COURT OF APPEALS
DECISION
DATED AND RELEASED

July 9, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

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

No. 97-0011-FT

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

CITY OF MEQUON,

PLAINTIFF-RESPONDENT,

V.

KENNETH HOSALE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Ozaukee County: THOMAS R. WOLFGRAM, Judge. *Affirmed.*

SNYDER, P.J. Kenneth Hosale appeals from a grant of summary judgment to the City of Mequon on a citation alleging that he failed to pay a building permit fee in full. Hosale contends that the trial court wrongly granted summary judgment to the City and that summary judgment should either be granted in his favor or vacated and the matter remanded for trial. We hold that the trial court's grant of summary judgment to the City was proper and affirm.

The following case history is undisputed. On July 6, 1994, Hosale submitted plans to the City to alter a 1188 square foot second floor portion of his residence to a commercial/retail art gallery. The 1188 square foot first floor of the building would remain as Hosale's personal residence and studio. The City waived review of the building plan in favor of a review and approval by the Department of Industry, Labor and Human Relations (DILHR). On July 6, 1994, Hosale submitted his building plan to DILHR. The DILHR application represented the involved floor area as 1188 square feet and estimated the total building fee at $290.

On August 16, 1994, DILHR engineer Clyde Bryant conditionally approved Hosale's plan subject to minor corrections. However, Bryant's approval incorporated both floors of the residence (2376 square feet) in the plan as commercial occupancy in order for Hosale's commercial building plan to comply with state handicap accessibility requirements.[1] On August 19, Hosale requested and obtained a building permit, paying a fee of $142.56 based upon commercial alterations to only the second floor (1188 square feet) of his building at 12 cents per foot.[2] Hosale represented to the city building inspector that DILHR had approved only the second floor of the building as commercial.

When the city building inspector became aware that the DILHR plan approval included the first floor area as commercial alterations, the City added an

[1] According to DILHR engineer Bryant's affidavit, approving Hosale's commercial building plan without including the first floor as commercial use "would necessitate an elevator inside the building or an extensive ramp system from grade to the second floor" and "Hosale's plans ... did not provide for an elevator nor ramp system."

[2] Hosale paid a total fee of $253.91 at the time he applied for and received his building permit. The total fee included $60 for plan review, $51.35 for the public works impact fee and the $142.56 building fee.

additional $142.56 to the previously assessed building permit fee to cover the additional 1188 square footage. Hosale refused to pay the additional fee.

On April 4, 1995, the City issued a citation seeking a daily forfeiture from Hosale for his failure to pay the appropriate building permit fee to the City. The citation alleged that an "alteration to [Hosale's] building are [sic] being done without payment of proper building permit fees[;] building changed from residential to commercial." Hosale pled not guilty to the citation and requested a jury trial.

On March 13, 1996, Hosale filed a motion for summary judgment requesting dismissal of the citation because: (1) the "present dispute rests solely upon the question of whether [Hosale has] sought to structurally alter the first floor of [the building]," and (2) "summary judgment is appropriate because there is no genuine issue involved in whether or not [Hosale] planned and/or executed physical alterations to the first floor of his residence." Hosale's supporting summary judgment affidavits address the absence of substantial structural alterations to the first floor of his building, a contention that the City does not directly dispute. We construe Hosale's motion for summary judgment dismissal of the citation as contending that his prior fee payment is a complete defense to the citation and would defeat the City's claim and request for per diem forfeitures.

On April 4, 1996, the City filed a cross-motion for summary judgment contending that the total assessment sought from Hosale was based upon DILHR's inclusion of both floors of Hosale's building as commercial alteration in order to comply with state handicap accessibility law. Although this treatment eliminated the need for a ramp or the installation of an elevator, Hosale's response

focuses only on his argument that "[t]here were no alterations to the first floor of the Hosale building."

We review summary judgment issues de novo employing the same methodology as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987). Under § 802.08, STATS., summary judgment is appropriate when the moving party shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *See* ***Germanotta v. National Indem. Co.***, 119 Wis.2d 293, 296, 349 N.W.2d 733, 735 (Ct. App. 1984). A motion for summary judgment carries with it the explicit assertion that the movant is satisfied that the facts are undisputed and that on those facts he or she is entitled to judgment as a matter of law. *See* ***Powalka v. State Mut. Life Assurance Co.***, 53 Wis.2d 513, 518, 192 N.W.2d 852, 854 (1972). Where both parties move for summary judgment, it is "the equivalent of a stipulation" as to the facts of the case. *See* ***id.***

We review the summary judgment affidavits and supporting documents to determine if Hosale has a valid defense to the City citation. If not, we then consider whether the City's citation is based upon a building permit that includes both the first and second floor of the Hosale building as commercial alterations. If it is, and summary judgment methodology is appropriate, the City would be entitled to summary judgment on the citation.

Hosale was issued a building permit on August 19, 1994, "to erect alteration at 11019 N. Wauwatosa Road 76 W" in the City of Mequon. The City of Mequon building inspector conditionally approved the issuance of the building permit based upon Hosale's agreement to comply with the City's ordinance requirements. Hosale submitted a building plan to DILHR indicating the

alterations that he intended to make to a part of his building. DILHR approved Hosale's plan to commercially alter the second floor of the building as including the first floor of the building to assure compliance with state handicap accessibility requirements. The City then recalculated the fee for the building permit to include the additional area as determined in the DILHR approval to be commercial alteration.

Hosale does not contend that a building permit is unnecessary. Instead, he maintains that the City lacks authority to assess the first floor as a part of the permit fee and that the City's own ordinances, as well as a DILHR definition adopted by the City, support his position that the assessment applies only to the second floor of the building. First, Hosale cites to MEQUON, WIS., ZONING CODE § 4.42 (1993), which requires building permits and states in relevant part:

> No *building* shall be ... structurally altered ... within the City of Mequon until a building permit has been issued ... certifying that such *building* ... would be in compliance with the provisions of this chapter and with the building code of the city. [Emphasis added.]

Because this provision relates to the structural alteration of a "building," Hosale's argument that only the portion of a building actually altered is to be included in the building permit fee assessment fails. This provision supports the City's position that it was necessary to include the first floor footage in the building permit fee in order to satisfy the requirements for commercially altered space.

Next, Hosale relies on the definition of "altering" contained in WIS. ADM. CODE § ILHR 51.01(105a), a DILHR provision adopted by the City of Mequon, to support his full compliance defense to the citation. In relevant part that provision states:

> To ... alter ... means to change *any building* ... which affects the structural strength, fire hazard, internal circulation, or exits of the existing building or structure. [Emphasis added.]

Id. Again, Hosale's contention that no commercial alteration occurred to the first floor of his building fails. Hosale commercially changed his building by making substantial alterations to the second floor that affected the first floor in order to provide required access to the second floor. The City could not issue Hosale's building permit without including the first floor in the commercial alterations unless the plans were amended to include an elevator and/or ramp to comply with the state handicapped persons access law.

The building permit identifies the Hosale building by its street address. Because DILHR's plan approval identified the first and second floors of the building at that address as commercial alteration, we conclude that the first floor area is subject to city building permit and assessment requirements. The record supports the grant of summary judgment to the City rather than to Hosale.[3] We conclude that Hosale is not entitled to summary judgment and now turn to whether it is proper to grant the City's motion.

In his reply brief to the City's motion for summary judgment, Hosale states that "the only dispute remaining is how the calculation of the fee for a

[3] Hosale contends that MEQUON, WIS., ZONING CODE § 4.43 (1993) is also relevant in support of his entitlement to summary judgment. That section deals with occupancy and zoning use permits, and we discern no relevance to the summary judgment issue presented here.

building permit for alterations in an existing building is made."[4] He argues that this factual dispute precludes summary judgment to the City. While the cross-motions for summary judgment imply a stipulation as to the facts, *see* ***Powalka***, 53 Wis.2d at 518, 192 N.W.2d at 854, a summary judgment movant may be correct in asserting that facts relevant to his or her theory of the case are not in dispute, but that relevant issues of fact supporting his or her opponent's theory of summary judgment may be disputed. *See* ***Stone v. Seeber***, 155 Wis.2d 275, 278, 455 N.W.2d 627, 629 (Ct. App. 1990) (citing ***Hiram Walker & Sons, Inc. v. Kirk Line***, 877 F.2d 1508, 1513 n.4 (11th Cir. 1989), *cert. denied*, 115 S. Ct. 1362 (1995)).

We cannot agree with Hosale that the City's method of fee calculation is at issue in this case. First, Hosale failed to formally challenge the calculation when he paid the fee assessed on the second floor 1188 square footage.[5] The City's citation concerns Hosale's failure to pay the total building permit fee assessed in the same manner as the partial fee already paid by Hosale. We conclude that Hosale's earlier payment of the $142.56 partial assessment

[4] In addition to this stated dispute, Hosale contends in his reply brief that other factual disputes exist as to "the appropriate building fee," including, inter alia, whether the City used the correct assessment provision, whether the building permit related to a new building or an altered existing building, whether a City summary judgment affidavit was credible and whether the fee assessment wrongly related to commercial use of his building rather than a portion of his building. Hosale generically cites to "the respective briefs and [thirty-seven pages of] oral argument" in support of his contentions. Because these contentions were not a part of the summary judgment record, do not relate to the allegations in the citation and do not appear other than in Hosale's appellate reply brief, we will not address them. We generally will not review issues raised for the first time on appeal. *See* ***Segall v. Hurwitz***, 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

[5] Hosale paid the total fee under protest but did not contest the assessment administratively or judicially. We are satisfied that the method of assessment is not relevant to this determination.

concedes that the schedule and calculations used by the City in determining the full permit fee are appropriate.

Second, the issue of the permit assessment calculation is not raised by the City's citation or by the judgment penalty imposed. The City did not seek recovery of the unpaid $142.56 fee balance in its citation; it sought a forfeiture for failure to comply with the City's building permit law. The record indicates that the $419 penalty imposed is a forfeiture.[6] Hosale has failed to persuade this court that a factual issue remains in dispute that prohibits summary judgment to the City. We need not address this issue further. *See* ***State v. Beno***, 99 Wis.2d 77, 91, 298 N.W.2d 405, 413 (Ct. App. 1980) (we need not address inadequately briefed issues).

In sum, this matter is before us on cross-motions for summary judgment. In their motion papers, both parties contend that the case is appropriate for summary judgment, that there are no material issues of fact in dispute precluding summary judgment and that the case can be decided as a matter of law. Hosale objects to granting summary judgment to the City because he claims that the method of permit fee calculation that he previously conceded to by payment of a partial fee is now in dispute. We reject Hosale's contention and conclude that the summary judgment record supports summary judgment to the City.

By the Court.—Judgment affirmed.

[6] The record includes only the clerk's notes indicating that the trial court imposed a "penalty" of $419 and notice from the City to Hosale stating that "the Court has imposed a forfeiture ... in the amount of $419.00, including court costs, with sixty (60) days to pay said forfeiture." We are unable to determine whether the City would allow Hosale to proceed under the building permit upon payment of the $419 forfeiture or would still require payment of the additional $142.56 permit fee.

This opinion will not be published. *See* RULE 809.23(1)(b)4, STATS.