention's claims.[5] Because Loss Prevention had not been paid as of that date, it follows by necessity that Washow had used the funds paid to Alpha Omega by London Square for a purpose other than paying Loss Prevention.[6]

Accordingly, we conclude that no genuine issues of material fact remained by the time of the hearing on the motion for summary judgment. We hold that the trial court correctly drew the only reasonable inferences supported by the record and correctly decided the legal issues presented.

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[4] The only evidence Washow submitted with respect to the availability of funds to pay Loss Prevention appears in her affidavit:

> 17. Your affiant asserts that despite the defendant corporation Alpha Omega being in a receivership, the corporation has and would have had money to payout on the disputed claim/invoice of Loss Prevention Systems, but was entitled to withhold the funds, due to the dispute which constitutes the basis for the present lawsuit.

Washow's assertions are conclusory, vague and self-serving. Accordingly, we conclude that the trial court did not err in declining to rely on such an assertion to determine Alpha Omega's financial condition.

[5] At the summary judgment hearing, Washow's counsel stated that Alpha Omega "does not have the assets sufficient to carry a $31,000 judgment."

[6] Alpha Omega's contention that it had funds available to pay Loss Prevention before it went into receivership is irrelevant. Section 779.02(5), STATS., imposes on the prime contractor the obligation to personally hold in trust those funds paid by the owner to satisfy claims submitted by subcontractors. It is undisputed that Washow failed to take those steps necessary to discharge that duty. In the alternative, Washow argues that she was entitled to withhold payment from Loss Prevention because of a bona fide dispute over Loss Prevention's invoices. However, the trial court held as a matter of law that Alpha Omega was liable to Loss Prevention on the theory of an account stated. Accordingly, the trial court did not err when it held that its ruling on the issue was the law of the case and, therefore, dismissed Washow's claim of a bona fide dispute as a defense to a theft by contractor claim.

By the Court.—Judgment affirmed.

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