COURT OF APPEALS
DECISION
DATED AND FILED

April 18. 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP264 **Cir. Ct. No. 2008CV4615**

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

JG DEVELOPMENT, INC.,

PLAINTIFF-RESPONDENT,

V.

TIMOTHY VALEK AND MICHELE SMITH,

DEFENDANTS-APPELLANTS,

FERGUSON ENTERPRISES OF MADISON,

DEFENDANT,

ASSOCIATED BANK, N.A.,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment and orders of the circuit court for Dane County: SARAH B. O'BRIEN, Judge. *Affirmed*.

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

¶1 SHERMAN, J. Timothy Valek and Michele Smith appeal a money judgment entered by the circuit court in favor of JG Development, Inc., as well as an order for judgment, an order addressing Valek's and Smith's motion for reconsideration, and an order addressing JG Development's motion for attorney's fees, interest and costs. JG Development brought suit against Valek and Smith for breach of contract pertaining to the construction of a residential property. The circuit court found in favor of JG Development and awarded JG Development damages, as well as JG Development's attorney's fees, interest and costs. Valek and Smith challenge the circuit court's finding that they had a valid contract with JG Development and that they breached that contract. They also challenge the court's award of attorney's fees and costs. We affirm.

BACKGROUND

¶2 In March 2008, Valek and Smith entered into a contract with JG Development for the construction of a residential property in Mazomanie, Wisconsin. The contract included the following relevant provisions:

> (4) Construction Price and Payments Owner shall pay to JG Development, Inc. the amount of One Million, Three Hundred and Sixty Thousand Dollars (1,360,000.00) in consideration of the construction of the Building by Contractor [the "Construction Price"]. The Construction Price shall be paid to Contractor as follows:
>
> > a. Owner shall pay **monthly payments** during the building process. Contractor shall provide a monthly bill, adjusted per the terms of the contract by change orders. The monthly bill shall be based upon percentage of completion of the project.
> >
> > ….
> >
> > d. … If timely payment of any draw of the Construction Price is not received by Contractor, Contractor may: (1) stop its Work until such

> payment is received; (2) extend the time for completion of the Work by the number of days such payment is delinquent; (3) add a delinquency charge to the Construction Price computed at a rate of eighteen percent [18%] per annum for the number of days such payment is delinquent; and (4) add Contractor's costs of collecting such delinquent amount (including attorneys' fees) to the Construction Price.
>
> ….
>
> (6) Changes and Extras … No changes in, additions to, or deletions from the drawings, plans or specifications [a "Change"], shall be made except by written notice thereof by Owner to Contractor. Any such Change shall be signed by Owner and Contractor, shall describe such Change, and shall indicate the increase or credit to the Construction Price….
>
> ….
>
> (21) Miscellaneous This Agreement expresses all agreements between the parties concerning the subject matter hereof and supersedes all previous understandings relating thereto, whether oral or written, including proposals, draft plans and specifications, brochures and other information, and shall be binding upon and shall inure to the benefit of the heirs, administrators, executors, successors and assignees of the parties hereto. If any part of this Agreement is found to be unenforceable, it shall not affect the enforceability of the remainder of this Agreement.

¶3 Construction on the residence began in January 2008, prior to execution of the contract. In late April or early May 2008, Valek and Smith informed JG Development that there had been a change in Valek's employment and that JG Development needed to stop construction on the project. Construction resumed approximately thirty days later with the understanding that the project needed to be "reduce[d]," or "scale[d] back," substantially. By that point the house structure was completed, which meant Valek and Smith had limited options for changing the scope of the project. However, a number of changes were made

to the construction project with Valek's and Smith's approval, which resulted in a reduction of the overall construction price.

¶4 Throughout the construction of the residence, JG Development provided Valek and Smith with periodic "draw summaries"—periodic applications for payment from Valek and Smith to JG Development for the cost of work completed up to that point. The first six draw summaries were paid without objection by Valek and Smith. However, the seventh and final draw summary, which requested a final payment of $302,696.90 and reflected "credits" in the amount of $329,272.85, was not. In an email to Jeff Gundahl, owner and president of JG Development, Valek informed Gundahl that he and Smith had "decided to hold off on signing the last draw until [they] [had] all the financial information related to the house." Valek stated that "[n]either one of us have felt comfortable with the exorbitant amount charged to us. And, now we have proof that this was the case. As you're probably aware, we've had experts come in to evaluate the house and give us the documentation to support our suspicions from all along." Valek further stated that Gundahl "might say 'signed contract' but I say I threw that out the door with your painter and the others that overcharged the shit out of this project." Shortly thereafter, Valek and Smith moved into the residence.

¶5 JG Development brought suit against Valek and Smith for breach of contract for failure to pay all amounts owing under the contract and by occupying the residence without written consent, contrary to the terms of the contract. JG Development sought a money judgment against Valek and Smith in the amount of $307,252.99, the amount JG Development claimed was still owed under the contract, plus costs and attorney's fees. Valek and Smith denied they were in breach of contract and counterclaimed for breach of contract, alleging JG

Development breached the contract by providing defective materials and workmanship, failing to complete the project, and failing to provide proper documentation.

¶6 The matter was tried before the circuit court, which found in favor of JG Development on both its claim and against Valek and Smith on their counterclaim. In a July 2011 order, the court awarded JG Development damages in the amount of $302,696.90,[1] an amount that included a $168,600 loan by Gundahl to Valek and Smith, which is not at issue on appeal. JG Development moved the court for attorney's fees, costs and interest, based on the terms of their agreement, in the amount of approximately $370,000. The court granted JG Development's motion, however, it reduced the amount of attorney's fees awarded to JG Development by the percentage of litigation attributable to the $168,600 Gundahl loaned Valek and Smith. Thereafter, the court entered judgment in favor of JG Development in the amount of $570,231.95. That amount of judgment represented the balance owing under the contract, the balance owing on the loan from Gundahl to Valek and Smith, and JG's attorney's fees, costs, and interest. Valek and Smith appeal. Additional facts will be discussed below as necessary.

DISCUSSION

¶7 Valek and Smith contend that the circuit court erred in determining that they breached their contract with JG Development. They also contend that the circuit court erred in determining that JG Development was entitled to recover its actual attorney's fees and costs under the terms of their contract, as well as interest. We address these contentions in turn below.

[1] This amount was later reduced on reconsideration by $14,949.12.

A. Breach of Contract

¶8 The circuit court determined that the contract between Valek, Smith and JG Development was "a valid contract," the terms of which required "payment of $1,360,000 in exchange for completion of the house described therein, plus or minus amounts agreed to for upgrades or deducts as specified in the [contract]." The court noted that Valek and Smith had maintained at trial that they had reached a verbal agreement with Gundahl that JG Development would construct their home "for cost plus 10% mark-up." However, the court did not find this to be credible. The court observed:

> There is a large volume of correspondence between the parties concerning the building of the home, pricing, and finally [Smith's and Valek's] growing unhappiness with the cost of the project and with the documentation they were receiving. NOT ONCE in all of these documents do Smith or Valek express their belief that they had a cost plus agreement, or that Gundahl had promised to build the house at a 10% profit.

¶9 On appeal, Valek and Smith challenge the court's finding that the facts do not support their claim that, regardless of the terms of the contract, they had agreed with Gundahl that JG Development would construct their residence at cost plus a 10% profit for JG Development, and that all parties understood that the $1,360,000 figure identified in the contract was merely an estimate of the total project cost.

¶10 A circuit court's factual findings will not be set aside unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2011-12).[2] "[A] finding of fact is

[2] All references to the Wisconsin Statutes are to the 2011-2012 version unless otherwise noted.

clearly erroneous when 'it is against the great weight and clear preponderance of the evidence.'" ***Phelps v. Physicians Ins. Co. of Wisc., Inc.***, 2009 WI 74, ¶39, 319 Wis. 2d 1, 768 N.W.2d 615 (quoted source omitted).[3]

¶11 Valek's and Smith's argument on appeal hinges largely on their challenge to the circuit court's finding that they did not have an oral agreement with Gundahl that the price of the project was JG Development's cost plus ten percent. Valek and Smith argue that their testimony that Gundahl had advised them that the cost of the construction project would be the actual cost plus a ten percent mark-up supports their claim that the contract was not a fixed price contract for $1,360,000, adjusted by subsequently agreed on additions or deductions. The circuit court found that Valek's and Smith's testimony on this topic was not credible. The circuit court, as fact finder, determines the weight and credibility given to witnesses' testimony. ***O'Connell v. Schrader***, 145 Wis. 2d 554, 557, 427 N.W.2d 152 (Ct. App. 1988). Although Valek and Smith disregard this constraint, we cannot.

¶12 Valek and Smith argue that evidence that Gundahl referred to "actual" costs in discussing changes to the project which would reduce the overall cost, "clearly indicate[s] that [Gundahl] did not view the [contract] as a fixed price contract." They argue that the evidence shows that they "continually discussed the contract price in terms of fluctuating budgets and estimates," which they claim suggests the contract was not a fixed price contract. They point out that "Gundahl

[3] Valek and Smith also assert that the "language of the Agreement itself" provides for a cost plus a ten percent mark-up agreement. However, they fail to develop an argument in support of that assertion. Accordingly, we do not address that issue any further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992) (appellate courts may decline to address issues that are inadequately briefed).

never asserted that the parties had a fixed price contract," and they argue that the "numerous changes during the course of construction, accompanied by repeated promises to make adjustments" demonstrates that JG Development was focused on the actual cost of the project to arrive at the final price for the home, rather than the $1,360,000 price identified in the contract.

¶13 Pointing out that there was a conflict in the evidence does not establish that the court's findings were clearly erroneously. Furthermore, Valek's and Smith's claim that JG Development's willingness to reduce costs by modifying their original selections is evidence that the contract was not a fixed price contract is not persuasive. It is the nature of change orders to fixed price contracts that the change orders discuss specific costs. Moreover, the argument disregards the terms of the contract, which clearly provide for such modifications. Paragraph six of the contract provided:

> Changes and Extras … No changes in, additions to, or deletions from the drawings, plans or specifications [a "Change"], shall be made except by written notice thereof by Owner to Contractor. Any such Change shall be signed by Owner and Contractor, shall describe such Change, and shall indicate the increase or credit to the Construction Price….

Accordingly, we conclude that Valek and Smith have not established that the court's finding that the contract required "payment of $1,360,000 in exchange for completion of the house described therein, plus or minus amounts agreed to for upgrades or deducts as specified in the [contract]" was clearly erroneous.

¶14 In addition to challenging the court's factual findings, Valek and Smith argue that the court erred in failing to determine that the contract was unenforceable in light of the amount of modifications made to the original specifications. Valek and Smith state that more than forty exterior and interior

modifications were made to the original specifications, which reduced the total price of the project by $270,000. They argue that under ***Olbert v. Ede***, 38 Wis. 2d 240, 242, 243-244, 156 N.W.2d 422 (1968), when modifications as extensive as theirs are made to a contract, "the contractor's compensation is to be measured as though there were no contract at all and [instead] calculated as the 'reasonable value of the services rendered and the materials furnished' by [the contractor]."

¶15 Valek's and Smith's reliance on ***Olbert*** is misplaced. In ***Olbert***, the supreme court adopted the following rule: "'If there is no special agreement, the builder's compensation is the reasonable value of the services rendered and the materials furnished by him; and this is so, also, *where the building plan is abandoned to such an extent that it is impossible to trace the contract in the work done*.'" ***Id.*** at 244 (emphasis added; quoted source omitted). The ***Olbert*** court stated that when the plan has not been "abandoned" and any additions or deletions can be "harmonized" with the original contract, the rule is that the contractor is entitled to recover "the contract price less deletions plus the cost of the extras." ***Id.*** at 243.

¶16 The circuit court in this case found that the modifications made by Valek and Smith could be harmonized with the original contract. The court stated: "In this case there were deletions and substitutions that the parties applied to the contract price, and the amount due is the contract price as modified by these deletions and substitutions." The contract specifically provided that additions and/or deletions could be made to the contract's original specifications and that the construction price, $1,360,000, would be increased or decreased accordingly. Valek and Smith have not established that the court's finding was clearly erroneous.

¶17 Valek and Smith argue that the contract is also unenforceable because they did not reach an agreement with JG Development with respect to the cost of the modifications in the change orders. Valek and Smith rely on ***Goebel v. National Exchangors, Inc.***, 88 Wis. 2d 596, 615, 277 N.W.2d 755 (1979), wherein the supreme court stated:

> "an agreement must be definite as to compensation. In order that an executory agreement may be valid, it is generally necessary that the price must be certain or capable of being ascertained from the agreement itself. By this is not meant that the exact amount in figures must be stated in the agreement; however, where that is not the case, the price must, by the terms of the agreement, be capable of being definitely ascertained." (Quoted source omitted.)

¶18 Here, the contract provided that the final price of the project would be the contract price, $1,360,000, less amounts attributable to any deductions and plus amounts attributable to any additions. Valek and Smith argue that the final price is not "capable of being ascertained from the agreement" because they and JG Development "never reached an agreement" as to the price of the modifications to the original contract price. *See* ***id.*** The circuit court, however, found otherwise. The circuit court found that "the parties [] engaged in a continuous process of reaching agreement on portions of the work at certain prices, which complie[d]" with the rule that price be certain and ascertainable for an executory agreement to be valid. The court further found that during construction, Valek, Smith and JG Development "continued to reach agreement on portions of the work and the price for each," and that Valek and Smith approved each of the first six draws. We must accept the circuit court's factual findings on this issue unless those findings are clearly erroneous. ***Village of Little Chute v. Walitalo***, 2002 WI App 211, ¶4, 256 Wis. 2d 1032, 650 N.W.2d 891.

¶19 We read Valek's and Smith's brief as asserting the court's finding was clearly erroneous because: (1) the evidence shows that they "did not authorize the final draw," which they maintain "shows the parties never did agree on the price"; (2) actual costs were still being finalized in September 2008; and (3) JG Development failed to provide them information as to JG Development's actual cost of the modifications. We reject all three subarguments.

¶20 First, we fail to see how Valek's and Smith's refusal to sign the final draw is evidence that the parties had not reached an agreement on price. At most, it is evidence that Valek and Smith were unwilling to pay.

¶21 As to the second and third subarguments, Valek and Smith have failed to show why JG Development's failure to have determined all of JG Development's costs, or provide such information to Valek and Smith, by September 2008 is evidence that there was no agreement as to price for changes. Plainly, the contract permitted JG Development to state what a change would cost or save, without disclosing actual cost information.

¶22 Accordingly, we conclude that Valek and Smith have not shown that the circuit court's finding was clearly erroneous.[4]

B. Attorney's Fees, Costs, and Interest

¶23 Valek and Smith contend the circuit court erred in awarding JG Development its actual attorney's fees and costs. They present six arguments.

[4] Valek and Smith contend the circuit court erred in failing to award them a credit for expenses they incurred in addressing deficient workmanship. We conclude this argument is too insufficiently developed to warrant a response. *See* ***Pettit***, 171 Wis. 2d at 646-47.

Some of Valek's and Smith's arguments are purely legal and we review such arguments de novo. To the extent Valek and Smith challenge factual findings, we apply the clearly erroneous standard set forth above. As to the amount of the award, our review is for an erroneous exercise of discretion. ***Kolupar v. Wilde Pontiac Cadillac, Inc***., 2004 WI 112, ¶22, 275 Wis. 2d 1, 683 N.W.2d 58.

1. Awarding attorney's fees and costs where amount's owing remain in dispute.

¶24 Valek and Smith argue that the court erred in awarding JG Development attorney's fees and costs because they disputed the final amount owing under the contract. They argue that the contract "does not include language that would typically be found in a contract to permit recovery of actual attorney's fees and costs" where there is a dispute regarding the contract. They further argue that the earliest they could have been considered delinquent on their payment of the seventh and final draw, and therefore responsible under the contract for JG Development's attorney's fees and costs, was when judgment was entered against them by the circuit court.

¶25 The circuit court rejected these arguments, determining that Valek and Smith were aware of the amount owing when they were presented with the final draw. Valek and Smith have limited their argument to self-serving assertions that the final draw was in dispute because they believed it to be so. That Valek and Smith found the charges by JG Development to be excessive does not mean that the amount owing was in dispute under the terms of the contract.

2. Failure to perform obligations under the contract.

¶26 Valek and Smith argue that JG Development is not entitled to recover any attorney fees because "it failed to perform its obligations under the

contract" by "never provid[ing] a complete and accurate final draw." However, while the circuit court made no specific finding as to the completeness of the final draw, it did in effect make a finding on this topic by finding that the draw was inaccurate only to the extent that it overbilled Valek and Smith by $14,949.12. Valek and Smith have not argued that this finding was clearly erroneous. For that matter, Valek and Smith have not cited to any provision in the contract or any legal authority supporting the argument that a "complete and accurate final draw" was required.

3. Actual attorney's fees versus statutory attorney's fees.

¶27 Valek and Smith argue that if JG Development was entitled to recover attorney's fees, it was entitled only to statutory attorney's fees, not its actual attorney's fees.[5]

¶28 In Wisconsin, "parties to litigation are generally responsible for their own attorney's fees unless recovery is expressly allowed by either contract or statute, or when recovery results from third-party litigation." ***Westhaven Assocs., Ltd. v. C.C. of Madison, Inc.***, 2002 WI App 230, ¶13, 257 Wis. 2d 789, 652 N.W.2d 819. We have stated that we will not construe contractual language contrary to the general rule that each side covers its own attorney's fees unless the contract provision is clear and unambiguous. ***Id.***

¶29 The contract in this case provided as follows:

> If timely payment of any draw of the Construction Price is not received by Contractor, Contractor may: … (3) add a

[5] Valek's and Smith's brief does not contain a citation to the statutory provision to which they refer.

> delinquency charge to the Construction Price computed at a rate of eighteen percent [18%] per annum for the number of days such payment is delinquent; and (4) add *Contractor's costs of collecting such delinquent amount (including attorneys' fees) to the Construction Price.* (Emphasis added.)

¶30 Valek and Smith argue that this contractual language is "clearly ambiguous" because "[i]t could be read to mean either actual or statutory attorney's fees." We disagree. Nothing in the contractual language suggests that the parties intended attorney's fees owing under that provision be limited to the statutory amount. As noted by JG Development, the provision in the contract pertaining to attorney's fees does not contain any reference to the word 'statutory,' nor is there any reference to the statutory provision. The plain, unambiguous language of the contract does not restrict the amount of attorney's fees awardable under the contract to a statutory amount.

4. Reduction of attorney's fees.

¶31 Valek and Smith argue the circuit court erred in failing to sufficiently reduce the amount of attorney's fees awarded to JG Development. The circuit court estimated that the parties had devoted approximately five percent of their total litigation to the issue of the personal loan given to Valek and Smith by Gundahl, and reduced the attorney's fees awarded to JG Development by that amount because the court found Valek and Smith "are not required to pay actual attorney's fees for the recoupment of the funds loaned to them." Valek and Smith assert that because "nearly 55% of the judgment is attributable to the … loan," the attorney's fees awarded to JG Development should have been reduced by fifty-five percent. However, they present no reasonably developed factual argument supporting their assertion that a fifty-five percent reduction was required.

Accordingly, we do not further address this issue. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992).

5. JG Development's "out-of-pocket" litigation expenses.

¶32 Valek and Smith argue that the circuit court erred in awarding JG Development its out-of-pocket expenses, including mediation expenses. They state that "[g]enerally, recoverable litigation expenses include only statutory costs such as copying costs and deposition transcript costs." However, they do not develop an argument as to why the award was erroneous in light of the contractual language, which provided that JG Development could collect its "costs of collecting" any draw that was not timely paid. ***Id.***

6. Interest.

¶33 Finally, Valek and Smith argue that the circuit court awarded JG Development an "excessive and unreasonable interest rate of 18% on the judgment beginning September[] 28, 2008." They argue that because they disputed the amount owing for the final draw, they should not have been required to pay any interest on disputed amounts, and interest should not have been ordered to begin until the date of the circuit court's order. The court found that regardless of any dispute, under the plain language of the agreement, Valek and Smith owed "18% interest 'for the number of days such payment is delinquent.'" Valek and Smith do not explain why the court's finding was clearly erroneous, but instead rely on a conclusory assertion. Accordingly, we reject this argument. *See* ***Associates Fin. Servs. Co. of Wis., Inc. v. Brown***, 2002 WI App 300, ¶4 n.3, 258 Wis. 2d 915, 656 N.W.2d 56 (an appellate court need not consider conclusory assertions).

CONCLUSION

¶34 For the reasons discussed above, we affirm.

By the Court.—Judgment and orders affirmed.

Not recommended for publication in the official reports.