COURT OF APPEALS
DECISION
DATED AND FILED

August 6, 2009

David R. Schanker
Clerk of Court of Appeals

Appeal Nos. 2008AP1357
2008AP2435

Cir. Ct. No. 2008SC71

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

WAUZEKA HEATING & COOLING LLP,

PLAINTIFF-RESPONDENT,

V.

JUDY DOLL,

DEFENDANT-APPELLANT.

APPEALS from a judgment and an order of the circuit court for Crawford County: MICHAEL KIRCHMAN, Judge. *Judgment reversed and cause remanded with directions; order affirmed in part.*

¶1 HIGGINBOTHAM, J.[1] Judy Doll appeals a judgment entered in favor of Wauzeka Heating and Cooling, LLP (Wauzeka) ordering her to pay the outstanding balance on a contract she had with Wauzeka for the installation of heating, ventilation and air conditioning (HVAC) units and ductwork in her home, and an order denying her motion for reconsideration. She contends that the circuit court erred in concluding that contract language requiring payment of the balance "on completion" did not require Wauzeka to provide units that were operational as installed. She also seeks damages for alleged violations by Wauzeka of three provisions of the Home Improvement Code, WIS. ADMIN. CODE §§ ATCP 110.02(6)(f), 110.02(9)(b), and 110.05(2) (Sept. 2001).

¶2 We conclude that the phrase "on completion" contained in the contract between Doll and Wauzeka is ambiguous as it is used here, and that its meaning cannot be determined by resort to extrinsic evidence. We therefore construe the relevant language against the drafter of the contract, Wauzeka. Based on this construction, we conclude that Wauzeka was required under the contract to ensure that the units were fully operational, including electrical and piping, before receiving final payment from Doll. However, we further conclude that Doll has forfeited her assertion of a right to recover under the Home Improvement Code. Accordingly, we affirm that part of the court's order denying Doll's motion for reconsideration related to her administrative code claims, and reverse the circuit court's judgment, and remand for the court to enter an order vacating the judgment in favor of Wauzeka and dismissing Wauzeka's claim.

[1] This appeal is decided by one judge pursuant to WIS. STAT. 752.31(2)(d) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

BACKGROUND

¶3 The following facts are unchallenged on appeal. In May 2007, homeowner Judy Doll entered into a contract with Wauzeka for the installation of new HVAC units and ductwork in an addition being added to her house. The contract was drafted by the owner of Wauzeka, Sheldon Dable. The agreement called for Doll to pay Wauzeka $6,600 in three installments, with the final payment due "on completion" of the project.

¶4 Doll made the first two payments totaling $4,000. When Wauzeka sought the final installment of $2,600, Doll refused to pay, claiming that Wauzeka had failed to complete the project by providing her HVAC units that were not operational as installed. Doll paid other companies approximately $1,025 to complete the installation.

¶5 Wauzeka sued Doll in small claims court to collect the outstanding balance, plus interest and attorney's fees. The circuit court entered judgment for Wauzeka for the outstanding $2,600, concluding that contract language requiring payment of the balance "on completion" did not require Wauzeka to install units that were operational before seeking payment. Doll moved for reconsideration. She argued that there was a manifest error of law because the court failed to construe the ambiguous contract language against the drafter. Citing for the first time portions of the Wisconsin Home Improvement Code, she further argued that

she was entitled to damages. The circuit court denied her motion. Doll appeals.[2] Additional facts are provided in the discussion section as necessary.

DISCUSSION

¶6 This case requires us to interpret the contract between Wauzeka and Doll for the installation of HVAC units. Contract interpretation is an issue of law that we review de novo. ***Ford Motor Co. v. Lyons***, 137 Wis. 2d 397, 460, 405 N.W.2d 354 (Ct. App. 1987). "The primary goal in contract interpretation is to give effect to the parties' intentions," which are exhibited in the language of the contract itself. ***Seitzinger v. Community Health Network***, 2004 WI 28, ¶22, 270 Wis. 2d 1, 676 N.W.2d 426. If the contract language is subject to two or more reasonable interpretations, the contract is ambiguous. ***Waters v. Waters***, 2007 WI App 40, ¶8, 300 Wis. 2d 224, 730 N.W.2d 655. Whether the contract is ambiguous is a question of law that we also review de novo. ***Tang v. C.A.R.S. Prot. Plus, Inc.***, 2007 WI App 134, ¶28, 301 Wis. 2d 752; 734 N.W.2d 169. If the contract is ambiguous, "two further rules are applicable: (1) evidence extrinsic to the contract itself may be used to determine the parties' intent and (2) ambiguous contracts are interpreted against the drafter." ***Seitzinger***, 270 Wis. 2d 1, ¶22.

¶7 The dispute in this case centers on the meaning of the term "completion" in the HVAC installation contract between Doll and Wauzeka. The pertinent language in the contract states: "Payment to be made as follows:

[2] Doll originally filed two appeals in this matter, one seeking review of the judgment, and the other seeking review of the order denying her motion for reconsideration. We previously entered an order consolidating these appeals.

$2,000[] at signing of Contract, $2000[] when complete with rough[;] Balance *on completion*[.]" (Emphasis added.)

¶8 Doll contends that the term "completion" is ambiguous, based on her acknowledgment that both she and Dable offer two reasonable interpretations of the term. Applying the plain and ordinary meaning of the term and based on her prior experience with Wauzeka, Doll interprets "completion" to mean that the HVAC units would be fully functional after Wauzeka completed the work and that she would not be required to hire any other contractors to install the gas piping or the electrical wiring. Wauzeka construes "completion" in a manner consistent with the trade standard, which requires only that an HVAC professional install the HVAC units and the ductwork.

¶9 We agree with Doll that the term "completion" in the context of the entire contract is ambiguous because both parties offer reasonable constructions of the term. *See* ***Waters***, 300 Wis. 2d 224, ¶8. We therefore must look to extrinsic evidence to determine the parties' intent regarding when the project was completed. *See* ***Nature Conservancy of Wisconsin, Inc. v. Altnau***, 2008 WI App 115, ¶6, 313 Wis. 2d 382, 756 N.W.2d 641 (When interpreting an ambiguous contract, we look to extrinsic evidence to determine the parties' intent.).

¶10 The evidence shows that neither party informed the other as to their respective understandings of what "completion" meant. Apparently, they never discussed what the job entailed, except in general terms. Wauzeka owner Dable testified that he did not explain to Doll that he believed the job was complete when the HVAC units and the ductwork were installed, and that he was not required to install and hook up the gas piping and electricity. Dable also conceded that a "lay person" could reach a different understanding of what "completion" meant. There

is evidence that Doll was aware that the electricity needed to be hooked up, as well as the gas piping. However, there is no evidence that Dable informed Doll that he would not be responsible under the contract for these tasks.

¶11 Doll testified that Dable never explained to her that she would be responsible for hiring somebody else to hook up the piping and the electricity to the furnace and air conditioner. She believed that when the job was complete, the units would be "ready to run." Doll also testified that Dable had performed other work for her prior to this project, where he installed new furnaces and air conditioners in new houses she owned. According to Doll, Dable installed the gas hook up and the electrical wiring, which included some rewiring. Based on this experience, she thought Dable would perform the same work on this project.

¶12 We conclude that the extrinsic evidence does not resolve the contractual ambiguity. It is clear from the record that there was no meeting of the minds on the question of what would constitute "completion" of the project. Each party had his or her own understanding of when Wauzeka's work would be complete, which neither person communicated to the other. The circuit court found that Dable believed the project would be complete when, consistent with his testimony regarding the trade standard, the units were installed but not hooked up to electrical wiring and piping. The circuit court also found that Doll believed that the project would be complete based on her understanding of the common and ordinary meaning of "completion," and on her past experience with Wauzeka.

¶13 Having concluded that the provision at issue is ambiguous, and that this ambiguity cannot be resolved by resort to extrinsic evidence, we must construe the ambiguous provision against the drafter of the contract, Wauzeka. *See* ***Roth v. City of Glendale***, 2000 WI 100, ¶51, 237 Wis. 2d 173, 614 N.W.2d

467 (explaining that the "construe ambiguity against the drafter" rule is a default rule that applies in cases of unresolvable ambiguity after extrinsic evidence has failed to demonstrate the parties' intention). The supreme court described the rationale for this rule as follows:

> Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning. Indeed, he may leave meaning deliberately obscure, intending to decide at a later date what meaning to assert. In cases of doubt, therefore, so long as other factors are not decisive, there is substantial reason for preferring the meaning of the other party.

Capital Invs., Inc. v. Whitehall Packing Co., 91 Wis. 2d 178, 190, 280 N.W.2d 254 (1979) (citation omitted). As the drafter, Dable was in the better position to understand the meaning of "completion" as used in the contract. It was therefore unreasonable for him to believe that Doll should understand the meaning Dable gave to the term without any communication to that effect. Moreover, it was unreasonable for Dable to believe that Doll should know that standard practice in the industry did not call for him to install and hookup gas piping and electrical wiring to the new units.

¶14 Construing the contract against Wauzeka, we read the term "completion" as used in the contract to mean that Doll would make the final payment to Wauzeka after the HVAC units had been installed and the units were fully operational. Thus, because Wauzeka did not "complete" the installation of the units, we conclude that Wauzeka is not entitled to recover the damages it seeks under the contract.

¶15 Doll next contends that the circuit court erred in denying her motion for reconsideration. She argues that she is entitled to recover damages under WIS.

STAT. § 100.20(5)[3] from Wauzeka because it violated three provisions of the Home Improvement Code, WIS. ADMIN. CODE §§ ATCP 110.02(6)(f), 110.02(9)(b), and 110.05(2) (Sept. 2001). "To prevail on a motion for reconsideration, the movant must present either newly discovered evidence or establish a manifest error of law or fact." ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶44, 275 Wis. 2d 397, 685 N.W.2d 853 (citation omitted). Doll appears to argue that the court's failure to address these claims was a manifest error of law. We disagree.

¶16 The court committed no such manifest error because Doll did not raise her administrative code claims until after trial in the motion for reconsideration. By failing to raise these claims at trial, we conclude that she has forfeited her right to assert them.[4] *See* ***O'Neill v. Buchanan***, 186 Wis. 2d 229, 234-35, 519 N.W.2d 750 (Ct. App. 1994) (A motion for reconsideration "assumes that the question has previously been considered. If a party has not … presented arguments in the litigation, the court has not considered that party's arguments in the first instance.").

[3] WISCONSIN STAT. § 100.20(5) provides that:

> [a]ny person suffering pecuniary loss because of a violation by any other person of any order issued under this section may sue for damages therefor in any court of competent jurisdiction and shall recover twice the amount of such pecuniary loss, together with costs, including a reasonable attorneys fee.

[4] We do not address whether it would have also been necessary for Doll to file a counterclaim to recover on claims under WIS. ADMIN. CODE §§ ATCP 110.02(6)(f), 110.02(9)(b), and 110.05(2) (Sept. 2001).

CONCLUSION

¶17 Construing the contract between Doll and Wauzeka against Wauzeka, and giving the term "completion" its plain and common meaning, we conclude that Wauzeka was required to ensure that the HVAC units were fully operational before requiring final payment from Doll. We therefore reverse the judgment, and remand for the circuit court to enter an order vacating the judgment in favor of Wauzeka and dismissing Wauzeka's complaint. Finally, we conclude that Doll has forfeited her assertion of a right to recover under the Home Improvement Code and therefore affirm the circuit court's order denying this part of Doll's motion for reconsideration.

By the Court.—Judgment reversed and cause remanded with directions; order affirmed in part.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.