COURT OF APPEALS
DECISION
DATED AND FILED

November 13, 2001

Cornelia G. Clark
Clerk of Court of Appeals

No. 00-3087

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

HARLEY PAWS, INC., D/B/A
THREE DOG BAKERY,

PLAINTIFF-RESPONDENT,

V.

MOHNS, INC.,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

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

¶1 PER CURIAM. Mohns, Inc., appeals from the judgment awarding Harley Paws, Inc., $21,958.82 in damages, following a court trial. Mohns argues that the trial court erred in finding that it breached the construction contract it had entered into with Harley Paws. Mohns also argues that the trial

court's damage findings are arbitrary and excessive. Finally, Mohns argues that Harley Paws wrongfully terminated the contract and, therefore, that it (Mohns) is entitled to an award on its counterclaim for $14,852.87.[1] We affirm.

I. BACKGROUND

¶2 In July 1998, the parties contracted for the remodeling of a retail store on Brady Street that Harley Paws planned to operate as "Three Dog Bakery." During contract negotiations, Mohns told Harley Paws that the construction should be completed in approximately five weeks, and estimated the cost to be $52,000. Based on that information, Harley Paws scheduled its grand opening for September 26, 1998. Construction commenced in early August 1998 and continued until September 11, when disputes developed primarily involving: (1) the modification, possible delay, and additional costs involving the construction of the store's cabinetry; and (2) the rescheduling of the faux finisher, who was scheduled to do the finishing painting on September 12, but could not because Mohns had failed to complete the preliminary painting. The former problem was resolved through an informal mediation meeting with Harley Paws' attorney on the afternoon of September 11. During the mediation, Harley Paws and Mohns agreed to a change order on the cabinets, which included a $5,000 increase in their cost. Hours later, however, when Harley Paws discovered defects in the drywall and learned from Ben Mohns, Mohns' President, that the store would not be completed by the grand opening date, Harley Paws fired Mohns and arranged for other contractors to complete the remodeling.

[1] Because we conclude that Mohns breached the contract, thus justifying Harley Paws' termination of the contract, we need not address Mohns' counterclaim for wrongful termination of contract. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 633 (1938) (only dispositive issue need be addressed).

¶3 Harley Paws subsequently sued Mohns for breach of contract. Throughout the trial, Harley Paws maintained that the contract's completion date, which was based on Mohns' five-week estimate, was September 12. The trial court found, however, that the parties had agreed to a completion date of September 23. Nevertheless, the court concluded that Mohns had breached the contract. In its findings of fact, the court explained that, given the need to be ready for the September 26 opening, the parties clearly understood that "time was of the essence." The court also found that as of September 11, "there was not substantial performance." The court concluded "that the termination on the 11th of the contract and the hiring of replacement contractors was reasonable and warranted under all circumstances and the totality of what happened from the beginning to the end." Consequently, the court also found "that the plaintiffs had no choice at that point but to get other contractors to be brought in to finish the job and get it done by the time set for the opening…."

¶4 After hearing extensive testimony regarding damages, the trial court awarded Harley Paws $21,958.82, plus costs and statutory attorneys' fees. The court also dismissed Mohns' counterclaim. Mohns appeals.

II. ANALYSIS

A. Breach

¶5 Mohns first argues that the trial court erred in finding that it was in breach of contract at the time Harley Paws terminated the contract. Asserting that the court "made no findings that Mohns' workmanship was defective," Mohns contends that the trial court's decision "indicated that its finding of breach rested on the issue of timeliness." Mohns maintains, however, that "the evidence showed that Mohns was right on schedule." Thus, Mohns argues, the only legal basis on

which the court could have concluded that a breach occurred was under the principle of "anticipatory breach," which, Moans claims, is not a viable theory given the facts of the case. Additionally, Mohns argues that because the trial court never used the term "anticipatory breach," and because Harley Paws did not use it in its pleadings, anticipatory breach cannot be a viable basis to support the trial court's conclusion.

¶6 Contrary to Mohns' argument, whether the trial court based its decision on an unarticulated theory of anticipatory breach or on a theory of actual breach is not necessarily determinative of the outcome. After all, an appellate court may affirm a lower court's decision on different grounds than those relied upon by the lower court. ***Saenz v. Murphy***, 162 Wis. 2d 54, 57 n.2, 469 N.W.2d 611 (1991), *overruled on other grounds by* ***State ex rel. Anderson-El v. Cooke***, 2000 WI 40, 234 Wis. 2d 626, 610 N.W.2d 821. Moreover, pleadings are to be liberally construed and a claim will only be dismissed if the plaintiff cannot recover under any circumstances. ***Evans v. Cameron***, 121 Wis. 2d 421, 426, 360 N.W.2d 25 (1985).

¶7 On appeal, findings of fact made by a trial court sitting without a jury will not be set aside unless they are clearly erroneous, WIS. STAT. § 805.17(2) (1999-2000), and when more than one inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact, ***Mentzel v. City of Oshkosh***, 146 Wis. 2d 804, 808, 432 N.W.2d 609 (Ct. App. 1988). We search the record not for evidence opposing the trial court's decision, but for evidence supporting it. ***Id.*** Whether the facts as found by the trial court constitute a breach of contract under a written document, however, is a question of law we review *de novo*. ***Edwards v. Petrone***, 160 Wis. 2d 255, 258, 465 N.W.2d 847 (Ct. App. 1990).

¶8 "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty." RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981). Moreover, and of particular relevance to this case:

> Non-performance is not a breach unless performance is due.... When performance is due, however, anything short of full performance is a breach, even if the party who does not fully perform was not fully at fault and even if the defect in his [or her] performance was not substantial.... Non-performance includes defective performance as well as absence of performance.

Id. § 235 cmt. b. Typically, "a promissor breaches a contract by failing to perform when and as promised." Keith A. Rowley, *A Brief History of Anticipatory Repudiation in American Contract Law*, 69 U. CIN. L. REV. 565, 565 (2001). "Until the time has come for him [or her] to perform, and until all conditions precedent to his [or her] performance are satisfied, he [or she] cannot breach the contract by failing to perform as promised." ***Id.*** Here, we conclude that the facts support the trial court's conclusion that Harley Paws breached the contract, though we also conclude that the breach, most realistically, may be viewed as an anticipatory one.

¶9 To establish an anticipatory breach of a contract, a definite and unequivocal manifestation of an intention on the part of the repudiator must be proved: that the promissor will not give the promised performance when the time fixed for it in the contract arrives. ***Wisconsin Dairy Fresh, Inc. v. Steel & Tube Prods. Co.***, 20 Wis. 2d 415, 427, 122 N.W.2d 361 (1963). "Although it has been held that the right to rescind for an anticipatory breach is exceptional and can be permitted only where future breach is conclusively established, nevertheless where a party disables himself from performing the other party may treat the contract as

rescinded and sue at once." ***Amberg Granite Co. v. Marinette Co.***, 247 Wis. 36, 42, 18 N.W.2d 496 (1945) (citations omitted). And "[a]lthough a mere anticipation that a contractor will not be able to perform may not be sufficient to justify treating the delay as a total default … where the contractor who is months behind a schedule agreed upon demands more time and the circumstances of the case show that time is material and is of the essence of the contract, a termination of the contract is justified." ***Id.*** Under the facts found by the trial court, Mohns had anticipatorily breached its contract with Harley Paws.

¶10 Ample evidence showed that the work had not progressed as scheduled and that, by September 11, it had become evident that the work would not be completed within the contracted time. Testimony established that Mohns had substantially underestimated the cost of the cabinetry and that, as of September 11, Mohns did not know who would construct the cabinets or when they would be installed. David Vecellio, one of the principals of Harley Paws, testified that during a September 11 telephone conversation, Ben Mohns admitted "that [it] had not timely performed [its] work as of September 11, 1998, and that the entire project was not going to be completed by the contractually agreed September 23, 1998, completion date[;] rather only the cabinets would be completed." Vecellio clarified that during the afternoon mediation at his attorney's office, he was under the impression that Mohns was committed to completing the entire store by September 23, but that later, after his evening conversation with Ben Mohns, he realized that Mohns was only willing to guarantee that the cabinets would be completed by September 23.

¶11 The contractors who replaced Mohns testified that Mohns' workmanship had been shoddy and, as a result, the scheduled subcontractors' work was delayed, further indicating that the job would not be completed on

schedule. Evidence also established that the new contractors worked twelve to thirteen hours a day to complete the project by September 23.

¶12 Mohns counters by pointing to evidence that it was prepared to pull all its workers off other projects in order to finish the Harley Paws job. Mohns also points to earlier testimony from David Vecellio, wherein he implied that Mohns' representatives never told him that the whole project would not be done by the grand opening date. Thus, Mohns contends, the trial court erred in its finding otherwise. We disagree.

¶13 In its findings, the trial court specifically noted that it "[did] not accept . . . the explanation that if [Mohns] had to make these cabinets, [it] would have taken [its] 10 workers, taken them off everything else and done the work within that period of time." The court also implicitly accepted David Vecellio's testimony that Ben Mohns admitted that the work would not be completed on time. This fact, coupled with the findings that Mohns had not proceeded in a workman-like manner in terms of the quality of its work and the manner in which it disclosed its failure to begin the cabinetry, led the court to find that Mohns, both by word and by action, had indicated that it would not complete the contract by the completion date. The court concluded, therefore, that Harley Paws had "no choice at that point but to get other contractors to be brought in to finish the job and get it done by the time set for the opening." Thus, the court implicitly found that Mohns' words and actions constituted an anticipatory breach. These findings are not clearly erroneous, and the facts found by the trial court do indeed constitute an anticipatory breach. *See* ***Wisconsin Dairy Fresh***, 20 Wis. 2d at 427.

B. Damages

¶14 Mohns also contends that the trial court erred in assessing damages. In particular, Mohns claims that the trial court's damage award is arbitrary and excessive. We disagree.

¶15 Damages for breach of contract compensate a wronged party for damages that arise naturally from the wrong. ***Reiman Assocs. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 320, 306 N.W.2d 292 (Ct. App. 1981). An award of damages for breach of contract compensates the injured party for losses directly and necessarily flowing from the breach, not for losses that did not directly flow from the breach. ***Repinski v. Clintonville Fed. Sav. & Loan Ass'n***, 49 Wis. 2d 53, 58, 181 N.W.2d 351 (1970). On appeal, a reviewing court will not substitute its judgment for that of the finder of fact and all evidence is viewed in the light most favorable to support the damage award. ***Wisconsin Natural Gas Co. v. Ford, Bacon & Davis Constr. Corp.***, 96 Wis. 2d 314, 340, 291 N.W.2d 825 (1980). "If there is any credible evidence which under any reasonable view supports the … finding as to [the amount of] damages, … this court will not disturb the finding." ***Id.*** "[A] verdict may not be set aside as excessive on appeal unless there is an indication that the award was the result of passion, prejudice, corruption, or a disregard of the evidence or the rules of law." ***Lautenschlager v. Hamburg***, 41 Wis. 2d 623, 629, 165 N.W.2d 129 (1969). "In the absence of an error of law, we will not upset a judge's post-trial order in regard to damages unless we find an [erroneous exercise of discretion]." ***Id.***

¶16 Harley Paws claimed that it cost $42,175.68 to complete Mohns' contract and sought damages of $28,958.82. Amy Vecellio, another principal of Harley Paws, testified in great detail and with supporting documentation to

establish Harley Paws' damages. She testified that certain upgrades were required due to the change in workers. Specifically, she noted that her replacement cabinetmaker could only guarantee the timely installation of Surrell countertops, as opposed to the less expensive Laminate counter tops, for which Harley Paws had contracted with Mohns. While Harley Paws argued that this added expense was part and parcel of its damages, the trial court found otherwise, concluding:

> As to damages, the Court accepts Exhibit 47 to some extent. It shows $86,601.82 total costs paid. They have [$]57,643 as the total contract [with Mohns]....
>
> ....
>
> The Court is also giving the defendants credit for $5,000 for the change order . . . which was agreed [to] in the law office. The reason I'm doing it is . . . because the cabinets were being approved. There were additions to it and I think [Mohns is] entitled to that credit because there was going to be an upgrade to the cabinets and they would have been responsible for it.
>
> The Court is going to also . . . lower the damages by an additional $2,000 which I find is the additional value to the cabinets by the use of [higher-end counter] tops,[which Harley Paws agreed to with its replacement contractor]....
>
> So the Court is—has come to the damages as follows: Twenty-eight nine fifty-eight eighty-two minus [$7,000] which comes to ... $21,958.82 ... plus costs plus statutory attorneys fees.

¶17 The trial court examined the exhibits and heard testimony concerning the costs to complete the job in the limited time remaining before the grand opening. Canceled checks, showing the amount paid to complete the contract, were also submitted and examined by the court. The trial court reduced some of the costs, concluding that $5,000 should be credited to Mohns for the change order to upgrade the cabinetry. In addition, the court concluded that the

subsequent cabinetry maker's use of Surrell counter tops, in lieu of the originally contracted-for Laminate counter tops, required a $2,000-reduction as well.

¶18 Thus, the record reflects the trial court's careful consideration of the evidence of damages. We see nothing to establish that the court's findings were erroneous or to suggest that the trial court's damage award is either arbitrary or excessive.

By the Court.—Judgment affirmed.

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