

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 12, 2004

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. 03-1693
STATE OF WISCONSIN**

Cir. Ct. No. 02CV001188

**IN COURT OF APPEALS
DISTRICT II**

VIP CONSTRUCTION, INC., AN ARIZONA CORPORATION,

PLAINTIFF-APPELLANT,

v.

RAJKO ANDELJKOVIC AND SHERI L. ANDELJKOVIC,

DEFENDANTS-RESPONDENTS,

**FIRST FINANCIAL BANK, N/K/A ASSOCIATED BANK,
JANE DOE, AND JOHN DOE,**

DEFENDANTS.

APPEAL from an order of the circuit court for Racine County:
GERALD P. PTACEK, Judge. *Affirmed.*

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

¶1 PER CURIAM. VIP Construction, Inc. appeals from an order invalidating a Deed of Trust and Assignment of Rents executed in its favor by Rajko Andeljkovic and Sheri Andeljkovic. Because the circuit court did not err, we affirm.

¶2 Rajko and Sheri Andeljkovic entered into a new home construction contract with VIP Construction for property in Arizona. To secure a promissory note for construction of the Arizona residence, the Andeljkovics executed a Deed of Trust and Assignment of Rents for property Rajko owns in Racine, Wisconsin. Rajko's parents previously owned the Racine property. They quit claimed the property to him and retained a life estate in themselves. The quit claim deed contains the following restriction: "No loans or liens may be placed upon this property without the consent of one of the grantors." The quit claim deed containing this restriction is of record in the office of the Racine County Register of Deeds. It is undisputed that Rajko's mother, who was his surviving parent at the time he executed the Deed of Trust, did not consent to this encumbrance of the property.

¶3 The Andeljkovics defaulted on their promissory note and their construction contract, and VIP commenced an action to foreclose on the Deed of Trust on the Racine property. In their amended answer and counterclaim, the Andeljkovics asserted that the Deed of Trust should be voided. The Andeljkovics' subsequent motion for summary judgment argued that Rajko's mother, Stevka Andeljkovic, never consented to the lien on the Racine property. VIP Construction countered that the Andeljkovics were estopped from attempting to void the Deed of Trust because they represented that Rajko owned the Racine property, they did not disclose the existence of the deed restriction, and VIP Construction relied on Rajko's representations in accepting the Deed of Trust.

¶4 After a hearing, the circuit court applied *Badger State Agri-Credit v. Lubahn*, 122 Wis. 2d 718, 365 N.W.2d 616 (Ct. App. 1985), and concluded that the Andeljkovics had no right to encumber the Racine property without Rajko’s mother’s consent as required by the quit claim deed. The court invalidated the Deed of Trust. VIP Construction appeals.¹

¶5 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat’l Bank v. Episcopal Homes*, 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.

¶6 On appeal, VIP Construction argues that the circuit court erroneously relied upon *Badger* to void the Deed of Trust. VIP Construction contends that *Badger* stands for the proposition that VIP Construction may seek its remedy against the Deed of Trust, subject to Rajko’s mother’s interest. We do not read *Badger* for the proposition cited by VIP Construction.

¶7 The issue in *Badger* was “whether the foreclosure judgment in favor of Badger defeats [the interest of a person in possession of part of the property] under a trustee’s deed.” *Id.* at 725. In *Badger*, the will conveyed title to the property to the mortgagees but made the mortgagees’ rights subject to the decedent’s daughter’s right to possess the house’s upper flat. *Id.* The court held that Badger had notice

¹ The parties’ only contact with Wisconsin was the existence of the Deed of Trust. Once that instrument was voided, the circuit court dismissed VIP Construction’s Wisconsin foreclosure action in favor of further proceedings in Arizona.

under WIS. STAT. § 706.09(2) (2001-02)² of the interests in the property as described in the property records. *Id.* at 730. Therefore, Badger’s foreclosure action could not defeat the interests of the decedent’s daughter in the property. *Id.*

¶8 *Badger* is distinguishable because in the case before us, the question is whether the Racine property could be encumbered in the first instance. The quit claim deed, which is of record, clearly states that the property may not be encumbered without the consent of one of Rajko’s parents. Therefore, we do not have to reach the question of whether VIP Construction can exercise its rights under the Deed of Trust subject to Rajko’s mother’s interest because the property could not have been encumbered in the first instance.

¶9 VIP Construction next argues that the Andeljkovics should be estopped from invalidating the Deed of Trust because VIP Construction relied on their representations regarding ownership of the Racine property.

¶10 Equitable estoppel is comprised of the following elements: “(1) action or non-action, (2) on the part of one against whom estoppel is asserted, (3) which induces reasonable reliance thereon by the other, either in action or non-action, and (4) which is to his or her detriment.” *Milas v. Labor Ass’n*, 214 Wis. 2d 1, 11-12, 571 N.W.2d 656 (1997).

¶11 We agree with the Andeljkovics that VIP Construction cannot satisfy these elements because its reliance upon Rajko’s representations regarding the

² All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Racine property was not reasonable in light of the provisions of WIS. STAT. § 706.09(2). Section 706.09(2) states:

(2) Notice of prior claim. A purchaser has notice of a prior outstanding claim or interest, within the meaning of this section wherever, at the time such purchaser's interest arises in law or equity:

...

(b) Notice of record within 30 years. There appears of record in the chain of title of the real estate affected, within 30 years and prior to the time at which the interest of such purchaser arises in law or equity, an instrument affording affirmative and express notice of such prior outstanding interest conforming to the requirements of definiteness of sub. (1)(b).

¶12 Under WIS. STAT. § 706.09(2), VIP Construction is charged with knowledge of the quit claim deed and its restriction on encumbering the property. Additionally, § 706.09(4) provides that an instrument is in the chain of title when a reasonable search of the public records would reveal it. Before taking the Racine property as security for the Andeljkovics' promissory note, VIP Construction should have conducted a reasonable search of the public records to confirm the Andeljkovics' ability to encumber the Racine property.

¶13 The circuit court applied the proper law, and we agree with its conclusion that there were no material factual disputes barring summary judgment in favor of the Andeljkovics.

By the Court.—Order affirmed.

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

