

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 28, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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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. 2015AP1564

Cir. Ct. No. 2014CV338

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VALLEY PEST CONTROL, INC.,

PLAINTIFF-APPELLANT,

V.

TODD CAMPBELL, D/B/A APEX PEST CONTROL,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Winnebago County:
THOMAS J. GRITTON, Judge. *Affirmed in part; reversed in part and cause
remanded.*

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 PER CURIAM. Valley Pest Control, Inc. appeals from a circuit court order granting summary judgment to Todd Campbell d/b/a Apex Pest Control and awarding him costs and actual attorney's fees. We affirm the grant of

summary judgment. We reverse the award of costs and actual attorney's fees and remand for proceedings to address costs and attorney's fees using the appropriate procedure.

¶2 Valley Pest sued its former employee, Todd Campbell, for damages and to enforce a restrictive covenant Campbell signed as part of his employment. Valley Pest alleged that Campbell violated the restrictive covenant when he started his own pest control business, solicited Valley Pest's customers, and breached his duty of loyalty to Valley Pest by using, in his new business, confidential information, including trade secrets, obtained during his Valley Pest employment. In addition to missing multiple discovery deadlines, Valley Pest failed to timely respond to Campbell's requests for admission and did not show the existence of genuine issues of material fact to avoid summary judgment. After the circuit court granted summary judgment, the court granted Campbell's request for costs and actual attorney's fees. We will refer to more facts as necessary to resolve the appellate issues.

Requests for Admission

¶3 On appeal, Valley Pest argues that the circuit court erred when it denied its request to extend the time to respond to Campbell's requests for admission. A party who does not timely respond to a request for admission has admitted the matter, and the "matter is conclusively established unless the court permits withdrawal." *Mucek v. Nationwide Commc'ns, Inc.*, 2002 WI App 60, ¶26, 252 Wis. 2d 426, 643 N.W.2d 98. "The court may permit withdrawal ... when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal ... will prejudice the party in maintaining the action or defense on the merits." WIS.

STAT. § 804.11(2) (2013-14).¹ Even if these factors are satisfied, “[t]he decision to allow relief from the effect of an admission is within the trial court’s discretion.” *Mucek*, 252 Wis. 2d 426, ¶¶25, 34. In deciding whether to permit a party to withdraw admissions, a court may also consider the impact on its “general authority to maintain the orderly and prompt processing of cases....” *Id.*, ¶35. We will affirm a discretionary decision if the court examined the relevant facts, applied a proper legal standard, and used a rational process to reach “a conclusion that a reasonable judge could reach.” *Id.*, ¶25.

¶4 The following facts are undisputed. On July 31, 2014, Campbell served requests for admission and other discovery upon Valley Pest. Valley Pest did not respond to the requests for admission until September 4, past the thirty-day time period for responding and past the date by which the requests were deemed admitted. *See* WIS. STAT. § 804.11(1)(b). Campbell received additional discovery responses from Valley Pest on September 18. Valley Pest did not take any steps to address its late discovery answers until the summary judgment process started.

¶5 The circuit court’s September 17 scheduling order required summary judgment motions by January 9, 2015 and set deadlines for disclosing witnesses and briefing summary judgment. Campbell filed a summary judgment motion on January 9 and timely filed his witness list. Valley Pest filed its witness list late and responded to the summary judgment motion three days after the scheduling order’s February 6 response deadline. With its February 9 summary judgment

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

response, Valley Pest filed a motion to extend the time to respond to Campbell's requests for admission and expressed an interest in conducting discovery to respond to Campbell's summary judgment motion.

¶6 Valley Pest's February 9 filing in opposition to summary judgment contained one signed employee's affidavit (the Bloechl affidavit) and one unsigned employee's affidavit (the Sydney affidavit). Valley Pest offered a signed Sydney affidavit on February 27, the first of three summary judgment hearings.

¶7 At the first summary judgment hearing on February 27, the circuit court stated that its review of the case revealed "that there is an awful lot of things that are late, whether that be witness lists ... answers to discovery request, admissions, and now I'm in the part of the case where we're in summary judgment mode and I'm being asked to have certain things admitted because there were no answers." The court found that the Sydney affidavit was not signed within the time period for responding to Campbell's summary judgment motion. The court observed that if Valley Pest's late summary judgment affidavit were the only issue in the case, the court might consider a different outcome. However, the court considered the entire case and placed great weight on the several instances in which Valley Pest did not comply with either the court's scheduling order or the discovery statutes. The court adjourned for another hearing.

¶8 At the second summary judgment hearing on April 1, Campbell argued that its requests for admission were deemed admitted under WIS. STAT. § 804.11(1)(b) almost six months before Valley Pest moved to extend the time to answer the requests for admission. Campbell also argued that Valley Pest failed to develop its case within the scheduling order's time limits. While conceding that its answers to Campbell's requests for admission were late, Valley Pest explained

its inaction over several months as follows: Valley Pest assumed that Campbell did not object to its late-filed answers and Valley Pest believed that its admissions would have no effect in the case. Valley Pest argued that Campbell would not be prejudiced if its admissions were withdrawn.

¶9 The circuit court found that Valley Pest’s answers to Campbell’s requests for admission were two days late. The court applied WIS. STAT. § 804.11(1)(b), which states that the matters admitted are conclusively established unless the court permits withdrawal or amendment of the admission. Valley Pest did not seek relief from the admissions for almost six months and only after Campbell filed his summary judgment motion. The court found that Valley Pest did not contact Campbell or take any other steps to remedy the late-filed answers and the resulting admissions. The court placed great weight on the multiple occasions Valley Pest did not comply with statutes or court orders and on Valley Pest’s failure to timely address the problems it created. The court found that those occasions “can’t be overlooked” and caused delay in the case. The court considered that Campbell would be prejudiced if the court permitted Valley Pest to withdraw its admissions. The prejudice arose from Valley Pest’s failure to comply with the discovery rules that govern the orderly process of developing cases. Therefore, the court declined to allow Valley Pest to withdraw its admissions. As a result, there were no disputed issues of material fact and summary judgment appeared to be appropriate. The court adjourned for a future hearing at which the parties could argue summary judgment. However, the court precluded supplementation of the record with new summary judgment materials.

¶10 We conclude that the circuit court properly exercised its discretion when it denied Valley Pest relief from its admissions. As in *Mucek*, the circuit court’s assessment of prejudice took into account evidence of Valley Pest’s

ongoing failure to comply with discovery rules and the scheduling order. *Mucek*, 252 Wis. 2d 426, ¶¶27, 31. The record supports the circuit court's discretionary decision to enforce Valley Pest's admissions. *See id.*, ¶34.

¶11 It is undisputed that Valley Pest's interrogatory answers were also submitted late. As part of the same exercise of discretion and in the context of other discovery deficiencies, we affirm the circuit court's decision not to accept Valley Pest's untimely answers to Campbell's interrogatories.²

Summary Judgment

¶12 At the third and final summary judgment hearing on April 29, Valley Pest argued that Campbell had not made a prima facie case for summary judgment and that its admissions did not resolve all of its claims against Campbell. The circuit court granted summary judgment because Valley Pest's admissions either addressed all of Valley Pest's claims or Valley Pest did not raise factual issues relating to its claims (such as its request for damages). The court concluded that to the extent the restrictive covenant had any ambiguity, that ambiguity would be construed against Valley Pest, the covenant's drafter. The court granted summary judgment to Campbell and dismissed Valley Pest's complaint.

¶13 Valley Pest argues that the circuit court erred in granting summary judgment. Specifically, Valley Pest argues that the court erred when: (1) the court agreed that the restrictive covenant was ambiguous but did not accept a reasonable alternative interpretation; (2) the court dismissed Valley Pest's tortious

² Because we affirm the circuit court's discretionary decision to disregard Valley Pest's interrogatory answers, we do not address Valley Pest's contention that the circuit court had to consider its interrogatory answers as part of its summary judgment record review.

interference, breach of loyalty and theft of trade secrets claims; and (3) the court declined to consider the Sydney affidavit in opposition to summary judgment.

¶14 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.*, 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). That methodology has been recited often and we need not “repeat it here except to observe that summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Id.* at 496-97.

¶15 Admissions arising from unresponded to requests for admission can be the basis for granting summary judgment. *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 630, 334 N.W.2d 230 (1983). We agree that Valley Pest’s failure to timely respond to Campbell’s requests for admission resolved all of the factual disputes in Campbell’s favor, making summary judgment appropriate. The admitted facts were: Valley Pest drafted the restrictive covenant, the restrictive covenant states that Valley Pest engages in commercial pest control, the restrictive covenant does not mention residential pest control, Valley Pest did not lose pre-existing commercial pest control customers to Campbell, Campbell did not retain lists of or contact information for Valley Pest’s customers or any of Valley Pest’s property after he was terminated, and Campbell did not acquire access to Valley Pest’s proprietary pest control information during his employment. These admissions resolved all of the claims brought by Valley Pest against Campbell.

¶16 Valley Pest argues that the circuit court erroneously declined to consider Sydney’s affidavit. The opponent of a summary judgment motion “may not rest on mere denials” but “must affirmatively counter with evidentiary

materials demonstrating” a factual dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106 (citations omitted). A court may disregard “affidavits which contain allegations of ultimate facts, conclusions of law or anything other than evidentiary facts.” *Weigel v. Grimmer*, 173 Wis. 2d 263, 271 n.4, 496 N.W.2d 206 (Ct. App. 1992) (citations omitted).

¶17 Sydney’s affidavit offered his observations about pesticide application notices posted by Apex Pest Control. Sydney’s unsigned affidavit was filed on February 9, after the deadline for Valley Pest’s summary judgment response. Sydney’s signed affidavit was not provided to the circuit court until February 27, the day of the first summary judgment hearing. The court noted that it prepared for the summary judgment hearing without Sydney’s affidavit. The court considered the late-filed affidavit as part of the same timeliness problem in other parts of the case.

¶18 A circuit court has discretion to address a party’s failure to comply with scheduling order deadlines and to manage its docket efficiently. *Lentz v. Young*, 195 Wis. 2d 457, 465, 536 N.W.2d 451 (Ct. App. 1995); see *Hefty v. Strickhouser*, 2008 WI 96, ¶28, 312 Wis. 2d 530, 752 N.W.2d 820. The court properly exercised its discretion when it declined to consider the Sydney affidavit.

¶19 Without the Sydney affidavit, the Bloechl affidavit was Valley Pest’s only summary judgment affidavit. The court found that the Bloechl affidavit lacked facts, including facts establishing Valley Pest’s damages from Campbell’s alleged failure to comply with the restrictive covenant. Valley Pest argued that its interrogatory responses raised factual issues, but, as discussed elsewhere in this opinion, the circuit court properly declined to consider those late responses. Finally, the court ruled that the Bloechl affidavit contained hearsay

statements of Sydney,³ which was not proper summary judgment evidence. Affidavits opposing a motion for summary judgment must contain evidentiary facts, and hearsay evidence is not properly before the court on a motion for summary judgment. *Fritz v. McGrath*, 146 Wis. 2d 681, 689, 431 N.W.2d 751 (Ct. App. 1988). Valley Pest does not dispute this hearsay ruling on appeal.

¶20 Valley Pest complains that the circuit court dismissed its tortious interference, breach of loyalty and theft of trade secrets claims while there were genuine factual disputes. Valley Pest does not discuss the law governing these causes of action, their elements and which elements were not satisfied by its admissions. This issue is inadequately briefed, *Vesely v. Security First Nat'l Bank*, 128 Wis. 2d 246, 255 n.5, 381 N.W.2d 593 (Ct. App. 1985), and we will not craft Valley Pest's arguments.

¶21 To the extent Valley Pest sought injunctive relief as a remedy for its various claims, we conclude that court did not err in granting summary judgment. The Bloechl affidavit, the only evidence submitted on summary judgment by Valley Pest, was insufficient to raise genuine issues of material fact on the question of whether an injunction was necessary to avoid further harm to Valley Pest. The Bloechl affidavit offered conclusory allegations, not facts, about Campbell's conduct and the harm allegedly arising from that conduct. Valley Pest did not counter its admissions or Campbell's prima facie case for summary judgment.

¶22 Valley Pest offers alternative arguments relating to the alleged ambiguity in the restrictive covenant it drafted. Valley Pest first argues that the

³ The hearsay statements included that Sydney told Bloechl he saw Campbell's Apex Pest Control pre-application notices on doorknobs in an apartment building.

circuit court erred when it concluded that the restrictive covenant was ambiguous but did not accept a reasonable alternative interpretation that did not require the court to resort to extrinsic evidence. In the alternative, Valley Pest argues that the circuit court was bound to resort to extrinsic evidence to resolve the ambiguity, but Campbell neglected to provide such evidence on summary judgment, and therefore he did not make a prima facie case for summary judgment.

¶23 Contract language is “ambiguous if it is susceptible to more than one reasonable interpretation.” *Danbeck v. American Family Mut. Ins. Co.*, 2001 WI 91, ¶10, 245 Wis. 2d 186, 629 N.W.2d 150. If a contract is ambiguous, courts can turn to extrinsic evidence to determine the parties’ intent. *See Energy Complexes, Inc. v. Eau Claire Cty.*, 152 Wis. 2d 453, 468, 449 N.W.2d 35 (1989). Admissible extrinsic evidence might include “the surrounding circumstances including factors occurring before and after the signing of an agreement.” *Board of Regents v. Mussallem*, 94 Wis. 2d 657, 671, 289 N.W.2d 801 (1980). The summary judgment record in this case is devoid of such extrinsic evidence.

¶24 It is undisputed that Valley Pest drafted the restrictive covenant. The restrictive covenant describes Valley Pest as engaged in commercial pest control,⁴ but Valley Pest argues that the restrictive covenant covered all pest control activity, including residential pest control engaged in by Campbell’s new company. The Bloechl affidavit, which was filed by Valley Pest with its summary judgment response, does not shed any light on the circumstances surrounding the drafting of the restrictive covenant which would be relevant to resolving any

⁴ Interestingly, Bloechl’s affidavit avers that Campbell was employed to work in commercial pest control.

ambiguity. Furthermore, Valley Pest does not cite to any part of the record showing that it offered any extrinsic evidence of the parties' intent vis a vis the restrictive covenant it drafted. To the extent the agreement contained any ambiguity, that ambiguity was properly construed against the drafter, Valley Pest. *Capital Invs. v. Whitehall Packing Co.*, 91 Wis.2d 178, 190, 280 N.W.2d 254 (1979).

¶25 Valley Pest did not show the existence of a factual dispute in its response to summary judgment. The summary judgment record supports the circuit court's decision to grant summary judgment.

Costs and Attorney's Fees

¶26 We now reach the costs and attorney's fees issue on which we reverse and remand. At the April 29 third summary judgment motion hearing, Campbell asked for costs and attorney's fees. The circuit court directed Campbell to file a written request and gave Valley Pest ten days to respond. The court anticipated making a written decision on the request.

¶27 On May 11, Campbell filed a letter request seeking costs and actual attorney's fees of \$11,205. In a letter dated May 21 but filed in the circuit court on May 26, Valley Pest objected because Campbell did not file a bill of costs as required by WIS. STAT. § 814.01 and the request for actual attorney's fees did not comply with WIS. STAT. § 802.05. Valley Pest also argued that the circuit court had to review the reasonableness of the actual attorney's fees under WIS. STAT. § 814.045 and could only award costs consistent with WIS. STAT. § 814.07. The court entered an order on May 26 finding that Valley Pest did not timely respond to Campbell's request for costs and fees. After considering the entire record and Valley

Pest's failure to timely respond, the court awarded Campbell costs and actual attorney's fees.

¶28 The circuit court's finding that Valley Pest did not timely respond to Campbell's request for attorney's fees is clearly erroneous. *Global Steel Products Corp. v. Ecklund Carriers, Inc.*, 2002 WI App 91, ¶10, 253 Wis. 2d 588, 644 N.W.2d 269. Campbell's request was filed on May 11; Valley Pest's objection was due in ten days and was filed on May 26. Under WIS. STAT. § 801.15(1)(b) (weekends and holidays excluded), Valley Pest's objection was timely.

¶29 Campbell's request for actual attorney's fees did not cite a statutory basis. Valley Pest's objection discussed the WIS. STAT. § 802.05 procedure applicable to Campbell's fee request. Other than an erroneous finding that Valley Pest did not timely object, the court's fee award did not cite a statutory basis and made no findings about the basis for the fee award.

¶30 On this record, we conclude that the circuit court erred in awarding actual attorney's fees. In the absence of a fee-shifting contractual provision, the procedure outlined in WIS. STAT. § 802.05(3) applies. There is no indication in this record that Campbell and the circuit court complied with this procedure. There is also no indication that the circuit court assessed the reasonableness of the fees under WIS. STAT. § 814.045. Therefore, we reverse the order awarding costs and attorney's fees and remand for proceedings that comply with the applicable procedure for awarding costs and fees.

¶31 We affirm the grant of summary judgment. We reverse the award of costs and attorney's fees and remand to the circuit court to address costs and attorney's fees using the appropriate procedure.

¶32 No WIS. STAT. RULE 809.25(1) costs to either party.

By the Court.—Order affirmed in part; reversed in part and cause remanded.

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

