

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 13, 2012

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

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.

Appeal No. 2011AP1340

Cir. Ct. No. 2008CV2189

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SMET CONSTRUCTION SERVICES CORP.,

PLAINTIFF-RESPONDENT-CROSS-APPELLANT,

V.

ALGREM PROPERTIES, INC.,

DEFENDANT-APPELLANT-CROSS-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Brown County: JOHN D. McKAY, Judge. *Affirmed.*

Before Lundsten, P.J., Sherman and Blanchard, JJ.

¶1 PER CURIAM. Algre Properties, Inc. (“Algre Properties”) appeals a money judgment entered against it and in favor of Smet Construction Services Corp. (“Smet Construction”) for remodeling work done on a property located at 790 Hansen Road in Green Bay. Smet Construction has initiated a

cross-appeal, challenging the circuit court's denial of its claim for statutory pre-judgment interest and its claim for a money judgment with respect to work done on another property, 2622 Indian Hill Drive, Green Bay. Smet Construction also seeks an order remanding the case to the circuit court with instructions to deny Algrem Properties' motion for relief pending appeal. For reasons discussed below, we affirm the judgment of the circuit court and deny the request for remand.

BACKGROUND

¶2 Smet Construction performed remodeling work at 790 Hansen Road (the "Hansen Road Property"), in a space leased by a health club called Fitness America. Smet Construction filed a complaint in circuit court, alleging that Algrem Properties owned the Hansen Road Property, knew about the remodeling work done in the space leased by Fitness America, and agreed to pay Smet Construction for half the total cost of the work, but did not pay. Attached to Smet Construction's complaint were invoices for work done at the Hansen Road Property and other sites, including Paul Algrem's personal residence located at 2622 Indian Hill Drive (the "Indian Hill Property").

¶3 After a court trial, the circuit court determined that Algrem Properties does not owe any sum to Smet Construction for work done on the Indian Hill Property. As to the Hansen Road Property, the court determined that

Algrem Properties owes Smet Construction \$79,423.00, plus statutory costs, with no prejudgment interest.¹

¶4 On appeal, Algrem Properties does not contest \$4,423.00 of the \$79,423.00 judgment against it for work on the Hansen Road Property, which it explains represents insurance claim work. This leaves a disputed amount of \$75,000.00 on appeal as to the Hansen Road Property.

DISCUSSION

Algrem Properties' Appeal

¶5 On appeal, Algrem Properties argues that the evidence in the record is insufficient to support the circuit court's determination that it owes Smet Construction a balance of \$75,000.00 for remodeling work done to the space rented by Fitness America at the Hansen Road Property (the "Fitness America Project"). For the reasons discussed below, we affirm the judgment of the circuit court.

¶6 We begin our discussion by emphasizing that, when reviewing the sufficiency of the evidence to support the outcome of proceedings in circuit court, we give great deference to the finder of fact. *State v. Hayes*, 2004 WI 80, ¶57, 273 Wis. 2d 1, 681 N.W.2d 203. This highly deferential standard of review is the same whether the fact finder is a jury or, as here, the circuit court. See *State v. Routon*, 2007 WI App 178, ¶17, 304 Wis. 2d 480, 736 N.W.2d 530.

¹ The judgment entered by the circuit court in favor of Smet Construction was for a total of \$97,504.67. This amount included \$79,423.00 for work done to the Hansen Road Property, \$1,100.63 in statutory costs, and \$16,981.04 for work done on four other sites. Algrem Properties does not contest that it owes \$16,981.04 to Smet Construction for work done on other sites.

¶7 At trial, the circuit court was presented with conflicting testimony as to whether an agreement between Smet Construction and Algre Properties existed for the Fitness America Project. Paul Algre, the sole principal of Algre Properties, testified that Algre Properties never entered into an agreement with Smet Construction to perform any work on the Fitness America Project. Rather, according to Paul, Smet Construction's contract was with Fitness America, and Algre Properties agreed with Fitness America that Algre Properties would reimburse half of the cost of the project. Algre Properties also contended that, for all time periods relevant to this case, Paul personally owned the Hansen Road Property, and that Algre Properties had no interest in it.

¶8 Paul's testimony that there was no Algre Properties-Smet Construction agreement conflicts with trial testimony given by Smet Construction's general manager, Shaun McKeefry. McKeefry testified that Paul contacted him and directed him to commence work on the Fitness America Project. McKeefry testified that, on separate occasions, Paul Algre and Eric Algre directed him to bill half the cost of the project to Algre Properties and half to Fitness America. McKeefry further testified that, after Smet Construction sent an invoice to Algre Properties for \$125,000.00, which was one-half of the total bill for the Fitness America Project, no one from Algre Properties objected to the invoice or to the nature of the work performed.

¶9 “[W]here there is conflicting testimony, the trial judge is the ultimate arbiter of the credibility of the witnesses.” *Cogswell v. Robertshaw Controls Co.*, 87 Wis. 2d 243, 250, 274 N.W.2d 647 (1979). “When more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept [inferences] drawn by the trier of fact.” *Id.* In this case, the circuit court ruled in favor of Smet Construction regarding the existence of an agreement

between Algrem Properties and Smet Construction, under which Algrem Properties would pay half the cost of the project. Implicit in this ruling is an inference that Paul Algrem's testimony was not as credible as the other testimony the court heard. See *Jacobson v. American Tool Cos.*, 222 Wis. 2d 384, 390, 588 N.W.2d 67 (Ct. App. 1998). Given the great deference afforded the fact finder on review of the sufficiency of the evidence, we will not now second-guess the court's credibility determinations. See WIS. STAT. § 805.17(2) (2009-10);² *Hayes*, 273 Wis. 2d 1, ¶57.

¶10 The court's determination that Algrem Properties agreed to pay half the cost of the Fitness America Project is further supported by the fact that Paul testified that he made a payment of \$50,000 by check to Smet Construction for the Fitness America Project. Paul Belschner, chief financial officer for Smet Construction, also testified that a payment of \$50,000 had been by Algrem Properties for work on the Fitness America Project.

¶11 Algrem Properties argues that the circuit court made a clearly erroneous finding of fact that Algrem Properties made concessions that it owed the disputed payments to Smet Construction. We disagree with Algrem Properties' position that the statements it refers to in the trial transcripts and written decision were findings of fact. The court did not label them as such, and nothing in the record indicates that the court intended the statements to be findings of fact. We also disagree with Algrem Properties' assertion that these statements by the court are directly contradicted and rendered clearly erroneous by the circuit court's

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

statement at trial that “[t]here’s no indication in any testimony that has been offered that [Paul] was going to pay \$125,000 directly to Smet. No one’s ever said that. He didn’t say that.” When read in context, the court appears at that point in the trial to be summarizing Paul’s testimony on the Fitness America Project which, as we discussed above, the court did not find to be credible.

¶12 In addition, even if we accept as true Algre Properties’ argument that Paul owned the Hansen Road Property individually, and not through his corporation, this fact would not render erroneous the circuit court’s determination that Algre Properties was obligated by agreement to pay for half the Fitness America Project. Paul testified at trial that, on at least one other occasion, he had instructed Smet Construction to bill Algre Properties for work done on a property that he owned personally, his cabin. As stated above, McKeefry testified that, in the case of the Fitness America Project, Smet Construction received instructions to bill Algre Properties for at least some of the work.

¶13 Our review of the record, including the evidence discussed here, persuades us that credible evidence supports the circuit court’s conclusion that a contract existed and that Smet Construction was entitled to judgment in the amount of \$75,000.00 for work on the Fitness America Project, such that we affirm the judgment of the circuit court on those issues.

Smet Construction’s Cross-Appeal

¶14 On cross-appeal, Smet Construction argues that the circuit court erred in denying its claim for statutory prejudgment interest and its claim for money judgment for work related to the Indian Hill Property. Smet Construction also requests that we remand the case to the circuit court with instructions to deny Algre Properties’ motion for relief pending appeal. For the reasons discussed

below, we affirm the decision and judgment of the circuit court as to the issues on cross-appeal, and deny the request for remand.

¶15 On the issue of prejudgment interest, Smet Construction argues that Algrem Properties introduced no legal or factual argument in circuit court that would indicate it disputed the prejudgment interest claim. Smet Construction concedes that it is not entitled to contractual prejudgment interest, but seeks an award of non-contractual prejudgment interest at the statutory rate under WIS. STAT. § 806.38. Smet Construction correctly states in its brief that prejudgment interest should be awarded where the amount owed is reasonably certain and readily determinable. *See Olguin v. Allstate Ins. Co.*, 71 Wis. 2d 160, 168, 237 N.W.2d 694 (1976). However, we agree with the circuit court that that is not the case here. Smet Construction does not point to any record facts identifying a particular payment date on which the amounts claimed were due. Without an identifiable payment date, the amount of prejudgment interest is not reasonably certain and readily determinable. *See id.*

¶16 We turn next to Smet Construction's argument that the circuit court erred in denying its claim for money judgment for work done at the Indian Hill Property. In support of its argument, Smet Construction points to the following trial testimony of Paul:

MR. GERBERS: All right. Mr. Algrem, who asked Smet Construction to perform the work at Indian Hill?

MR. ALGREM: I did.

MR. GERBERS: Did you do so in your capacity as an officer of Algrem Properties, or did you do so in your individual capacity?

MR. ALGREM: Algrem Properties.

However, as Algrem Properties points out in its responsive brief on cross-appeal, Paul later testified at trial that he had been mistaken in his statement that the work done at his personal residence was for Algrem Properties.

¶17 In its written decision, the circuit court determined that the evidence did not support a conclusion that the work done at the Indian Hill Property was for Algrem Properties. Implicit in the court's decision is a credibility determination that Paul was telling the truth when he said he had made a mistake in first testifying that Algrem Properties contracted with Smet Construction for work on the Indian Hill Property. It is for the circuit court to determine the credibility of witnesses and the weight to be given to their testimony, and we will not disturb that determination on appeal. See *State v. Turner*, 114 Wis. 2d 544, 550, 339 N.W.2d 134 (Ct. App. 1983).

¶18 As part of its argument that Algrem Properties should be held liable for work done on the Indian Hill Property, Smet Construction argues that Paul had established a course of dealings over the years in which he directed Smet Construction to bill Algrem Properties for work done on properties owned by him individually. Smet Construction makes a similar argument with respect to the Fitness America Project. However, Smet Construction fails to point to specific record evidence sufficient to persuade us that the parties' course of dealings rose to the level of creating an implied contract with respect to the properties at issue. See *Bong v. Cerny*, 158 Wis. 2d 474, 481, 463 N.W.2d 359 (Ct. App. 1990). Moreover, the circuit court did not rely upon evidence of past dealings in deciding the present case. As we have discussed above, other evidence in the record supports the circuit court's conclusion that an Algrem Properties-Smet Construction contract existed with respect to the Fitness America Project, but did

not exist as to the Indian Hill Property, such that we affirm the circuit court on those issues.

¶19 The final argument that Smet Construction makes on cross-appeal involves a temporary restraining order and a motion for relief pending appeal. We first give the relevant background, then turn to Smet Construction's argument. After judgment was entered in this case, Smet Construction commenced post-judgment collection efforts, which included obtaining a court order for a supplemental examination of Paul Algrem. Algrem Properties filed a motion in circuit court for relief pending appeal, seeking a stay of enforcement of the judgment. The circuit court issued a temporary restraining order that enjoins Smet Construction from proceeding with any post-judgment collection activity until such time as the circuit court renders its decision on Algrem Properties' motion for relief pending appeal. From the circuit court docket entries, it appears that no ruling has yet been made on Algrem Properties' motion for relief pending appeal.

¶20 With that background, Smet Construction now requests that this court remand the case with instructions for the circuit court to deny Algrem Properties' motion for relief pending appeal and lift the temporary restraining order preventing post-judgment collection. Smet Construction asserts that its counsel has called the circuit court to request a hearing on the pending motion, but that the court has declined to set a hearing date. These assertions by Smet are not supported by any record citations and appear to refer to facts outside the record. This court need not consider arguments that are unsupported by adequate factual citations or are otherwise undeveloped. *See Dieck v. Antigo School Dist.*, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990), *aff'd*, 165 Wis. 2d 458, 477 N.W.2d 613 (1991). Therefore, the request for remand is denied.

¶21 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.

