

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

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No. 00-2919

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

KERRY INC. F/K/A KERRY INGREDIENTS, INC.,

PLAINTIFF-RESPONDENT,

V.

**ECONO EQUIPMENT, INC. A/K/A ECONO CHEESE
EQUIPMENT,**

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County:
JAMES WELKER, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront and Roggensack, JJ.

¶1 ROGGENSACK, J. Econo Equipment, Inc. appeals the portion of the circuit court's order refusing to award attorney's fees incurred in defending

against Kerry, Inc.’s claims. Econo argues that a contract¹ provision allowing it to recover attorney’s fees incurred “in the enforcement and adjudication of its rights hereunder” should allow it to recover attorney’s fees incurred while defending a suit by Kerry. Because we conclude that the contract does not unambiguously provide for an award of attorney’s fees in defending against Kerry’s claims, we affirm the order of the circuit court.

BACKGROUND

¶2 In 1998, Kerry, which processes and sells food ingredients, contracted with Econo to purchase a bread staling system.² The contract included the following provision:

In addition to any other damages or remedies provided ECONO CHEESE EQUIPMENT by law, Purchaser shall be liable to ECONO CHEESE EQUIPMENT for reasonable attorney’s fees incurred by ECONO CHEESE EQUIPMENT in the enforcement and adjudication of its rights hereunder.

After Econo installed the system at Kerry’s plant, Kerry claimed that it did not work properly. Kerry did not pay the balance of the purchase price and sued Econo alleging breach of contract, breach of warranty and breach of the duty of good faith. Econo then counterclaimed against Kerry for the balance of the purchase price, contract interest and attorney’s fees.

¹ Although interpretation of the contract is the only issue raised in this appeal, the contract was not included in the record. Although it was listed as a trial exhibit, it was neither offered nor received during the trial. However, both parties argue from the contract in their briefs, using the same wording as dispositive of the issue presented to us. Therefore, we take their arguments as conclusive of the contract terms that are relevant to this controversy.

² A bread staling system is a system for drying loaves of bread before grinding them into bread crumbs.

¶3 The case was tried before a jury. At the conclusion of testimony, the court granted Econo’s motions for a directed verdict, dismissing Kerry’s claim and awarding judgment for Econo on its counterclaim.³ Econo then sought to recover the attorney’s fees it had incurred in defending against Kerry’s claim and in prosecuting its counterclaim. The circuit court concluded that the phrase, “in the enforcement and adjudication of its rights hereunder” allowed Econo to recover only the attorney’s fees incurred in prosecuting its counterclaim, and it awarded those fees. Econo appeals the portion of the court’s order denying it attorney’s fees incurred in defending against Kerry’s claims.

DISCUSSION

Standard of Review.

¶4 The interpretation of a contract is a question of law that we review *de novo*. ***Borchardt v. Wilk***, 156 Wis. 2d 420, 427, 456 N.W.2d 653, 656 (Ct. App. 1990). Whether a contract is ambiguous is also a question of law. ***Moran v. Shern***, 60 Wis. 2d 39, 47, 208 N.W.2d 348, 351 (1973). If neither party has argued from extrinsic evidence as to intent, we decide the contract’s meaning as a matter of law. ***Reserve Life Ins. Co. v. LaFollette***, 108 Wis. 2d 637, 646, 323 N.W.2d 173, 177 (Ct. App. 1982).

Attorney’s fees.

¶5 Under the “American Rule,” each party is responsible for its own attorney’s fees absent some right of recovery established by statute or common law. ***Hunzinger Constr. Co. v. Granite Res. Corp.***, 196 Wis. 2d 327, 338, 538

³ Kerry has not appealed the circuit court’s decision.

N.W.2d 804, 809 (Ct. App. 1995). In Wisconsin, a party may not recover its attorney's fees unless: (1) the fees were incurred in third-party litigation against the party seeking attorney's fees, caused by the action of the party against whom the fees are sought, *id.*; (2) attorney's fees are authorized by statute, *Borchardt*, 156 Wis. 2d at 426, 456 N.W.2d at 656; or (3) recovery is expressly allowed by contract. *Id.* The case before us involves no third-party litigation, and no statute authorizes Econo to recover attorney's fees expended in defending against Kerry's claim. Therefore, if Econo is to recover its attorney's fees, it must do so based upon the provisions of the contract.

¶6 When we are asked to apply contract terms, we attempt to ascertain and carry out the intention of the parties. *Kraemer Bros. v. United States Fire Ins. Co.*, 89 Wis. 2d 555, 562, 278 N.W.2d 857, 860 (1979). A contract must be interpreted according to the plain meaning of its terms unless it is ambiguous. *Id.* at 561-62, 278 N.W.2d at 860. A contract is ambiguous if its terms are susceptible to more than one reasonable interpretation. *Wisconsin End-User Gas Ass'n v. Public Serv. Comm'n of Wisconsin*, 218 Wis. 2d 558, 568, 581 N.W.2d 556, 560 (Ct. App. 1998). However, we will not interpret an ambiguous contract to create an obligation to pay attorney's fees contrary to the American Rule. *Hunzinger*, 196 Wis. 2d at 340, 538 N.W.2d at 809. In *Hunzinger*, for example, we concluded that a contract provision that stated, in part, "The Vendor agrees ... to reimburse the purchaser in any event for any loss, cost or expense incurred including special damages as a result of delay in or failure to make delivery," was ambiguous with respect to attorney's fees because it did not specifically mention them. 196 Wis. 2d at 337-38, 538 N.W.2d at 808.

¶7 In *Borchardt*, which also concerned an alleged contractual right to attorney's fees, Wilk bought a house from Borchardt and gave her a promissory

note for part of the purchase price. The note contained the following language: “[T]he Note Holder will have the right to be paid back by me for all of its costs and expenses in enforcing this Note [including] reasonable attorneys’ fees.” *Borchardt*, 156 Wis. 2d at 425, 456 N.W.2d at 655-56. Shortly thereafter, Wilk stopped making payments on the note. Borchardt sued for the \$9,469 balance due on the note and her attorney’s fees, and Wilk counterclaimed for misrepresentation. Borchardt prevailed on her claim, but Wilk also prevailed on his counterclaim for negligent misrepresentation with regard to the septic system. On appeal, we concluded that the attorney’s fees provision in the promissory note was ambiguous because: (1) the agreement did not address what should happen if the buyer made a claim against the seller, and (2) reasonable persons could differ about whether defense of a counterclaim constitutes “enforcement” of the note. Therefore, we apportioned the fees Borchardt incurred between her collection action on the note and her defense of the misrepresentation claim, awarding no fees for defending against the misrepresentation claim.

¶8 In the case at hand, we must interpret the attorney’s fees provision of a contract that Econo drafted:

In addition to any other damages or remedies provided ECONO CHEESE EQUIPMENT by law, Purchaser shall be liable to ECONO CHEESE EQUIPMENT for reasonable attorney’s fees incurred by ECONO CHEESE EQUIPMENT in the enforcement and adjudication of its rights hereunder.

Econo argues that the phrase “in the enforcement and adjudication of its rights hereunder” entitles it to attorney’s fees incurred in defending against Kerry’s misrepresentation claim because the attorney’s fees provision is broadly stated in terms of “rights” and contains no limitation on when attorney’s fees can be awarded. Kerry, on the other hand, contends that the clause is ambiguous because

it does not specify that Econo may recover attorney's fees any time it is involved in litigation with Kerry. Neither party has identified any extrinsic evidence that bears on their intent; therefore, we interpret the provision's meaning as a matter of law. *Reserve Life Ins. Co.*, 108 Wis. 2d at 646, 323 N.W.2d at 177.

¶9 Like the “enforcement” provision in *Borchardt*, the phrase “enforcement and adjudication of its rights hereunder” does not define whether Econo may collect attorney's fees to defend against a claim by Kerry. As a result, the terms may be interpreted to mean either: (1) Econo is entitled to its attorney's fees whenever it is involved in litigation with Kerry, regardless of whether it is suing Kerry or being sued by Kerry; or (2) Econo is entitled to its attorney's fees only when it seeks to enforce its rights of collection for the equipment it sold. Both of these interpretations are reasonable. Therefore, we conclude that the contract is ambiguous.

¶10 The contract provision at issue here is very similar to the terms at issue in *Borchardt*. Both provisions were directed at enabling a seller to enforce its right to collect the purchase price. Neither Borchardt nor Econo identified any other contract provision that they were enforcing in their defense of the claim or counterclaims of the purchasers. That position is in sharp contrast to the enforcement that occurred in *Aspen Servs. v. IT Corp.*, 220 Wis. 2d 491, 583 N.W.2d 849 (Ct. App. 1998). There, Aspen leased equipment to IT, then sued to recover unpaid rental fees. IT counterclaimed, alleging breach of warranty, breach of contract and conversion. The contract in *Aspen* provided, “[IT] shall pay all costs, expenses and reasonable attorney fees that may be incurred or paid by [Aspen] in enforcing the covenants and agreements of this Lease.” *Id.* at 493-94, 583 N.W.2d at 850. The lease also contained a covenant that limited Aspen's liability by stating that the equipment was accepted “as is” and that there were no

warranties of any kind. *Id.* at 494, 583 N.W.2d at 851. We concluded that the terms of the contract were unambiguous and allowed Aspen to recover its attorney's fees incurred in defending against the counterclaim because it was enforcing the contract covenant that limited its liability. In contrast, Econo has identified no specific contract covenant that it argues it was enforcing in defending against Kerry's claims.

¶11 And finally, had Econo intended the contract to be interpreted as it now asserts, Econo, as the drafter of the contract, could have clearly and unambiguously expressed the intent to hold Kerry liable for attorney's fees that Econo incurred in defending against Kerry's claims. *Goebel v. First Fed. Sav. & Loan Ass'n*, 83 Wis. 2d 668, 675, 266 N.W.2d 352, 356 (1978). Because it did not do so, we conclude that the contract does not unambiguously provide a right to attorney's fees except those incurred in seeking payment of the agreed upon price for the equipment Kerry purchased. Accordingly, we affirm the order of the circuit court.

CONCLUSION

¶12 Because we conclude that the contract does not unambiguously provide for an award of attorney's fees in defending against Kerry's claims, we affirm the order of the circuit court.

By the Court.—Order affirmed.

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