COURT OF APPEALS
DECISION
DATED AND FILED

September 23, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2470 **Cir. Ct. No. 2012CV149**

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

VOYAGER VILLAGE PROPERTY OWNERS ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

BROOKS D. LETOURNEAU,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Burnett County: KENNETH L. KUTZ, Judge. *Affirmed*.

Before Hoover, P.J., Stark, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Brooks Letourneau appeals an order denying a WIS. STAT. § 806.07[1] motion to vacate a summary judgment for past due lot assessments granted in favor of Voyager Village Property Owners' Association, Inc. We affirm the order.

¶2 Letourneau originally purchased a vacant lot in the Voyager Village development in 1999. Following Letourneau's 2005 purchase of three additional vacant lots, this court affirmed a judgment for past due assessments. We specifically rejected Letourneau's contention that additional adjacent lot purchases would not result in additional, per lot, annual dues. *See* ***Voyager Village P.O.A., Inc. v. Letourneau***, No. 2011AP1097, unpublished slip op. (WI App May 1, 2012).

¶3 Voyager Village subsequently commenced another lawsuit for past due lot assessments for years 2009 through 2012. The circuit court granted Voyager Village's motion for summary judgment. Letourneau filed a motion under WIS. STAT. § 806.07 for relief from judgment, which the court denied. Letourneau now appeals.

¶4 Letourneau argues summary judgment must be vacated because the circuit court mistakenly based its decision on his failure to appear at the summary judgment hearing.[2] *See* WIS. STAT. § 806.07(1)(a). Letourneau claims he was

[1] References to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

[2] Letourneau uses the phrase "abused its discretion." Our supreme court changed the terminology used in reviewing a trial court's discretion from "abuse of discretion" to "erroneous exercise of discretion" in 1992. *See* ***State v. Plymesser***, 172 Wis. 2d 583, 585-86 n.1, 493 N.W.2d 367 (1992).

denied fair access to the courts "to submit evidence and facts supporting his case," because he contacted the court on the date of the hearing requesting to appear by telephone and the court "made no attempt to telephone Appellant and give him the opportunity to be heard and challenge the motion for summary judgment …."

¶5 Letourneau is in error. The circuit court emphasized at the hearing on the motion for relief from judgment that it did not base the summary judgment decision on Letourneau's failure to appear. In fact, the decision was based upon Letourneau's noncompliance with the statutory requirement that an adverse party "shall serve opposing affidavits, if any, at least 5 days before the time fixed for the hearing." WIS. STAT. § 802.08(2). As the court noted:

> With regard to Mr. Letourneau, we received nothing in response or opposition to that motion for summary judgment, until either at or shortly after the time and date set for the hearing, and the only response that the court received was the third-party complaint ….[3] There were no affidavits in any shape, way, or form which oppose[d] the affidavits that were submitted in support of Voyager Village's affidavits in support of their motion ….

¶6 Letourneau also asserts Voyager Village failed to establish the absence of a genuine issue of material fact entitling it to a judgment as a matter of law. Letourneau stands the summary judgment procedure on its head. Here, the pleadings clearly established a claim for relief, and we established in the prior appeal that Letourneau's additional adjacent lot purchases resulted in additional, per lot, annual dues. *See* ***Voyager Village***, slip op. at 2. Moreover, the circuit court in the present case correctly determined no factual issues existed:

[3] Letourneau admitted in his brief in support of the motion for relief from judgment that he "filed with the court on the morning of the hearing a Third-Party Summons and Complaint asserting claims against multiple third-party defendants."

> The court reviewed the motion and affidavits that were submitted by [Voyager Village], and it certainly appeared to the court that, number one, Mr. Letourneau owed the assessments. It also appeared that the issues which were raised in the responsive pleadings in this particular case were essentially the same issues that the court addressed in the previous trial.

¶7 An adverse party may not rest upon the allegations or denials of the pleadings, but must set forth specific facts by affidavit or otherwise showing that there is a genuine issue for trial. *See* WIS. STAT. § 802.08(3). As mentioned, the circuit court correctly observed that Letourneau failed to comply with the statutory requirement to submit opposing affidavits within five days of the summary judgment hearing. The court properly granted summary judgment.

¶8 Letourneau nevertheless insists newly discovered evidence established a genuine issue of material fact. He claims there was a "continuing fraud, deception and scheme" between Voyager Village and its exclusive listing broker to entice Letourneau to buy adjacent lots without disclosing that he would be charged separate annual assessments for each of the four lots owned rather than one. *See* WIS. STAT. §§ 806.07(1)(b) and (c). He insists Mark Crowl, the general manager at Voyager Village, was involved in a variety of schemes to increase the percentage that would be received for the lots. According to Letourneau, "[i]f Appellant would have been allowed discovery, he would have uncovered this fraud that likely involved over one million dollars."[4] He contends the court did not allow him argument and the submission of evidence "supporting an obvious denial of summary judgment."

[4] In his reply brief to this court, Letourneau states "the Circuit Court stuck its head in the sand …." This comment is unwarranted and violates a cardinal rule of appellate practice: avoid disparaging the court system or opposing parties. *See* ***State v. Rossmanith***, 146 Wis. 2d 89, 89, 430 N.W.2d 93 (1988). Violations of this sort in the future may result in sanctions.

¶9 We are unpersuaded. The circuit court concluded Letourneau did not meet the requirements for newly discovered evidence.[5] The court found the alleged facts "obviously came to the defense's attention before the date of the summary judgment hearing." The following colloquy supports the court's finding:

> THE COURT: Let me ask you a couple of questions here before I go to Mr. Lein for his response. First off, if I'm reading the submissions correctly, this information … was known to your client before the summary judgment motion hearing on November 15th?
>
> MR. HANDORFF: I believe it was like a week before, a week or ten days ….

¶10 The court rejected counsel's explanation that Letourneau was "trying to fax in" the information on the date of the summary judgment hearing. The court noted:

> If there was an issue with regard to being able to submit an affidavit to get that to the court's attention, certainly I think a motion for an extension of time or continuance of the hearing would have been appropriate. Nothing of that nature was brought to the court's attention ….

¶11 More importantly, the circuit court also concluded "[t]here's been nothing that's been presented to the court here that would establish that there is material evidence here and that it would change the result of the trial." The court properly found Letourneau's "conspiracy theory for lack of a better term," was based upon "speculation and supposition." The court stated:

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[5] Newly discovered evidence requires: (1) the evidence must have come to the moving party's knowledge after a trial; (2) the moving party must not have been negligent in seeking to discover it; (3) the evidence must be material to the issue; (4) the testimony must not be merely cumulative to the testimony which was introduced at trial; and (5) it must be reasonably probable that a different result would be reached on a new trial. *See* ***State v. Brunton***, 203 Wis. 2d 195, 200, 552 N.W.2d 452 (Ct. App. 1996).

> But to a large extent … the arguments here are based on it may have happened, it could have happened. Essentially what we've got here is a fishing expedition. What [Letourneau] is requesting me to do is to make some assumptions without any evidence to back them up. At this point, the only thing I know for sure, and I'll assume it's taken for granted for purposes of this hearing, was that Mark Crowl was a real estate agent and that he was also working for Northwoods Properties besides his duties as general manager for Voyager Village Property Owners Association.
>
> There's been nothing presented by way of affidavit or otherwise to indicate that he was involved in any way, shape, or form here with the actual transaction or sale, including Voyager Village Property Owners Association and Mr. Letourneau. Essentially, what [Letourneau] wants me to do is to reopen the judgment to give him the opportunity to conduct discovery to find out, if in fact, that is the case. But that's not the test here.[6]

¶12 Letourneau also suggests he is entitled to relief from judgment under the "catch-all" provision under WIS. STAT. § 806.07(1)(h). However, he fails to develop an argument in this regard, and we will not abandon our neutrality to develop the argument. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

¶13 In sum, Letourneau failed to demonstrate entitlement to relief from judgment. The circuit court correctly denied the motion.

[6] We note in this regard that Letourneau failed to reply to Voyager Villager's argument that Letourneau never communicated with Mark Crowl, prior to or at the time of the purchase, concerning any fact that caused him to purchase the three additional lots. Letourneau has therefore conceded this issue. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Order affirmed.

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