COURT OF APPEALS
DECISION
DATED AND FILED

July 10, 2013

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. 2012AP2207 **Cir. Ct. No. 2010CV1308**

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

UNIVERSAL RESTORATION SERVICES, INC.,

PLAINTIFF-RESPONDENT,

V.

LAWRENCE HARTUNG AND LORINE HARTUNG,

DEFENDANTS-APPELLANTS,

ABC INSURANCE COMPANY,

DEFENDANT.

APPEAL from a judgment of the circuit court for Racine County: CHARLES H. CONSTANTINE, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Lawrence and Lorine Hartung[1] appeal from an amended judgment imposing upon them an equitable lien by agreement and a constructive trust, both for the benefit of Universal Restoration Services, Inc. (URS). The Hartungs argue that the court's amendment converting a previously imposed "equitable lien" (in the amount of $107,534.06) to an "equitable lien by agreement" and creating a constructive trust on this same amount was not supported by the court's and jury's findings. They further argue that they are entitled to an offset against the judgment amount based on a settlement between URS and codefendants insurer and insurance adjustor. We disagree and affirm.

¶2 This case arises from the June 2008 flooding, remediation and restoration of the Hartungs' home. Because of the home's proximity to a river, the mortgagee had required the Hartungs to purchase flood insurance at the time they acquired the home. The flood insurance covered only the structure, not any of the Hartungs' personal property. A local adjustor assessed the damage to the home. Upon Lawrence's request for a referral, the adjustor contacted URS on the Hartungs' behalf. On June 16, 2008, Lawrence signed an Authorization to Repair (ATR) with URS, which stated:

> I authorize Universal Restoration Services Inc. to perform repairs caused by a loss of June 7, 2008. I understand that Assuant [sic] Insurance, my Insurance Company is paying for the repairs to the property damage covered under my policy. I understand that Universal Restoration Services Inc. is an independent contractor hired by me and not by my Insurance Company.
>
> I understand and agree to pay Universal Restoration Services Inc. the full amount of my deductible. I understand and agree to pay Universal Restoration Services

[1] We will refer to the Hartungs individually by their first names only.

> Inc. for any and all repairs, or improvements made at my direction, which are not covered under my policy. I understand that I am ultimately responsible for payment even though I am receiving payment via an Insurance Claim.

URS completed the remediation and restoration work, and the Hartungs moved back into the home in October 2008.

¶3 While the restoration work was ongoing, the insurer issued three checks totaling $107,534.06, made payable jointly to the mortgagee and the Hartungs. These funds were initially placed in an escrow account not accessible to the Hartungs. Shortly before the Hartungs moved back into the home, a representative from the mortgagee came to the home and Lawrence signed a release for the funds that stated the Hartungs were satisfied with the work and the funds would be made available to pay URS. Thereafter, the Hartungs removed the funds from the escrow account and placed them in their personal checking account, comingling the funds with their paychecks and an inheritance.

¶4 After the Hartungs made no payment to URS despite its demands, URS commenced this lawsuit in 2010 against the Hartungs, the insurer and the adjustor, raising claims of quantum meruit, unjust enrichment and promissory estoppel (Counts I-VI). The Hartungs counterclaimed, raising, among other claims, a breach-of-contract claim. In July 2011, the insurer and adjustor were dismissed pursuant to a confidential settlement.

¶5 URS filed a second amended complaint in September 2011, adding claims for equitable lien by agreement-constructive trust (Count VII) and conversion (Count VIII), and the matter proceeded to trial. During the jury instruction/special verdict conference, the court found, based on the testimony and the Hartungs' attorney's agreement, that there was an implied contract between the

Hartungs and URS. It then held that the only issues for the jury were the amount of damages owed by the Hartungs to URS and the amount of money URS owed the Hartungs for any necessary remediation and rebuilding; the remaining claims were equitable and to be decided postverdict.

¶6 The jury awarded to URS all the money it requested, for a total of $133,856.02, and awarded the Hartungs nothing on their counterclaims. URS moved postverdict to amend its pleadings to include a claim of civil theft, for the imposition of an equitable lien by agreement-constructive trust in the amount of $107,534.06, and for a judgment in its favor on its quantum meruit claims. The Hartungs filed no posttrial motions, but submitted a brief[2] opposing the civil theft and conversion claims and the imposition of an equitable lien or a constructive trust.

¶7 Three months later, URS filed a reply brief and the trial court heard argument on the posttrial motions. The court issued a written decision and judgment dismissing Counts I-VI and VIII of URS's second amended complaint, denying URS's motion to add the civil theft claim, entered judgment for URS in the amount of $164,130.07, and imposed an equitable lien on $107,534.06 of that amount. URS moved the court to change the equitable lien to an equitable lien by agreement and to impose a constructive trust on $107,534.06 of the judgment, all as pled in the second amended complaint. The Hartungs opposed any modification. The trial court issued an amended judgment, imposing both an equitable lien by agreement and a constructive trust.

[2] That same day, counsel for URS was notified that the United States Bankruptcy Court issued an automatic stay. Subsequently, a partial lift of the stay was granted to complete this litigation.

¶8 On appeal, the Hartungs contend that the trial court erred when it imposed upon them an equitable lien by agreement and a constructive trust and when it failed to address their argument that they were entitled to a "reduction in the judgment amount awarded in favor of [URS] due to amount received from co-defendants who settled prior to trial." We apply the erroneous exercise of discretion standard in reviewing a court's decision to impose an equitable lien by agreement. *See* ***Klawitter v. Klawitter***, 2001 WI App 16, ¶8, 240 Wis. 2d 685, 623 N.W.2d 169. Such review is highly deferential. ***Id.*** We uphold discretionary acts if the trial court "examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach." ***Id.*** (citation omitted).

¶9 To properly impose an equitable lien by agreement, the evidence must demonstrate that there exists (1) "a debt, duty or obligation owing by one person to another," (2) "a res to which that obligation fastens," and (3) a contract from which the obligation arises showing an intention to charge a particular property with the payment of the debt. ***Yorgan v. Durkin***, 2006 WI 60, ¶38 & n.12, 290 Wis. 2d 671, 715 N.W.2d 160; *see also* ***US Airways, Inc. v. McCutchen***, 569 U.S. __, 133 S. Ct. 1537, 1544-45 (2013). While equitable liens require the ability to trace the particular funds or property in the defendant's possession, *see* ***Great–West Life & Annuity Ins. Co. v. Knudson***, 534 U.S. 204, 213 (2002); ***Yorgan***, 290 Wis. 2d 671, ¶38, equitable liens by agreement do not require this tracing, *see* ***Sereboff v. Mid Atl. Med. Servs., Inc.***, 547 U.S. 356, 365, 367-68 (2006). Rather, to be entitled to an equitable lien by agreement, the plaintiff must show that the parties agreed "[t]o dedicate property to a particular purpose[;] to provide that a specified creditor and that creditor alone shall be

authorized to seek payment of his [or her] debt from the property or its value." ***Sereboff***, 547 U.S. at 364-65, 367-68 (citations omitted).

¶10 Here, the trial court found, and the Hartungs conceded,[3] that an implied contract existed between URS and the Hartungs for the remediation and restoration work done by URS on the home. The parties fully briefed the issue of what agreements existed between the parties, and the court also heard trial testimony by witnesses for both parties. While we have only a limited record on appeal from the trial proceedings,[4] in those transcripts we have testimony from Lawrence and Lorine. Lawrence acknowledged he met with a URS representative and signed the ATR. Both Lorine and Lawrence testified that they intended to use the insurance proceeds to pay URS for its work on their home. The court found that URS has "a viable claim in a sense that [the Hartungs] were well aware that the insurance proceeds were money that would be set aside for paying somebody who did the repairs" to their home. The jury found that URS was entitled to all of the compensation it requested, awarding the Hartungs nothing on their counterclaims.

¶11 In its written decision granting the equitable lien, the trial court found that (1) Lawrence had executed the ATR, which contained the following

[3] Specifically, the Hartungs conceded that the only missing element of the contract was the ultimate price to be charged by URS for the remediation and restoration work on their home.

[4] The record contains only the testimony of Lawrence and Lorine Hartung and transcripts from some of the hearings in this case. There is no testimony in the record from the remaining six trial witnesses. In the absence of a complete record, we will assume "that every fact essential to sustain the trial court's decision is supported by the record." ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶6 n.4, 256 Wis. 2d 848, 650 N.W.2d 75; ***Fiumefreddo v. McLean***, 174 Wis. 2d 10, 26-27, 496 N.W.2d 226 (Ct. App. 1993) (it is the appellant's responsibility to ensure that the appellate record is complete).

referenced language: "I understand that Assurant Insurance, my Insurance Company is paying for the repairs to the property damage covered under my policy;" (2) the Hartungs received the insurance proceeds; and (3) "these funds were clearly to be utilized to pay for the cost of repairs, whoever did them." The court noted, "If you take a look at the [ATR], clearly, they were earmarked funds…. [I]t's like a trust account." The court found that "there was an identifiable fund which the plaintiff had control of which was to be utilized for one purpose, and that purpose was to pay [URS] for the work performance pursuant to the agreement between [URS] and [the Hartungs]." Finally, the court held that the Hartungs had a fiduciary duty to hold the insurance proceeds in trust for payment to URS for its remediation and restoration work on their home. These findings are not clearly erroneous. These findings establish the debt, res, and agreement necessary to impose an equitable lien by agreement. Because the court rationally applied the relevant facts to the applicable law, the trial court did not erroneously exercise its discretion when it imposed the equitable lien by agreement in the amount of insurance proceeds received by the Hartungs.

¶12 The Hartungs argue that under ***Bartholomew v. Thieding***, 225 Wis. 135, 273 N.W. 468 (1937), the ATR constituted a mere promise to pay, and could not be more, because they did not have the funds at the time they signed it. ***Bartholomew*** is easily distinguished. In that case, the defendant stated that, should she get an inheritance (she had no information she would in fact receive one), she would pay the funeral expenses from that money. ***Id.*** at 136. However, she also entered into a separate agreement to make installment payments, regardless of any eventual inheritance. ***Id.*** at 138. The ***Bartholomew*** court concluded that based on these facts, the statement by defendant was an unenforceable promise to pay. ***Id.*** at 138-39. Here, however, at the time

Lawrence signed the ATR, the insurer had already contracted with a local adjustor who had previously met with the Hartungs regarding the flood damage. At Lawrence's request, the adjustor had referred the Hartungs to URS as a potential contractor for the remediation and restoration work. The Hartungs testified that at the time they signed the ATR, it was their intention to use the insurance proceeds to pay for URS's work. The language of the ATR itself states that URS's work is to be paid by the insurance company except for the Hartungs' deductible, for which they were responsible. URS then, in fact, did the work on the home. The Hartungs conceded that there was an implied contract with only the final price missing. Here, there was more than a mere promise to pay. ***Bartholomew*** does not assist the Hartungs.

¶13 The Hartungs next argue that because the insurance proceeds did not exist at the time the ATR was signed, and because the proceeds were comingled with other personal funds, there is no "fund" to which to attach an equitable lien by agreement. As the United States Supreme Court has held, "[T]he fund over which a lien is asserted need not be in existence when the contract containing the lien provision is executed." ***Sereboff***, 547 U.S. at 366; *see also* ***Barnes v. Alexander***, 232 U.S. 117, 121 (1914). Additionally, no tracing of the funds is required for an equitable lien by agreement. *See* ***Sereboff***, 547 U.S. at 365, 367-68. The Hartungs further argue, citing ***Bartholomew***, 225 Wis. at 137, that in order for a court to impose an equitable lien by agreement, it must link the debt and res requirements to a "*written* contract[] showing an intention to charge some particular property with the payment of a debt." They then argue that the ATR is insufficient to provide the required nexus. However, the trial court found that the ATR "earmarked" the insurance proceeds creating "an identifiable fund which the plaintiff had control of which was to be utilized for one purpose, and that purpose

was to pay [URS] for the work performance pursuant to the agreement between [URS] and [the Hartungs]." These findings are not clearly erroneous. The trial court did not erroneously exercise its discretion when it imposed the equitable lien by agreement.

¶14 The Hartungs also appeal the trial court's imposition of a constructive trust. A constructive trust is an equitable remedy that a court may impose to prevent the retention of a benefit by one party that would be unjust as against the other party. ***Pluemer v. Pluemer***, 2009 WI App 170, ¶9, 322 Wis. 2d 138, 776 N.W.2d 261; ***First Nat'l Bank v. Nennig***, 92 Wis. 2d 518, 539, 285 N.W.2d 614 (1979). We review the trial court's decision to impose a constructive trust for an erroneous exercise of discretion. ***Pluemer***, 322 Wis. 2d 138, ¶9.

¶15 A "constructive trust will be imposed only in limited circumstances" where (1) the legal title is "held by someone who in equity and good conscience should not be entitled to [its] beneficial enjoyment" and (2) where title was "obtained by means of actual or constructive fraud, duress, abuse of a confidential relationship, mistake, commission of a wrong, or by any form of unconscionable conduct." ***Wilharms v. Wilharms***, 93 Wis. 2d 671, 678-79, 287 N.W.2d 779 (1980). Here, Lawrence acknowledged in his testimony that while he and Lorine were very displeased with URS's work on their home, he signed a document from the mortgagee stating that he was satisfied with URS's work thereby giving himself and his wife access to the escrowed insurance proceeds; that the Hartungs had removed all the insurance proceeds from the escrow account, comingling them with their own personal account; that the Hartungs had paid nothing to URS through the date of trial; and that he and his family lived in the restored home from October 2008 through at least trial in 2012. The trial court, having heard all the evidence, held that the Hartungs had a fiduciary duty to hold the insurance

proceeds in trust for payment of URS's bill for services and costs and imposed the constructive trust. Where the trial court acts as the finder of fact, and when more than one reasonable inference can be drawn from the credible evidence, we must accept the inference drawn by the trier of fact. ***Cogswell v. Robertshaw Controls Co.***, 87 Wis. 2d 243, 249-50, 274 N.W.2d 647 (1979). Based on the limited record before us, we conclude that there exists all of the elements necessary for the imposition of a constructive trust and further conclude that the trial court did not erroneously exercise its discretion when it imposed the constructive trust on the insurance proceeds.

¶16 Finally, the Hartungs contend that they are entitled to a reduction in the judgment amount awarded in favor of URS "due to amounts received from co-defendants who settled prior to trial." The Hartungs first raised this issue at the time of trial. At the conclusion of the hearing on the postverdict motions, the trial court asked the Hartungs' counsel if he had any further argument. Referring the court to their brief, the Hartungs argued that the court should grant an offset or credit against their judgment for the confidential settlement amounts the insurer paid to URS because the collateral source rule did not apply.

¶17 In its written decision, the trial court did not address the Hartungs' argument, nor did it explicitly dispose of this issue in the judgment order. Shortly thereafter, URS filed its motion to amend the judgment; the Hartungs filed no motion. In their opposition to URS's motion, the Hartungs simply state "without conceding any of its opposition as to substance, in terms of form, the 6/11/12 Order accurately reflects the Court's written decision and should not be modified." The court's amended judgment and correspondence to counsel relating to same also make no mention of any offset.

¶18 The Hartungs are not entitled to offset damages. First, the Hartungs never moved the trial court to address this issue or argued in any way that the trial court failed to do so, nor asked the court to reconsider its omission of these claimed offset damages. *See* ***Wirth v. Ehly***, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980) (we will not consider for the first time on appeal issues not raised or considered in the trial court). Further, at no time in the proceedings did the Hartungs make any cross-claims against the insurer or adjustor defendants. There is nothing in the record demonstrating that the Hartungs opposed the dismissal of these parties by stipulation. In their motions in limine, while requesting that the court "mandate that following any jury verdict in Plaintiff's favor, the trial court offset the settlement amount from any amount owed by the Hartungs," they argued that no information go to the jury regarding the fact or amount of the settlement. The limited trial record contains no evidence that the Hartungs provided any proof to the jury or the court of any settlement amounts or of their right to use such amounts to offset any award in favor of URS. Accordingly, there was no legal basis for the trial court to award such offset.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2011-12).