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WISCONSIN COURT OF APPEALS
DISTRICT 2

09-21-2012

**CLERK OF COURT OF APPEALS
OF WISCONSIN**

THE VILLAS OF WAUKESHA OWNERS ASSOCIATION, LTD.,

Plaintiff,

Appeal No. 2012-AP-001585

v.

THE VILLAS OF WAUKESHA LIMITED PARTNERSHIP,
WAUKESHA VILLAS, INC., THE HEARTLAND
DEVELOPMENT GROUP, LTD., and
ROBERT A. PATCH,

Defendants-Third-Party
Plaintiffs-Appellants,

and

CONDON CONSULTING ENGINEERS, PC,

Defendant,

v.

DOUG BRUCH EXCAVATING, INC., BC MASONRY,
COMPLETE CONSTRUCTION, INC.,
PERFECTION EXTERIORS, INC.,
AMERICAN SURVEYING COMPANY, INC.,
R&R EXTERIOR HOME IMPROVEMENTS,
DAVE'S ROOFING, LLC, PROMILL WORK,
CITY WIDE INSULATION CO., INC.,
GUARANTEED ROOFING & SIDING, LLC,
CUSTOM COMPONENT CO.,
JENDUSA ENGINEERING ASSOCIATES, INC.,
AFFORDABLE COMFORT HEATING & COOLING,
a/k/a BELL CITY MECHANICAL,
RELIANCE HEATING & AIR CONDITIONING, LLC,
FRANKLIN MECHANICAL CORPORATION,
ADVANCED MECHANICAL, BOWAR CONCRETE, INC.,
GITTER CONSTRUCTION, INC.,

PROBUILD COMPANY, LLC
and ABC INSURANCE COMPANY,

Third-Party Defendants,

WILSON MUTUAL INSURANCE COMPANY, and
WEST BEND MUTUAL INSURANCE COMPANY,

Intervenors,

BIG BUCK BUILDING CENTERS, INC.,

Third-Party Defendant-Respondent,

THOMAS MICHAEL CONSTRUCTION, INC.,

Third-Party Defendant-Fourth-Party Plaintiff,

v.

TMS LANDSCAPE, INC., and
TIMOTHY M. SCHMITT, d/b/a TMS LANDSCAPE,

Fourth-Party Defendants.

**BRIEF OF DEFENDANTS-THIRD-PARTY PLAINTIFFS-
APPELLANTS, THE VILLAS OF WAUKESHA, LP, WAUKESHA
VILLAS, INC., HEARTLAND DEVELOPMENT GROUP, LTD.
AND ROBERT A. PATCH**

**Appeal From The Circuit Court Of Waukesha County
The Honorable J. Mac Davis, Presiding
Circuit Court Case No. 2009-CV-004665**

Thomas A. Cabush
State Bar No. 1019433
Dustin T. Woehl
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STATEMENT OF ISSUES

Are material facts in dispute, thus requiring denial of Big Buck's motion for summary judgment?

The trial court granted Big Buck's summary judgment motion without addressing any of the arguments against it.

STATEMENT REGARDING ORAL ARGUMENT AND PUBLICATION

Oral argument and publication should be unnecessary as this appeal presents a straight-forward case of summary judgment that must be denied based on the presence of disputed material facts, and none of the criteria for oral argument or publication are met.

STATEMENT OF THE CASE

This is an appeal from a judgment entered on June 11, 2012, in the circuit court for Waukesha County, J. Mac Davis, Judge, granting the summary judgment motion of Respondent-Third Party Defendant, Big Buck Building Centers, Inc. (“Big Buck”). (R.329; A. App. 101-102).

This is a construction defect case. The Appellants-Defendants: The Villas of Waukesha, Limited Partnership; Waukesha Villas, Inc.; The Heartland Development Group, Ltd.; and Robert A. Patch (“Heartland”) are the developer and related parties for The Villas of Waukesha, a condominium complex, that allegedly sustained damage from water infiltration and other problems as a result of defective construction. (R.2, R.15, R.35, R.160).

Heartland was sued by plaintiff, The Villas of Waukesha Owners Association, Ltd. (“Association”) and, in turn, filed a Third Party Complaint for breach of contract, contribution, and indemnification against Big Buck, who was a subcontractor involved in the project, as well as against other subcontractors involved in the project. (R.2, R.15, R.35, R.160).

Big Buck moved for summary judgment, arguing that there was insufficient evidence that it contributed to the allegedly faulty construction or claimed damages of the Association. (R.278-281; A.App. 115-197). Heartland filed a written response to the motion, identifying the evidence supporting Big Buck's liability. (R.290, R.291, R.292; A.App. 198-235). Big Buck filed a reply. (R.306). The trial court granted Big Buck's motion without discussing the summary judgment record or fully explaining its reasoning.

STATEMENT OF THE FACTS

- I. **Big Buck installed allegedly defective Tyvek, provided allegedly broken roof trusses, and installed allegedly leaky patio doors at the project.**
 - A. **Big Buck installed the allegedly leaky Tyvek building wrap.**

It is undisputed that Big Buck fabricated the exterior pre-wrapped wall panels for the sixteen-unit buildings. (R.292, pp. 2,3; A.App. 233-234, R.291, pp. 2-3, 6-10; A.App. 208-209, 212-216). The wall panels were pre-wrapped with Tyvek building wrap prior to delivery by Big Buck to the property for installation. (R.291, 3; A.App. 209). Third party defendant, Gitter Construction, Inc. (“Gitter”), then erected the wall panels. (R.319B, p. 2; R.319C, 1-2).

The Association alleges that the two sixteen-unit condominium buildings leaked. (R.2, R.15). In his report, the Association’s expert, Thomas Laufenberg, criticized the buildings’ siding and noted that the buildings’ water barrier must be evaluated with regard to the alleged water penetration at the sixteen-unit buildings. (R.291, 4, 19-20; A.App. 210, 225-226, R.319, 1, ¶4, 26-29; A.App. 106, 131-134). Laufenberg testified at his deposition on May 10, 2012 that the Tyvek was installed incorrectly. (R.319D, 4-6, 14-

20). His opinion was based, in part, on his review of a photograph of some of the Tyvek that had been exposed by the removal of some of the siding during prior repairs. (R.319, 7, 15-18; A.App. 109, 117-120).

That photograph was taken by Steve Marino of Marino Consulting Corp. during repair work he was involved in at the 16-unit buildings, which required replacement of the Tyvek. (R.319, 2-3, 6-7, 12-24; A.App. 104-105, 108-09, 114-26). According to the Association's experts, the previous repairs revealed that the Tyvek was lapped incorrectly and not sealed. (R.319, 4, 5; A.App. 106-07, *Id.*). Mr. Marino's expert report, which was filed by the Association in support of its claim for damages, included a proposal for the replacement of all of the Tyvek at a cost of over \$20,000. (R.174).

Experts retained by Heartland have opined, referring in part to information from the siding manufacturer, that the siding is not designed to be the water-resistive barrier and is not a watertight covering compared to the underlying building wrap, which provides the necessary protection for the building such that if there

was water penetration into the walls, it would be attributable at least in part to the Tyvek. (R.291, 3, 18; A.App. 209, 224).¹

B. Big Buck supplied allegedly defective roof trusses.

The Association alleges that some of the roof trusses were broken or defective. It seeks over \$20,000 in damages for the replacement of these trusses. (R.291, 13; A.App. 219). Thomas Laufenberg attributed the defects in the roof trusses to missing braces, **damage incurred during shipping** and installation, or a combination of those two. (R.291, 3, 13; A.App. 209, 219). Laufenberg cites the fact that some trusses were repaired with scrap wood as evidence that they were damaged in transit or during installation. (Id.)

Big Buck prefabricated the roof trusses and was responsible for their shipment to the jobsite for use in the sixteen-unit buildings. (R.292, 2; A.App. 232, R.291, 2-3; A.App. 208-09, R.291, 6-11; A.App. 212-17). Gitter was responsible for the erection of the roof trusses supplied by Big Buck. (R.319B, 1). Gitter has denied that it was negligent and has alleged that other parties might be responsible for

¹ In a similar development constructed during the same time as the Villas of Waukesha, the Villas of Racine, Big Buck has similarly been alleged to have improperly installed the Tyvek building wrap to the exterior wall panels. (R.219, p. 25).

the Association's claimed damages. (R.164). Notably, Big Buck did not submit an affidavit or any other evidence in support of its summary judgment motion disputing the allegation that it damaged the trusses in transit.

C. Big Buck installed patio doors that allegedly leaked.

Experts have opined that the patio doors allowed water to infiltrate the buildings due to a lack of flashing around them. (R.281, 27, A.App. 153). Thomas Michael Construction ("TMC") served as the general contractor for the sixteen-unit buildings and retained Big Buck. TMC produced documents in this litigation that indicate that Big Buck not only supplied the patio doors, but later returned to the site in order to replace previously-installed doors at the buildings. (R.292, 2, 4-5; A.App. 233, 235-36, R.291, 3, 14; A.App. 209, 220).

The documents indicate that Big Buck in fact took it upon itself to install the replacement doors. As stated in an April 4, 2005 fax from Big Buck (d/b/a Promillwork) to TMC:

In regard's [sic] to patio door's [sic] at jobsite, I spoke with Jeldwen rep around 11:00 am today 4-22-05, and he stated that the door's [sic] at jobsite must be removed first and then switched out to whatever swing you may need. *We at Promillwork would like to go out and change them out before your siding people come in.* Please get back to me ASAP so this can be scheduled. . . . I am assuming that you will need a quantity of eight right and eight left for each building

(R.292, 2, 4-5; A.App. 233, 235-36) (emphasis added).

Indeed, one month after that fax, a reprinted invoice from Big Buck to TMC showed the order for the sixteen patio doors. (R.291, 3, 14; A.App. 209, 220). Big Buck has provided no affidavit or any other evidence that it did not, in fact, go out to the site, remove the existing patio doors and install sixteen new patio doors as it said it needed to do. It has pointed to no evidence that any other party had any involvement in installing the patio doors.

II. Procedural History.

The Association filed this action on November 20, 2009, complaining of construction defects and water infiltration at the condominium complex. (R.2). It amended its complaint in August 2010. (R.15). The Association sued several defendants, including the developer and a few other entities involved in the design of the complex. (R.15).

In January, 2011, Heartland filed a Third-Party Complaint against various subcontractors who worked at the subject property, including Big Buck, seeking contribution and indemnification to the extent that the Association's claimed damages arose from their work. (R.35, R.160). Heartland filed an Amended Third-Party

Complaint on July 1, 2011. (R.160). Throughout this case, Big Buck is sometimes referred to by its other trade names or divisions, Custom Component and Promillwork, as well as by the entity who later purchased it, Probuild, Inc.

After the Association named its experts, but before the third party defendants were required to name theirs, (R.132, 191, 199) Big Buck moved for summary judgment arguing that there was not enough evidence against it to keep it in the case. (R.277-281, A.App. 115-197).

On April 5, 2012, Heartland timely served and filed with the court its opposing brief (R.290, A.App. 198-206), the affidavit of attorney Nicholas D. Harken (R.291, A.App. 207-231), and the affidavit of Thomas Cecchini. (R.292, A.App. 232-235). The general contractor, TMC, wrote to the court for more time to respond to Big Buck's motion. (R.299). Big Buck filed its reply brief on April 20, 2012. (R.306). TMC then formally moved for more time to respond to Big Buck's motion, as its witness list was not yet due and it had not determined yet whether it wanted to oppose Big Buck's motion. (R.309, R.310).

When Big Buck's summary judgment motion was heard on May 4, 2012, the trial court mistakenly concluded that all parties except for TMC had stipulated to Big Buck's dismissal. (R.336, A.App. 106-114). Big Buck had submitted a stipulation and proposed order in support of its motion, which was **not** signed by Heartland, the third-party plaintiff who brought Big Buck into the case. In fact, the Association was the only party to sign Big Buck's proposed stipulation. (R.277, R.279; A.App. 115, 118-119).

Apparently thinking that no party opposed the motion, with TMC needing only to confirm as much after finalizing its expert disclosures, the trial court indicated that it would grant Big Buck's motion, but would make the dismissal without prejudice as to TMC until the end of May. The dismissal would then convert to "with prejudice" on June 1, 2012 unless TMC had before then filed a response to Big Buck's motion. (R.336, 7; A.App. 113).

Attorney Nicholas Harken, appearing for Heartland, reminded the trial court that Heartland did indeed oppose Big Buck's motion for summary judgment. (Id.). Without discussing Heartland's opposition or otherwise explaining its reasoning, the trial court reiterated its decision, summarized above. (Id.).

The trial court signed an order on May 16, 2012 granting Big Buck's motion for summary judgment and dismissing all claims against Big Buck with prejudice with the exception that TMC's cross claim was dismissed without prejudice until June 1, 2012, and if TMC did not file an opposition to Big Buck's motion before June 1, 2012, the dismissal of Big Buck as to TMC would convert to a dismissal with prejudice. (R.319, A.App. 103-105). On May 30, 2012, TMC filed a brief opposing Big Buck's motion for summary judgment. (R.323C).

The final judgment with costs was filed on June 11, 2012. (R.329, A. App. 101-102). The final judgment dismissed all claims against Big Buck with prejudice, except that TMC's claims were dismissed without prejudice. The final judgment provides that "Pursuant to Sections 806.01 and 806.06, Wis. Stat., this judgment is a final judgment." (Id.) (emphasis original).

Big Buck filed a notice of entry of judgment dated June 17, 2012. (R.328). The docket sheet erroneously lists the date as June 11, 2012, which is actually before the judgment was entered. Heartland filed a timely notice of appeal on July 17, 2012. (R.330).

ARGUMENT

This is not a case in which the relevant facts are undisputed and there is nothing left to try regarding Big Buck's involvement. Rather, there is evidence and expert opinion implicating Big Buck in the construction issues that allegedly allowed water to infiltrate the Villas. First, Big Buck was responsible for the Tyvek building wrap that the Association's expert opines was incorrectly installed so as to allow water to infiltrate the buildings. Second, Big Buck provided roof trusses that the Association's expert opines probably broke in transit or during installation. Third, Big Buck removed patio doors and installed new patio doors, which the Association's expert opines leaked because their flashing was not installed.

Based on the evidence implicating Big Buck, the jury could reasonably find that Big Buck was responsible for some or all of these alleged defects and damages. There are, therefore, material issues of fact preventing summary judgment.

I. Summary Judgment Standard.

This Court reviews a grant of summary judgment *de novo*. *Green Spring Farms v. Kersten*, 136 Wis.2d 304, 314-16, 401 N.W.2d 816 (1987). The summary judgment standard requires that "a party

seeking summary judgment must ‘establish a record sufficient to demonstrate . . . that there is no triable issue of material fact on any issue presented.’” *Hunzinger Const. Co.*, 179 Wis. 2d at 290 (citing *Heck & Paetow Claim Serv., Inc. v. Heck*, 93 Wis. 2d 349, 356, 286 N.W.2d 831, 834 (1980)). To prevail on summary judgment, therefore, Big Buck must establish that there is no genuine issue as to any material fact. *Green Spring Farms v. Kersten*, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987); *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994).

Summary judgment should not be granted if reasonable persons could reach different inferences from the undisputed facts. *Delmore v. American Family Mut. Ins. Co.*, 118 Wis. 2d 510, 516, 348 N.W.2d 151 (1984); *Goff v. Seldera*, 202 Wis. 2d 600, 613, 550 N.W.2d 144 (Ct. App. 1996). To the contrary, summary judgment is appropriate only if the inferences that can reasonably be drawn from the facts are not doubtful and lead to the sole conclusion that the moving party must prevail. *Radlein v. Industrial Fire & Cas. Ins. Co.*, 117 Wis. 2d 605, 609, 345 N.W.2d 874 (1984); *Fischer v. Doylestown Fire Dept.*, 199 Wis. 2d 83, 89, 543 N.W.2d 575 (Ct. App. 1995).

II. The record contains evidence demonstrating triable issues of material fact regarding Big Buck's liability.

As outlined above, discovery in this case indicates that Big Buck is indeed potentially liable, to some extent, for the Association's claimed damages. There is record evidence implicating Big Buck for incorrectly installing the Tyvek house wrap on the prefabricated exterior walls it supplied to the jobsite, installing patio doors without the proper flashing, and supplying damaged roof trusses.

A. Big Buck installed the Tyvek, which allegedly allowed water to infiltrate the buildings.

Following the conclusion of a trial in which all parties have an opportunity to present all of their evidence and challenge each others' evidence, a jury could very well conclude that Big Buck improperly installed the Tyvek in a way that allowed water to penetrate the building and, therefore, needs to be replaced.

As is set forth at length in the fact section above, it is undisputed that Big Buck was responsible for the Tyvek building wrap. Mr. Laufenberg opines that the building wrap was incorrectly applied and would allow water to infiltrate the building. (*See, e.g.,* R319D). Mr. Laufenberg opines that the Tyvek therefore needs to be

replaced. The Association is clearly seeking the cost of replacing the allegedly defective Tyvek as part of its damages in this case. It has, in fact, already replaced some of the Tyvek and has submitted the report of Steve Marino calling for the replacement of all of the Tyvek at a cost of approximately \$20,000. (R.174)

Big Buck is the only party responsible for the installing allegedly defective Tyvek and associated damages claimed by the Association. Clearly there are factual issues precluding dismissal of Heartland's contribution claim against Big Buck.

B. Big Buck is potentially responsible for the damaged roof trusses.

The Association claims that some of the Villa's roof trusses are broken and need to be replaced. The Association's expert opined that the trusses were probably broken in transit or during installation. (R.291, 3, 13; A.App. 209, 219). He supports that conclusion with the fact that the trusses were repaired with scrap wood. (Id.). Big Buck undisputedly delivered the trusses. Gitter, the entity responsible for installing the trusses, has denied liability. (R.164).

Thus, according to the Association's expert, the broken trusses were caused either by Big Buck or Gitter. Big Buck has not even

submitted an affidavit stating that none of the roof trusses were damaged in transit. The jury could very well believe Gitter and conclude that the roof trusses were damaged while in transit by Big Buck. There are, therefore, material issues of fact preventing summary judgment, based on Big Buck's role in transporting roof trusses that have been observed to be broken.

C. Big Buck is potentially liable for its role in installing patio doors that allegedly leaked.

Documents presented in this case indicate that Big Buck said it was going to remove existing patio doors and reinstall new patio doors, and then invoiced the general contractor for the new patio doors. (R.292, 2, 4-5; A.App. 233, 235-36, R.291, 3, 14; A.App. 209, 220). Big Buck has pointed to no documents even suggesting that it did not do so, or identifying any other contractor who installed those patio doors. Neither has Big Buck filed any affidavit disavowing its involvement. Laufenberg observed missing flashing around these patio doors and identified this as a construction defect and probable source of water infiltration. (R.281, 19, 27; A.App. 145, 153).

A reasonable jury could very well conclude that Big Buck removed the old patio doors (and possibly removed the flashing in

doing so) and the reinstalled new patio doors and failed to install the proper flashing, which then allowed water to infiltrate the buildings. A jury could also reasonably fault Big Buck for removing and replacing patio doors and either failing to notice that the flashing was missing or for failing to notify the TMC of the missing flashing. There are, therefore, material issues of fact precluding summary judgment for Big Buck regarding its involvement in removing patio doors and then installing the allegedly leaky patio doors.

CONCLUSION

Because the evidence and expert opinion implicate Big Buck as being potentially liable for some of the Association's claims, there are material issues of disputed fact making summary judgment in Big Buck's favor improper. Heartland therefore requests that the Court reverse the trial court, vacate the judgment entered against Heartland, and deny Big Buck's motion.

Dated this 20th day of September, 2012.

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CERTIFICATION

I certify that this brief meets the form requirements of Rule 809.19(8)(b) and (c), in that it is:

Proportional serif font: Min. printing resolution of 200 dots per inch, 13 point body text, 11 point for quotes and footnotes, leading of min. 2 points, maximum of 60 characters per full line of body text. The length of this brief is 2,700 words.

Dated this 20th day of September, 2012.

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ELECTRONIC SUBMITTAL CERTIFICATION

I hereby certify I have submitted an electronic copy of this brief, excluding the appendix, if any, which complies with the requirements of s. 809.19(12). I further certify that this electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the court and served on all opposing parties.

Dated this 20th day of September, 2012.

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