

**COURT OF APPEALS
DECISION
DATED AND FILED**

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Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

No. 00-1402

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**WESTRIDGE BUILDERS, INC., A WISCONSIN
CORPORATION,**

**PLAINTIFF-APPELLANT-
CROSS-RESPONDENT,**

v.

LINDA A. FRIDLINGTON,

**DEFENDANT-RESPONDENT-
CROSS-APPELLANT.**

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 PER CURIAM. Westridge Builders, Inc. appeals from a judgment awarding it damages pursuant to the liquidated damages provision of its

construction contract with Linda A. Fridlington rather than full breach of contract damages. Fridlington cross-appeals and argues that the parties did not have an enforceable construction contract in the first instance. We affirm the circuit court in all respects.

¶2 In October 1998, Westridge and Fridlington entered into a contract to construct Fridlington's home (the contract). The contract contained a contingency requiring "buyer to secure adequate financing." The contract also provided that if the buyer failed to carry out the agreement, all money paid "shall, at the option of the builder, be forfeited as liquidated damages and shall be paid to or retained by the builder subject to deductions of broker's commission and disbursements if any." Fridlington gave earnest money under the contract, and made additional payments under a separate contract for tree removal and silt fencing (the site preparation contract).¹

¶3 Fridlington secured financing at the end of December 1998. Shortly thereafter, she exercised her right to rescind the financing and notified Westridge of her decision.² Westridge retained Fridlington's payments and sued Fridlington in breach of contract to recover its anticipated profit under the contract.

¶4 After a trial to the court, the court found that Fridlington breached the contract after she fulfilled her obligation to obtain adequate financing. The court concluded that Westridge's damages were subject to the contract's liquidated damages provision because Westridge withheld the funds Fridlington had paid.

¹ The dollar amounts are not in dispute. The dispute centers on the nature of the damages to be awarded: liquidated or breach of contract (anticipated profit under the contract).

² The right to rescind arose because Fridlington was refinancing her existing home as part of the financing package for the Westridge home.

Westridge appeals the ruling limiting its damages to liquidated damages. Fridlington cross-appeals, claiming that the contract was not enforceable because the financing contingency was too vague.

¶5 We decide the cross-appeal first because it calls into question the enforceability of the contract. Fridlington argues that the financing contingency was not specific enough to create an enforceable contract. The contract required Fridlington “to secure adequate financing.” The court found that “adequate financing” meant financing sufficient for Fridlington to build the home called for under the contract.

¶6 A “subject to financing clause” is a condition precedent to a buyer’s performance under a real estate contract and must be sufficiently definite for the court to determine the terms of financing; otherwise, the entire contract is unenforceable. *Nodolf v. Nelson*, 103 Wis. 2d 656, 658-59, 309 N.W.2d 397 (Ct. App. 1981). A contract whose financing clause is indefinite may be salvaged if there is subsequent action which removes the uncertainty regarding the clause. *Id.* at 659. Such action “[r]equires some interpretative conduct by both parties, consisting either of the rendition of some performance by each one or by the willing acceptance by one of them of such a performance rendered by the other.” *Id.* (quoted source omitted). If the financing terms are not sufficiently set out, “the circumstances surrounding the contract [can] be considered to determine whether the deficiencies can be supplied.” *Perkins v. Gosewehr*, 98 Wis. 2d 158, 163, 295 N.W.2d 789 (Ct. App. 1980).

¶7 In this case, the circumstances surrounding the financing contingency provide sufficient definiteness to render the contract enforceable. Fridlington obtained financing, closed on the financing and then elected to rescind

the financing. This is evidence that the parties had remedied the deficiencies in the financing contingency.

¶8 Other evidence that the parties believed they had an enforceable contract is found in the fact that between the execution of the contract until Fridlington closed on her financing, both parties acted in a manner which indicated that each believed the contract was enforceable. Fridlington made various material selections after entering into the contract. Fridlington paid \$2450 in September for a survey and plan deposit, \$5500 in earnest money in October, and additional funds for removing trees and installing silt fencing. On December 17, Fridlington paid another \$5000 toward expenses on the project. This payment was made after Fridlington's financing was approved but before she closed on the financing. The circuit court's finding regarding the parties' conduct are not clearly erroneous. WIS. STAT. § 805.17(2) (1999-2000). This interpretative conduct, in conjunction with the steps taken to remove the financing contingency, is sufficient to render the contract enforceable.

¶9 We turn to Westridge's appeal from the circuit court's award of liquidated damages. The court found that Fridlington, after obtaining the necessary financing, decided not to go forward and breached the contract. The court awarded Westridge liquidated damages under the contract because it retained all of Fridlington's payments.

¶10 The construction contract provided that "[s]hould the Buyer fail to carry out this agreement, all money paid ... hereunder shall, at the option of the Builder, be forfeited as liquidated damages and shall be paid to or retained by the Builder...." It is undisputed that Westridge did not return Fridlington's earnest money prior to suing her under the contract for its anticipated profit.

¶11 A liquidated damages provision similar to the provision in this case was construed in *Zimmermann v. Thompson*, 16 Wis. 2d 74, 114 N.W.2d 116 (1962). There, the court concluded that the contract gave the seller the option of keeping the earnest money as liquidated damages or recovering any actual damages the seller could prove, but not both.

If he chooses liquidated damages he may retain the down payment without further fuss or bother. If he chooses actual damages the contract gives him no additional present, simultaneous, right to retain the down payment. He has retained it and is now trying to expand the limited right of retention into a right to keep the money and apply it on whatever larger damages he can establish. The contract does not so provide.

Id. at 76-77. By keeping the earnest money, the seller “had exercised his option to treat the cash in his hands as liquidated damages. Accordingly, no cause of action for actual damages remains to him.” *Id.* at 77.

¶12 This is the case here. Having withheld the earnest money, Westridge was barred from suing Fridlington for its anticipated profit under the contract.

¶13 Westridge argues that subsequent cases undermine *Zimmermann*. We disagree. In *Moritz v. Broadfoot*, 35 Wis. 2d 343, 349-50, 151 N.W.2d 142 (1967), and *Sorce v. Rinehart*, 69 Wis. 2d 631, 639-41, 230 N.W.2d 645 (1975), the court upheld the sellers’ choice to keep the earnest money and sue for specific performance. See *Galatowitsch v. Wanat*, 2000 WI App 236, ¶14 n.4, 239 Wis. 2d 558, 620 N.W.2d 618 (discussing *Moritz* and *Sorce* in light of *Zimmermann*). This makes sense because in such cases the seller does not end up with anything other than what the seller contracted for: earnest money and a sold home. Here, Westridge did not seek specific performance of the construction contract; it sought anticipated profit. Westridge did not plead that it intended to

return the earnest money in favor of an award of anticipated profit. Under the unambiguous language of the contract, Westridge exercised its option to retain the earnest money and was limited to that remedy.

¶14 No costs to either party.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5 (1999-2000).

