COURT OF APPEALS
DECISION
DATED AND FILED

August 08, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP3013 **Cir. Ct. No. 2005SC9741**

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

1522 ON THE LAKE CONDOMINIUM ASSOCIATION,

PLAINTIFF-RESPONDENT,

V.

NELLA GROYSMAN,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: JEAN W. DI MOTTO, Judge. *Reversed and cause remanded for further proceedings*.

¶1 KESSLER, J.[1] Nella Groysman appeals *pro se* from an order granting summary judgment to 1522 on the Lake Condominium Association

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

("Association") for $6,170.79, which includes $400 in parking fines and $5360 in attorney fees, plus costs and interest.[2] Because we conclude there are genuine issues of material fact that preclude summary judgment, we reverse and remand for further proceedings.

BACKGROUND

¶2 Groysman owns a condominium at 1522 North Prospect. On March 15, 2005, the Association sued Groysman in small claims court. The complaint alleged that Groysman owed $400 in parking fines for parking violations by two cars (one belonging to her husband, from whom she was separated, and one belonging to her son) that occurred between August 11, 2004, and September 1, 2004. It also alleged that Groysman was liable for the Association's actual attorney fees, pursuant to the Association bylaws, and that those fees were estimated to include $1141 in past attorney fees and at least $1250 in attorney fees associated with the filing of the small claims action.

¶3 On August 17, 2005, a hearing was held before a court commissioner, who found in favor of the Association.[3] Groysman sought *de novo* review by the circuit court.

¶4 On September 1, 2005, the circuit court sent out a notice scheduling a pre-trial conference. The notice stated:

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[2] Groysman has represented herself for all proceedings before the court commissioner and the circuit court, and on appeal.

[3] The hearing was not recorded and only the case file notes are provided. These indicate that judgment of $415 was entered against Groysman. In a subsequent affidavit, Groysman indicated that the court commissioner found the attorney fees were unreasonable in relation to the total amount of money being recouped, which may explain why judgment was for only $415.

> This case is scheduled for a pretrial. It is not necessary to bring your witnesses because the case will not be tried at this hearing. If possible, you should bring with you to the hearing an original and one copy of all documents that you want the court to consider. The purpose of the hearing is to determine if the case can be settled and, if it cannot, to set a date for and discuss the trial.

(Some capitalization removed.)

¶5 On October 4, 2005, about six weeks prior to the pretrial conference, the Association moved for summary judgment. The Association asserted:

> The facts of this case are clear and simple. Defendant, owner of a condominium unit at 1522 On the Lake, admits that her husband and son, residents of her unit, routinely parked their cars in the designated "guest parking" areas during the months of July and August, 2004, which actions violated the Association's Guest Parking Rules and Regulations (the "Regulations"). According to the Regulations, the Association assessed fines against Defendant, which she refused to pay. The Association … had communications with Defendant, trying to collect the fines from her through December 2004, but Defendant continued to dig in her heels and refused to pay. Finally, the Association turned Defendant's account over to counsel for collection pursuant to the condominium documents and Wis. Stat. § 703.165. Because the Association has the authority to create and enforce Regulations for the condominiums, and because Defendant admits the conduct which is in violation of the Association's Regulations, Plaintiff is entitled to Summary Judgment in this matter including payments of its costs and attorney fees pursuant to the Association's Declarations, By-laws, and Wis. Stat. § 703.165.

The Association's motion included affidavits from one of the Association's attorneys and an employee for the Association's property management company, as well as printed reports stating which cars the Association asserts were in the guest parking lot on certain dates and times.

¶6 In response, Groysman filed an affidavit in opposition to the motion for summary judgment. She asserted that she did not know about the parking rules until October 2004, that her husband was not a "resident" when he parked in the guest parking lot, and that every time one of the vehicles was parked in the guest lot, it was either parked during permissible hours or was appropriately registered. Groysman also contested the amount of attorney fees sought, asserting that they should be limited to the standard attorney fees awarded in small claims court ($15-$100), and that the $7353 that the Association's counsel was seeking was unreasonable.

¶7 The parties appeared for a pretrial conference on November 14, 2005. The parties and the circuit court went on the record after the pretrial conference, during which time the circuit court summarized the status of the case:

> We've had I see a lengthy pretrial conference, an hour, in which all of the evidence and the arguments from both sides were presented to me. The documents in this matter have all been submitted to the Court as documents for a summary judgment motion.
>
> There are two disputes here, the first is in the underlying action which is for a sum of $400 plus interest for fines assessed by the [Association] against [Groysman]. Half of those fines were assessed based on [a] new parking policy of which [Groysman] was fully aware before it even went into effect because she wrote a letter to the board of directors protesting it.
>
> Her son is a resident with her at that condominium and drives a Jetta. To enforce the new parking policy about where residents may not park, the condominium randomly it seemed to me throughout the day on a variety of different dates checked cars that were parked in the guest spots and recorded the make of the car as well as the license plate number and the time it was there.
>
> Overnight parking includes being in a guest spot at 6 a.m. for a resident. [Groysman's] son's car was parked according to the condominium association, illegally or in violation of the policy 52 times, but they assessed fines of

> $40 and then $80, and then another $80, for three of six clear violations according to their ledger when he was there at 6 a.m.
>
> I find that those fines are reasonable, that his parking there in the guest parking area was in clear violation. I use the word clear with caution here because I feel compelled to state for the record that [Groysman's] responses in chambers were all over the map.
>
> ….
>
> I am sorry to say that I have never experienced someone except perhaps in my previous court assignments … who has had such circuitous, nonresponsive, over in left field then out of right field responses.
>
> It has been a true challenge to conduct this pretrial and motion hearing off the record. It would have been the same on the record, only I would have lost my patience and responded more abruptly sooner.
>
> There really is no defense to this whatsoever. Her defenses are irrelevant and immaterial. They are such things as "Well, he was parked on the street…. [W]e take the dogs out for a walk in the morning, and so he had to take it off the street because of parking regulations on the street and would park it then in a guest parking lot … after 6 a.m."
>
> The ledger or the document submitted by the [Association] with their motion that shows the 6 a.m. parking times of the Jetta on 6 occasions clearly reflects that these were not made-up times or estimated times but exact times because other of the entries are at times that show a precision, for example, 10:50, 7:05….

¶8 The circuit court concluded that "[t]he fines are reasonable. There is no factual dispute that carries any weight whatsoever." The circuit court continued: "Accordingly, my first grant of summary judgment … is of a fine of $200 for the resident parking of her son against the parking violations of the [Association].

¶9 The circuit court also concluded that Groysman's husband, from whom Groysman was separated, was not a guest. The circuit court stated: "The ones for which there is no factual dispute, those assessments are reasonable. The amount of the fines [is] reasonable."

¶10 The circuit court then addressed the attorney fees:

> I find first of all the amount of time spent on these matters which all involve [Groysman] to be reasonable. I find the amounts charged to be reasonable….
>
> Some of these charges nonetheless relate to not only these [parking] fines, but also some issues around payment of her condominium fees I believe which is what raised the original amount of the complaint here.

The circuit court's statement prompted Groysman to assert that was not true, and the following exchange occurred:

> [COURT]: Ma'am, stop now. She's … said in chambers that she's always paid those fees, but there is entry after entry in the attorney fee transaction details that indicate that that was part of what was contributing to the size of this bill.
>
> [GROYSMAN]: He can —
>
> [COURT]: Ma'am, if you say one more word, I'm going to start contempt proceedings. I've had enough.
>
> Accordingly, I discount part of those fees to eliminate those related to that, and I find that a reasonable amount of attorneys' fees here is $4,565. That's granted pursuant to the summary judgment motion.

The Association asked the circuit court to award it an additional $795 for attorney fees for that day's hearing. Without discussion or input from Groysman, the circuit court stated: "So ordered." This appeal followed.

DISCUSSION

¶11 In reviewing a grant of summary judgment, we apply the standards set forth in WIS. STAT. § 802.08(2) in the same manner as the circuit court. ***Badger State Bank v. Taylor***, 2004 WI 128, ¶12, 276 Wis. 2d 312, 688 N.W.2d 439. Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 Applying this standard, we conclude that genuine issues of material fact preclude summary judgment. At issue are the parking fines and the attorney fees. With respect to the fines, the Association submitted affidavits and records of times it asserts the cars were illegally parked. It also provided copies of correspondence outlining the parking rules. In response, Groysman in her affidavit asserted that she was unaware of the parking regulations, that she registered one of the cars as required, and that the cars were not parked where the Association says they were parked. These assertions of fact create genuine issues of material fact that preclude summary judgment. Specifically, a factfinder must determine when the cars were parked where, whether they were registered and, applying the parking rules to the facts, determine whether the parking rules were violated. Additional factfinding may also be necessary to determine whether Groysman's estranged husband was a "guest" or a "resident" when his car was parked in the guest lot.

¶13 We recognize that the circuit court had the benefit of observing Groysman and assessing her credibility during a one-hour, off-the-record pretrial conference, and that the circuit court implicitly found that Groysman lacks credibility. However, summary judgment cannot be based on credibility

assessments. *See* ***Yahnke v. Carson***, 2000 WI 74, ¶11, 236 Wis. 2d 257, 613 N.W.2d 102 ("[A] circuit court does not decide issues of credibility on summary judgment."). Based on the affidavits submitted, there are genuine issues of material fact that require resolution by a factfinder.

¶14 Our conclusion is the same with respect to attorney fees. Groysman's affidavit contested the amount and reasonableness of the attorney fees. Indeed, the circuit court itself explicitly found that certain fees should not be charged because they were not related to the parking fines, and reduced the Association's attorney fees. The reasonableness of the attorney fees and the necessity of work performed—all of which appear to be disputed here—are genuine issues of material fact that require a trial, which will create a record that permits meaningful appellate review. Here, all factual representations regarding these fees appear to have been discussed in chambers. There is no record of the dispute that can be reviewed.

¶15 The Association argues that the summary judgment should be sustained because Groysman "presented no evidence to establish a genuine factual issue and the court properly granted summary judgment in favor of the Association." The Association asserts that Groysman's "evidence was insufficient to persuade a reasonable jury that she should not have to pay fines levied pursuant to the condominium documents." We reject the Association's arguments for the same reason we cannot sustain the summary judgment: Groysman has submitted an affidavit that raises genuine issues of material fact. While it may be that Groysman turns out to be an unbelievable witness, it is not appropriate to weigh her credibility on a motion for summary judgment. *See* ***id.*** The fact that the Association argues that the circuit court properly "found the Association's evidence to be persuasive" and that Groysman's "assertions are, quite simply,

untrue" is proof that there are indeed factual disputes that require resolution by a factfinder.

¶16 To the extent the pretrial itself was an off-the-record factfinding hearing, it was unfair to Groysman, who was notified to appear for pretrial scheduling purposes only, and explicitly told not to bring witnesses. In addition, there is no way for us to review what occurred in chambers or what representations were made. For these reasons, we reverse and remand for further proceedings.[4]

By the Court.—Order reversed and cause remanded for further proceedings.

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

[4] This court notes, for Groysman's benefit, that a trial may not guarantee a lower judgment than that she appealed from. If a court ultimately awards actual attorney fees based on the condominium contract and Wisconsin law, Groysman's liability may be even greater due to the additional expenditure of attorney time to try the case. Her victory here may be purely Pyrrhic, as her ultimate liability could be much greater than the present judgment. We reverse only because summary judgment was not appropriate here. We have not considered the merits of whether the Association will ultimately be entitled to some or all of its actual attorney fees. For these reasons, we encourage Groysman to consult with an attorney and to carefully consider the risks and possible outcomes of her legal options and strategies.