COURT OF APPEALS DECISION DATED AND FILED

September 28, 2005

Cornelia G. Clark
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. 2004AP3337

Cir. Ct. No. 2003CV974

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT II

TOWN OF EAST TROY,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF EAST TROY,

DEFENDANT-RESPONDENT,

BIELINSKI INVESTMENTS, LLC,

INTERVENOR-DEFENDANT-RESPONDENT,

BRUCE GRAFENAUER, PHYLLIS GRAFENAUER, DAVID THOMAS, ROXANNE THOMAS, WILLIAM JOAS AND CAROLYN JOAS,

INTERVENORS-DEFENDANTS.

APPEAL from a judgment of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Anderson, JJ.

¶1 BROWN, J. The Village of East Troy passed an ordinance on August 18, 2003, annexing some land previously located in the Town of East Troy. The Town responded with a lawsuit challenging the annexation. The Village, contending that the town board had never authorized the action within the statutorily prescribed time limits, moved to dismiss the case on summary judgment. The circuit court granted relief, and we affirm. The Town has not offered any competent evidence that the town board held a meeting at which it approved the lawsuit.

¶2 The landowners of the properties in question unanimously petitioned the Village to annex their land and filed this petition on June 23, 2003. The town board held a meeting on August 11. Although the board had other matters on the agenda that night, the chairman of the board did make an announcement related to the annexation. Specifically, he noted that the Village wanted an answer as to what the Town planned to do in terms of litigation. Although the board had consistently opposed the annexation, it had not yet formally voted on the issue. It did not set another meeting date for a vote at the August 11 meeting.

¶3 At some point on August 11, the town clerk/treasurer printed a notice for an August 13 special town board meeting concerning the annexation. This notice does not say what, specifically, the board intended that meeting to accomplish. The record does not reveal whether the notice was ever posted, and the local newspaper did not publish any notice, nor did it report on any August 13 meeting, although it customarily published notices and agendas for all scheduled meetings and provided subsequent coverage of what transpired at each open meeting.

¶4 The Village passed its ordinance in favor of the annexation on August 18. The Town filed a lawsuit on November 14 challenging the ordinance. The Town sought declaratory relief and asked the court to prevent the Village from enforcing the annexation. The landowners of the annexed properties intervened on the Village's behalf. Bielinski Investments, LLC was substituted as the intervening party after it bought their land.

¶5 The Village and Bielinski moved for summary judgment on August 4, 2004, asserting that the Town had provided no evidence that it had authorized the lawsuit. *See* ***Town of Nasewaupee v. City of Sturgeon Bay***, 77 Wis. 2d 110, 113, 251 N.W.2d 845 (1977) (town board controls all suits to which town is a party, and authority to commence an action must stem from official action of the board). The defendants subsequently deposed both the current and former town clerk/treasurer and the three members of the town board. The former clerk testified that she had no personal recollection of any formal vote and had never heard that such a vote had occurred. She also stated that she was unaware of the existence of any resolution memorializing the board's decision to commence an action, despite the fact that the town keeps a log of all resolutions it passes. The current clerk attested that although she had searched diligently, she had found no meeting minutes or other documentation recording a vote to file suit against the Village and was convinced no such record existed.

¶6 The chairman of the board stated that if a vote had taken place, it would have occurred on August 13, 2003. He testified that he had no recollection of attending such a meeting, however, and therefore would have no personal knowledge whether a vote had occurred. The other two board members also testified that they did not specifically remember a formal vote or attending an August 13 meeting. The board members also admitted that despite the fact that at

each meeting they customarily approved minutes from the previous meeting, they did not recall approving any minutes of an August 13 meeting at the board's September 15 meeting. Rather, the minutes of the meeting reveal that the board approved minutes only for the August 11 meeting on September 15.

¶7 The circuit court held a motion hearing on October 11, 2004, and granted the defendants' request for summary judgment. It noted that no record of any vote existed and the Town therefore had not presented a triable issue. The Town appeals.

¶8 When we review a summary judgment, we do so de novo, applying the same analysis the circuit court applies. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). We grant summary judgment when the pleadings, affidavits, depositions, and other available documentation reveal that no genuine issue of material fact exists for trial and that the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08(2) (2003-04);[1] ***Green Spring Farms***, 136 Wis. 2d at 315; ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980). If the pleadings reveal a triable issue, we then look to whether the moving party has submitted sufficient evidence to make a prima facie case for summary judgment. ***Grams***, 97 Wis. 2d at 338. If so, we then turn to the opposing party's evidence to see whether reasonable alternative inferences may be drawn in favor of that party that would entitle the party to a trial. ***Id.*** We view all evidence in the light most favorable to the nonmoving party. *See* ***id***. at 338-39.

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶9 Here, the Village and Bielinski certainly have made a prima facie case for summary judgment. Nobody actually recalls voting in favor of the lawsuit on August 13, even though that is the only date anyone contends that such a vote might have occurred. The local newspaper reported on any proceedings per its usual custom. Moreover, there is no evidence that the Town ever posted notice of the meeting or that it recorded or approved minutes or other documentation of a vote, even though the town customarily followed such procedures. *See* ***Gabe v. Town of Lake***, 271 Wis. 391, 398, 73 N.W.2d 509 (1955); ***Chippewa Bridge Co. v. City of Durand***, 122 Wis. 85, 103, 99 N.W. 603 (1904) ("The presumption is, where no record of proceedings of a public body exists, that none took place.").

¶10 The Town contends that it put forth sufficient evidence to justify a trial based on the affidavits of two town board members, which averred that the board was consistently opposed to the annexation, that it intended to institute an action before the statutory limitations period ran, that it had set August 13, 2003, as the date on which the board was to vote on whether to file a lawsuit, and that the affiants were certain they had formally authorized the litigation at some point. The Town also relied on deposition testimony of the board members, in which they indicated their belief that they had taken a formal vote on the issue at some point.

¶11 We disagree with the Town's position. The proffered evidence indicates that the Town intended to have a vote and that August 13 was the only date on which such action could have been taken. At best, this evidence proves that a meeting *could have* occurred on August 13 at which the board took formal action to authorize the lawsuit. The Town cannot survive a motion for summary judgment merely by offering evidence that the board members had "reason to believe" that they had formally taken action. Moreover, we cannot credit the

board members' mere assertion, unsupported by any documentation, that such a vote took place. *Cf.* WIS. STAT. § 60.33(2) (clerk responsible for attending meetings and keeping a full record of proceedings); ***Walsh v. State***, 180 Wis. 356, 358, 192 N.W. 1004 (1923) (circuit court in error for allowing clerk to give oral testimony about whether board had granted liquor license when clerk had duty to record proceedings, no documentation existed, and absence of such documentation had not been accounted for); ***Chippewa Bridge Co.***, 122 Wis. at 103 ("[I]t is doubtful whether evidence from several interested persons should be held sufficient" to rebut the presumption that the absence of a record indicates a lack of proceedings.).

¶12 No record exists that the town board ever took action to authorize this lawsuit. The Town has offered no competent evidence that such a meeting did in fact occur. We affirm.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.