COURT OF APPEALS
DECISION
DATED AND FILED

January 9, 2018

Diane M. Fremgen
Acting Clerk of Court of Appeals

Appeal No. 2017AP308 **Cir. Ct. No. 2015CV6750**

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

CHRISTOPHER J. SAUGSTAD,

PLAINTIFF-RESPONDENT,

V.

DOUGLAS A. PRAHST,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: WILLIAM SOSNAY, Judge. *Affirmed*.

Before Kessler, Brash and Dugan, JJ.

¶1 BRASH, J. Douglas A. Prahst appeals from a judgment entered in favor of Christopher J. Saugstad for damages incurred relating to repairs to the

chimney and fireplace of a residential property that Saugstad[1] purchased from Prahst. A jury found that Prahst had failed to perform the condition of the contract regarding those repairs, and awarded Saugstad damages in the amount of $8900.

¶2 On appeal, Prahst argues that the evidence does not support the amount awarded by the jury, and that the trial court erred in not limiting the amount of damages to the cost of the repairs that were listed on an initial estimate obtained from a chimney repair company. Additionally, Prahst argues for the first time on appeal that Saugstad ultimately had a gas insert installed in the fireplace, which he alleges rendered the chimney repairs unnecessary, and thus the damages should have been limited to Saugstad's actual cost for the insert installation.

¶3 Saugstad counters that an additional amendment to the contract signed at closing, which provided for the repair of the fireplace and chimney such that they were safe for use, was the proper basis for determining damages. We affirm.

BACKGROUND

¶4 The parties in this case entered into a Residential Offer to Purchase ("Offer") in April 2015 for a property located at 1602 South 75th Street in the City of West Allis. A home inspector, who was hired by Saugstad to perform an inspection on the property, noted some concerns regarding the condition of the fireplace and chimney, and suggested that they be evaluated by an expert. An amendment to the Offer was then negotiated by the parties ("Amendment 1"),

[1] Saugstad purchased the property individually, but was married shortly after purchasing the property. His wife, Alana, was not a party to the purchase contract; however, she was involved in the purchase process with her husband and testified at trial.

whereby Prahst was to have a "qualified contractor make repairs to [the] fireplace and chimney as described/recommended in [the] quote from Royal Chimney Sweep dated 5/1/15." This repair work was to be completed no later than a week before the closing date.

¶5 The real estate agent representing Prahst was his brother, Greg Prahst. Greg Prahst provided Saugstad's real estate agent, Patricia Collins, with a copy of the estimate from Royal Chimney Sweep, Inc., itemizing the repairs that were to be made to the fireplace and chimney. However, the amounts quoted in the estimate had been blacked out of that copy. Collins testified that in the fifteen years that she had been a real estate agent, she had never been in a situation where the seller refused to advise the buyer of the cost of repairs. Collins testified that she was never provided a copy of the estimate by Royal that did not include the cost redactions.

¶6 The closing was scheduled for May 29, 2015. The day before closing, Collins received from Greg Prahst a lien waiver for the fireplace and chimney repairs from Ideal Masons, signed by Tom Barnes. The lien waiver noted that two things had been completed by Barnes; however, it was not accompanied by a copy of the work order or an invoice detailing the work that had been completed. Collins then contacted Ideal Masons to obtain this information, but was told that Tom Barnes was not associated with them. Collins then asked Greg Prahst about this inconsistency on the lien waiver, but he never responded with any further information. Collins was able to contact Tom Barnes, who indicated that he had done the repair work, but there was no evidence that he was a qualified contractor, as required by Amendment 1.

¶7 Consequently, Collins drafted another amendment to the Offer at closing ("Amendment 2") stating that Royal was to "reinspect [the] chimney and firebox within [thirty] days of closing to ensure all work per their [sic] proposal has been completed and chimney/fireplace is safe for use," with the cost of that inspection to be paid by Prahst. Additionally, Amendment 2 required that Prahst "pay for any additional work that was not completed as specified in [Royal's] proposal dated 5/1/15."

¶8 Royal, however, refused to do the post-closing inspection on the property. The parties then agreed to have a different chimney contractor do the post-closing inspection, Quality Fireplace and Chimney, Inc. Quality did an inspection, documented specific concerns with the fireplace and chimney, and gave Saugstad an inspection report.

¶9 It was Saugstad's understanding that Quality would do the required repair work, but Quality did not perform any of the repair work. However, Quality was subsequently called again to the property on June 24, 2015, for a reinspection of repairs that had been made, to ensure that they had been properly completed.

¶10 During the reinspection, an owner of Quality, Edward Winship, was called to the property by the technician who was performing the reinspection. He found that while there was evidence that some work had been performed on the chimney and fireplace, it had not been done by a "qualified chimney person." He noted that there were defects in the some of the repairs that had been completed, and that some of the repairs suggested during Quality's first inspection had not been done at all. Upon being advised of these problems, Prahst became very upset and left the property without paying Quality for the reinspection.

¶11 Based on that experience, Quality declined to submit a proposal to perform the repairs to the fireplace and chimney that it had recommended. However, at the request of Collins, Quality compiled prices for the recommended repairs and determined that the total cost to complete the repairs would be $8900. Subsequently, Saugstad hired Burlington Fireplace and Solar to convert the fireplace to gas with the installation of a gas insert, for which Saugstad paid $3695.

¶12 Saugstad filed suit against Prahst in August 2015 for breach of contract, and the matter went to trial in September 2016. A jury found that Prahst had failed to fully perform the conditions of the contract, and awarded Saugstad damages in the amount of $8900. Prahst filed a post-verdict motion to change the answer on the verdict form and for a new trial on the damages, arguing that the evidence did not support this award. He asserted that the award amount was likely based on the evidence presented by Quality, and that the repairs included in that total went beyond the scope of what was initially set forth in Royal's estimate for repairs, and thus were beyond the scope of what was required by Amendment 1. He further contended that there was no evidence that the chimney was not "safe for use," the requirement of the second amendment signed at closing.

¶13 The trial court found that there was sufficient credible evidence that in order to be safe for use, the repairs recommended by Quality were necessary. Therefore, based on all of the evidence presented at trial, the trial court found that the jury verdict was reasonable and upheld the damages award. This appeal follows.

DISCUSSION

¶14 In his appeal, Prahst reiterates the arguments of his post-verdict motion: that there was not sufficient evidence to support the $8900 damages award, and that the award should be limited to the repairs recommended by Royal as set forth in Amendment 1. Additionally, Prahst asserts that the damages should be limited based on the fact that Saugstad subsequently had a gas insert installed in the fireplace, rendering the repairs unnecessary.

¶15 Prahst first argues that the evidence was not sufficient to support the damages award because there was no evidence that the chimney would not have been safe to use without the repairs. The trial court disagreed, pointing out that it is impossible to compare Quality's estimate of the cost of repairs to that of Royal since the amounts quoted by Royal were blacked out on the copy of the estimate provided to Saugstad. Additionally, the trial court suggested that the jury, which based the damages award on the estimate provided by Winship, had likely found Winship's testimony credible because he was the "most removed" from this matter in that "he didn't have anything to gain here by his testimony."

¶16 "A damage award is a matter resting largely within the discretion of the jury, and is to be upset only where it is so excessive as to indicate that it resulted from passion, prejudice, or corruption, or a disregard of the evidence or applicable rules of law." ***Staskal v. Symons Corp.***, 2005 WI App 216, ¶38, 287 Wis. 2d 511, 706 N.W.2d 311. In reviewing a motion challenging a damages award, the trial court "is to view the evidence in the light most favorable to the jury's verdict." ***Id.***, ¶39. In other words, if there is "any credible evidence under any reasonable view that supports the jury's finding on the amount of damages," the trial court must affirm it. ***Id.***

¶17 On appeal, we will affirm the trial court's ruling on a motion challenging damages unless the trial court erroneously exercised its discretion. *See* ***id.***, ¶40. Furthermore, "'[w]e afford special deference to a jury determination in those situations in which the trial court approves the finding of a jury.'" ***D.L. Anderson's Lakeside Leisure Co., Inc. v. Anderson***, 2008 WI 126, ¶22, 314 Wis. 2d 560, 757 N.W.2d 803 (citation omitted). This "deferential standard" is due to the trial court being "in a better position than the reviewing court to analyze the evidence and make an appraisal on the reasonableness of the damages." ***Staskal***, 287 Wis. 2d 511, ¶40. "It is only when the evidence that the trier of fact has relied upon is inherently or patently incredible that the appellate court will substitute its judgment for that of the fact finder, who has the great advantage of being present at the trial." ***Gauthier v. State***, 28 Wis. 2d 412, 416, 137 N.W.2d 101 (1965). "Inherently or patently incredible evidence" is evidence which is '"in conflict with nature or fully established or conceded facts."' ***Day v. State***, 92 Wis. 2d 392, 400, 284 N.W.2d 666 (1979) (citation omitted).

¶18 We agree with the trial court that there is sufficient evidence upon which the jury reasonably based its determination of the damages award. While Prahst argues that both amendments to the Offer unambiguously stated that the repairs to the fireplace and chimney were to be based on the estimate submitted by Royal, Prahst presented no evidence at trial explaining what that work was to have entailed.[2] In contrast, Saugstad's expert witness, Winship, specifically described

[2] Saugstad in his response brief discusses the implied duty of good faith with regard to the performance of the terms and conditions of the Offer. Because we resolve the arguments raised by Prahst on other grounds, we do not address this issue. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) ("As one sufficient ground for support of the judgment has been declared, there is no need to discuss the others urged.").

in his testimony the repairs that were needed to make the chimney and fireplace safe to use and why they were necessary.

¶19 Nevertheless, Prahst asserts that Winship never testified that the fireplace and chimney were *not* safe to use. However, the jury reasonably inferred that they were not safe based on all of the evidence in the case. *See* ***State v. Poellinger***, 153 Wis. 2d 493, 506, 451 N.W.2d 752 (1990) (stating that it is the function of the trier of fact "to fairly resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts").

¶20 Prahst also argues that because Saugstad had a gas insert installed in the fireplace that the chimney repairs were unnecessary, and thus damages should be limited to the cost of the insert installation. However, Prahst did not raise this argument in his post-verdict motion, and "[a]rguments raised for the first time on appeal are generally deemed forfeited." ***Northbrook Wis., LLC v. City of Niagara***, 2014 WI App 22, ¶20, 352 Wis. 2d 657, 843 N.W.2d 851. Furthermore, Prahst's argument fails on the merits as well, in that it is based on his assertion that the installation of the gas insert rendered the chimney repairs unnecessary, but there was no evidence presented at trial to support that contention.

¶21 In sum, we agree with the trial court's finding that there was sufficient, credible evidence presented at trial that the jury utilized in making its damages determination; that evidence was not "inherently or patently incredible." *See* ***Gauthier***, 28 Wis. 2d at 416. We therefore affirm the trial court's denial of Prahst's post-verdict motion challenging the damages award.

By the Court.—Judgment affirmed.

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