COURT OF APPEALS
DECISION
DATED AND FILED

April 26, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 99-0824

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

BADGER CONTRACTING, INC.,

PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,

V.

JOHN HARWOOD AND JOANNE HARWOOD,

DEFENDANTS-RESPONDENTS-
CROSS-APPELLANTS.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Waukesha County: PATRICK L. SNYDER, Judge. *Affirmed.*

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

¶1 BROWN, P.J. This case is about a home-remodeling job. The contractor claimed that the homeowners still owed it money for extras on the job, and the homeowners counterclaimed that the contractor owed them a refund for "credits against the contract." The dispute lead to arbitration, after which the

arbitrator awarded judgment to the contractor. On appeal, the contractor claims that it should have been awarded attorney's fees. The homeowners cross-appeal, claiming that the circuit court erred in not confirming the arbitrator's amended award and that the circuit court should have dismissed the contractor's case for allegedly being commenced after the contractual limitation period. Additionally, the homeowners move this court for attorney's fees, asserting that the contractor's appeal is frivolous. The issues on appeal are controlled by ***Finkenbinder v. State Farm Mut. Auto Ins. Co.***, 215 Wis. 2d 145, 572 N.W.2d 501 (Ct. App. 1997). The cross-appeal involves a discretionary decision of the circuit court, which we uphold. We affirm, but do not find the contractor's appeal frivolous.

¶2 We briefly recite the facts and supplement them later where necessary. John and Joanne Harwood, the homeowners, contracted with Badger Contracting, Inc., to do some remodeling on their home. The contract price was $259,100.00. During the course of the project, the Harwoods requested changes to the original plans. The project was completed on December 28, 1992, and the Harwoods paid Badger $251,984.58. After attempting to collect from the Harwoods, Badger filed suit demanding $38,544.44 for the amount remaining on the contract and additional costs due to extras and change orders. Originally the case was in Judge Robert Mawdsley's court. Under the contract, any dispute was "subject to arbitration." The parties agreed to arbitration, and the case went to retired Judge Willis Zick for arbitration. Zick delivered his written decision on November 7, 1998, awarding Badger $11,251.00. This is the award the circuit court, now presided over by Judge Patrick L. Snyder, confirmed. The Harwoods sought to have the award reduced by ten percent, stating that Zick had made a mistake and had corrected it in a new decision. The circuit court refused to affirm Zick's second decision. Badger requested that the circuit court award it attorney's

fees pursuant to the contract. It is from the circuit court's decision not to grant attorney's fees that Badger appeals. On cross-appeal, the Harwoods claim that the circuit court erred in not dismissing Badger's case and in refusing to honor the arbitrator's amended award. We discuss the appeal, then the cross-appeal, and finally, the Harwoods' motion for costs for frivolousness.

Badger's Appeal

¶3 Badger argues on appeal that it was error for the circuit court to refuse to award it attorney's fees and prejudgment interest. The circuit court ruled that Badger had waived both issues by not raising them before the arbitrator. Furthermore, the circuit court found that ***Finkenbinder*** precluded the award of attorney's fees following arbitration. Badger argues that ***Finkenbinder*** is not controlling because that case interpreted the costs statute while here we have a contract calling for attorney's fees to be awarded to the prevailing party. Badger claims the contract requires all disputes to be arbitrated, and thus the fee-shifting provision would be rendered superfluous if read to mean that attorney's fees are awarded only when there had been actual litigation.

¶4 Before discussing our standard of review, we set forth the pertinent contract provisions. Regarding arbitration, the contract provides that "[a]ny controversy or claim arising out of this Agreement that cannot be resolved, is subject to arbitration, with an arbitrator of mutual agreement." The contract goes on to state that "[i]f either party becomes involved in litigation arising out of this Agreement, the court shall award costs/expenses including attorney fees to the party justly entitled to them."

¶5 The interpretation of a contract is a question of law we review de novo. *See* ***Cardinal v. Leader Nat. Ins. Co.***, 166 Wis. 2d 375, 382, 480 N.W.2d 1

(1992). Thus, we look at whether this contract called for attorney's fees after arbitration without deference to the circuit court's conclusions.

¶6 ***Finkenbinder*** controls this case. There, the availability of costs under WIS. STAT. § 814.01 (1997-98),[1] which allows costs to a plaintiff upon recovery, was at issue. The court concluded that the statute envisioned the award of costs only to a party "who is successful in a litigated trial court proceeding, not one who succeeds in obtaining an award before an arbitrator." *See* ***Finkenbinder***, 215 Wis. 2d at 151. In short, arbitration is not litigation.

¶7 While we acknowledge that ***Finkenbinder*** was interpreting a statute while here we interpret a contract, we find its holding applicable to this case. The contract says that all claims are "subject to" arbitration. Badger argues that this means all claims must be arbitrated. The Harwoods respond that the phrase is permissive, not mandatory; in other words, a dispute goes to arbitration if one of the parties requests arbitration. We agree with the Harwoods. While both interpretations have support in the dictionary, *see* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1893 (2d ed. 1987) ("subject" means both "open or exposed to" and "under the necessity of undergoing something"), only the permissive interpretation makes sense when read in pari materia with the attorney's fees provision. ***Finkenbinder*** tells us that arbitration is not litigation. Thus, if arbitration were mandatory for all disputes, then the requirement that attorney's fees be awarded after litigation would be surplusage, as litigation would never occur. Rather, the more reasonable reading is that arbitration is not

[1] All references to the Wisconsin Statutes are to the 1997-98 version.

mandatory in every case and that attorney's fees are only meant to be awarded when a matter is litigated, not arbitrated.

¶8 ***Finkenbinder*** also controls the second issue Badger raises on appeal—that it was entitled to prejudgment interest on the arbitration award. The same issue arose in ***Finkenbinder***, and we held that Finkenbinder had waived her chance to request preverdict interest by not raising it during arbitration. *See* ***Finkenbinder***, 215 Wis. 2d at 153. The same is true here.

¶9 Finally, the Harwoods argue in their response that both the circuit court and this court "lack subject matter jurisdiction to award attorney fees" because Badger "failed to agree to (or commence) arbitration within the 2-year contractual limitation period."[2] We need not address what effect failure to commence an action within two years would have had on our jurisdiction and competency because Badger filed its action within two years after the completion of the work.[3]

Harwoods' Cross-Appeal

¶10 All but one of the Harwoods' claims on cross-appeal have to do with the arbitrator's attempt to amend his award and the circuit court's refusal to approve the arbitrator's amended award. Arbitrator Zick's original award was for

[2] That provision provides: "No action related to the Project may be made by either party against the other more than 2 years after the completion of work."

[3] The parties also dispute who is the party justly entitled to attorney's fees here since the judgment was in favor of Badger but only for twenty-nine percent of what Badger demanded. We need not address this issue as we hold that the contract does not require an award of attorney's fees for arbitration. *See* ***Sweet v. Berge***, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

$11,251.00 in favor of Badger. Two days after Zick issued his decision, the Harwoods contacted him and alerted him to what they considered to be a "mathematical error" in his decision. While Zick had marked change orders up by ten percent pursuant to the contract, he had not adjusted allowances by ten percent, for which the contract also called. Badger wrote to Zick in response, arguing that he had no authority to alter the award. The Harwoods then filed a motion requesting that Judge Snyder allow Zick to amend the award or, in the alternative, that Judge Snyder himself modify the award. At the hearing on that motion, Judge Snyder informed the parties that he would consider granting the motion if Zick felt that a mistake had been made. Judge Snyder stated that "he [Zick] is free to write to this court and to counsel, and you may advise him of same, that he feels a mistake was made." Rather than write the circuit court, Zick reopened the matter on his own, writing to counsel to invite submission of exhibits and further argument as desired. Judge Snyder, on January 9, 1999, rendered his written decision confirming Zick's existing award.

¶11 WISCONSIN STAT. § 788.10(1) directs the circuit court to vacate an arbitration award under certain circumstances. Paragraph (d) requires vacation "[w]here the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made." Section 788.10(1)(d). We construe the Harwoods' motion to allow the arbitrator to amend as a motion under this section. The Harwoods contended that Zick had missed an issue; in other words, they claimed that Zick's decision was "imperfectly executed" so that it did not make a "final and definite award." Judge Snyder declined to grant the motion unless Zick wrote to him. That decision to hold his ruling pending further information was entirely within the discretion of the trial court and we will not overturn it. A week later, when Judge Snyder had

not received such a letter from Zick, Judge Snyder rendered his decision confirming the existing award.

¶12 There was no error in Judge Snyder's handling of this matter. Rather, it was the Harwoods who should have proceeded differently. If the Harwoods wanted Judge Snyder to consider the ten-percent matter, they should have followed the procedure he laid out. They should have written Zick, copying Judge Snyder and Badger, informing Zick of Judge Snyder's decision and requesting that Zick write the circuit court. They cannot complain now of Judge Snyder's confirmation of the then-existing award.

¶13 The Harwoods also argue that the circuit court erred when it refused to dismiss Badger's case. The Harwoods claim that the case was commenced after the two-year contractual period of limitation had expired and that the circuit court should have dismissed the case for failure to prosecute. Our review of the record confirms that Badger filed suit within two years after the project was completed. The Harwoods' argument that the clock did not start to tick until Badger agreed to arbitration is without merit. It was the filing of the suit that commenced the action. Furthermore, the circuit court's decision not to dismiss for failure to prosecute is a discretionary decision. *See* ***Johnson v. Allis Chalmers Corp.***, 162 Wis. 2d 261, 273-74, 470 N.W.2d 859 (1991). We will not overturn such a decision unless an erroneous exercise of that discretion is shown; here, it was not.

Frivolousness of Appeal

¶14 Finally, the Harwoods have moved this court for attorney's fees incurred in defending the appeal, claiming that Badger's counsel "knew, or should have known, that the appeal … was without any reasonable basis in law or equity." WIS. STAT. RULE 809.25(3)(c). While we agree with the Harwoods that

Finkenbinder controls Badger's appeal, we do not view Badger's argument on appeal as so far-out that it warrants a finding of frivolousness.

No costs will be awarded to either party.

By the Court.—Judgment affirmed.

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