

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**April 26, 2012**

Diane M. Fremgen  
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. 2011AP886**

**Cir. Ct. No. 2010CV326**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**EUGENE ROSENTHAL AND RIVERPLACE  
MARINA & YACHT CLUB, INC.,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**VILLAGE OF ASHWAUBENON AND VILLAGE OF  
ASHWAUBENON COMMUNITY DEVELOPMENT AUTHORITY,**

**DEFENDANTS-THIRD-PARTY  
PLAINTIFFS-RESPONDENTS,**

**v.**

**ASHWAUBENON BOARDWALK, LLC,**

**THIRD-PARTY DEFENDANT.**

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APPEAL from a judgment of the circuit court for Brown County:  
DONALD R. ZUIDMULDER, Judge. *Affirmed.*

Before Lundsten, P.J., Vergeront and Sherman, JJ.

¶1 PER CURIAM. Eugene Rosenthal and Riverplace Marina and Yacht Club, Inc. appeal a summary judgment that dismissed their multi-claim lawsuit against the Village of Ashwaubenon and the Village of Ashwaubenon Community Development Authority. Rosenthal advances several theories on which he believes the Village should be required to convey to him the title to a specific parcel of land. For the reasons discussed below, we reject each theory, and affirm the circuit court’s decision.

### BACKGROUND

¶2 This lawsuit concerns a parcel of land in a project to redevelop a marina along the Fox River. In October 2003, the Village entered into a development agreement with Ashwaubenon Boardwalk, LLC. Broadly speaking, the Village promised under the agreement to sell Boardwalk several parcels of land (some of which the Village already owned and others of which it would undertake to acquire) in exchange for Boardwalk’s promise to develop the property according to certain specifications. The Village retained the right to approve any assignment by Boardwalk of Boardwalk’s rights or obligations under the agreement or any conveyance of the subject properties.

¶3 In 2004, Rosenthal became interested in buying the marina. After extensive negotiations, Boardwalk agreed to sell Rosenthal the marina property to which the Village had already conveyed title, as well as a nearby parcel that the Village had not yet acquired that Rosenthal wanted to use for parking. Rosenthal discussed with the Village what remediation measures would need to be taken before the Village would convey the proposed parking parcel to Boardwalk, and the Village entered into a “general” agreement with Rosenthal regarding his

“participation in costs of the improvements.” The Village ultimately approved the sale of the marina to Rosenthal. However, due to ongoing condemnation proceedings, the Village had not yet conveyed the title to the potential parking parcel to Boardwalk when Boardwalk and Rosenthal closed on the sale of the marina in February 2005.

¶4 The Village finally acquired title to the potential parking parcel in December 2006. However, the Village refused to convey the title to Boardwalk because Boardwalk had not met its obligations under the development agreement.

¶5 Rosenthal eventually filed suit against Boardwalk, based in part on Boardwalk’s failure to obtain and convey title to the potential parking parcel. In that action, the circuit court reformed the marina sale contract to require Boardwalk to convey to Rosenthal title to a different parcel of property sufficient to accommodate 90 parking spaces, to perform whatever work was necessary to obtain title to the original potential parking parcel from the Village, and to provide Rosenthal with an easement over that parcel once acquired to provide access to the new parking parcel.

¶6 Not fully satisfied with the results of its suit against Boardwalk, Rosenthal then filed the present lawsuit seeking both damages and to obtain title to the original potential parking parcel directly from the Village. Rosenthal set forth ten causes of action, all of which were dismissed by the circuit court on summary judgment. Rosenthal renews nine of his ten claims on appeal. We will set forth additional facts relevant to each of the causes of action as necessary in our discussion below.

## STANDARD OF REVIEW

¶7 This court reviews summary judgment decisions de novo, applying the same methodology and legal standard employed by the circuit court. *Frost v. Whitbeck*, 2001 WI App 289, ¶6, 249 Wis. 2d 206, 638 N.W.2d 325. We first examine the pleadings to determine whether the complaint states a claim and the answer joins an issue of fact or law. *Id.* If an issue has been joined, we examine the parties' affidavits and other submissions to determine whether the movant has made a prima facie case for judgment and, if so, whether there are any material facts in dispute that would entitle the opposing party to trial. *Id.*; see also WIS. STAT. § 802.08(2) (2009-10).<sup>1</sup>

## DISCUSSION

¶8 The causes of action from Rosenthal's complaint that he discussed on this appeal are: (1) a declaration of interest in real estate; (2) conversion; (3) specific performance; (4) promissory estoppel; (5) implied duty of good faith; (6) interference with performance of a contract; (7) unjust enrichment; (8) quantum meruit; and (9) punitive damages. Since the parties do not dispute that the pleadings joined issue, we will proceed to consider whether the summary judgment materials show any material facts in dispute requiring trial on any of these causes of action.

¶9 First, Rosenthal seeks a declaration of his interest in the proposed parking parcel based upon the negotiated agreement he claims that he entered into

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

with the Village in order to obtain the Village's approval for the marina sale. However, although there are several references to a written agreement between Rosenthal and the Village in the deposition excerpts, the summary judgment materials do not appear to contain a copy of the agreement itself, and Rosenthal has not quoted the agreement's specific terms. We see nothing, for instance, documenting that Rosenthal's promise to pay for infrastructure costs was specifically linked to the conveyance of the potential parking property as opposed to other land conveyed in the marina sale, or that the previously specified preconditions on the conveyance of the potential parking property would be waived. In fact, there is at least one e-mail suggesting that Boardwalk would still be responsible for filling in land on the property to remediate contamination before the Village would convey title to Boardwalk, and that Rosenthal would then be responsible for grading and adding gravel or blacktop for his parking lot. Therefore, Rosenthal has failed to make a prima facie case that the Village ever promised or agreed to convey title to the proposed parking parcel directly to Rosenthal, whether in exchange for improvements or any other consideration.

¶10 Second, Rosenthal claims that the Village has improperly converted the subject property for its own use. However, the summary judgment materials show that the Village acquired title to the property by buying it from the estate of its former owner. Because Rosenthal is not now, and has never been, the title holder of the subject property, he has no basis to make a conversion claim.

¶11 Third, Rosenthal contends that he is entitled to specific performance of the development agreement. This claim is premised on the proposition that the Village's approval of the marina sale effectuated an assignment of the Village's promise to convey the proposed parking property from Boardwalk to Rosenthal. We note that this premise would appear to conflict with the ruling in the lawsuit

between Rosenthal and Boardwalk, which directed Boardwalk to fulfill its remaining obligations to the Village in order to obtain title. In any event, even assuming that an assignment of some of Boardwalk's rights and obligations under the development agreement had occurred, Rosenthal has not explained why the Village's promise to convey the proposed parking property would not be subject to the preconditions for the conveyance set forth in the Village's contract with Boardwalk.

¶12 Fourth, Rosenthal asserts that he is entitled to a conveyance of the title on a theory of promissory estoppel because the Village induced him to spend money on the marina project by the Village's promise to convey the potential parking property to Boardwalk and the Village's subsequent approval of Boardwalk's sale of the property to Rosenthal. However, the Village's promise to convey property to Boardwalk could not have been reasonably expected to induce Rosenthal to do anything because Rosenthal had not yet expressed interest in the project when the Village's promise was made. And, as we have already explained, there is nothing in the summary judgment materials showing that the Village made any specific promise to Rosenthal—either when approving the marina sale or at any other time—that it would convey the proposed parking property to him without the preconditions of the development agreement having been met.

¶13 Fifth, Rosenthal contends that the Village breached an implied duty of good faith in the performance of its obligations under the development agreement. Since Rosenthal was not a party to the development agreement, however, any duty of good faith would be owed to Boardwalk, not Rosenthal.

¶14 Sixth, Rosenthal argues that the Village's refusal to convey title interfered with Rosenthal's performance of a contract—namely, “being able to

market and offer convenient, adjacent parking to the marina members.” Again, since Rosenthal was not a party to the development agreement, he had no duty to perform anything under it. If Rosenthal is referring to a separate general agreement between him and the Village, he failed to provide sufficient information about the terms of such an agreement to support his claim.

¶15 Seventh, Rosenthal claims that the Village was unjustly enriched by increased tax revenues attributable in large part to Rosenthal’s contributions to the development project, including the construction of a yacht clubhouse pool, as well as by the infusion of money Rosenthal made to Boardwalk. Rosenthal cites no authority for the proposition that it is inequitable for a municipality to retain the benefit of tax revenues without paying the value thereof, and we do not see any logic in that proposition. The Village is not collecting tax revenues on the proposed parking parcel because the Village still holds title to it. If Rosenthal is paying increased taxes as a result of his contributions to the development project, that result flows from the fact that the value of Rosenthal’s property has increased, a benefit to him carrying with it the corresponding obligation to pay property tax commensurate with the value of his property. If the Village is collecting increased tax revenues from anyone else, Rosenthal has no claim to that money. And the Village is certainly not enriched, unjustly or otherwise, by any money Rosenthal paid to Boardwalk.

¶16 Eighth, Rosenthal claims that the Village “benefitted from the monies Rosenthal expended and ... should be responsible for the same” under a theory of quantum meruit. Rosenthal has not developed this argument on appeal by specifying what services he claims to have performed at the request of the Village that were not also for his own benefit as the marina owner, and what benefit other than increased tax revenues was conferred.

¶17 Finally, Rosenthal contends that he is entitled to punitive damages because the Village has acted maliciously and with intentional disregard for his rights by failing to fulfill its own obligations to provide infrastructure under the development agreement and by delaying conveyance of the title to the proposed parking property for five years. Aside from any question whether the Village is immune from liability for intentional torts, we again reiterate that Rosenthal was not a party to the development agreement. Therefore, any breach of that agreement was not a breach of Rosenthal's rights.

*By the Court.*—Judgment affirmed.

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



