COURT OF APPEALS
DECISION
DATED AND FILED

October 8, 2024

Samuel A. Christensen
Clerk of Court of Appeals

Appeal No. 2023AP1353 **Cir. Ct. No. 2019CV601**

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

CITY OF ABBOTSFORD,

PLAINTIFF-RESPONDENT,

V.

CHELT DEVELOPMENT, LLC AND LON H. WALDINGER,

DEFENDANTS-THIRD-PARTY PLAINTIFFS-APPELLANTS,

V.

DANIEL GRADY,

THIRD-PARTY DEFENDANT.

APPEAL from a judgment of the circuit court for Marathon County: MICHAEL K. MORAN, Judge. *Affirmed*.

Before Stark, P.J., Hruz and Gill, JJ.

¶1 PER CURIAM. Chelt Development, LLC and Lon H. Waldinger[1] appeal from a judgment awarding damages to the City of Abbotsford on the City's breach of contract claim against Chelt and dismissing Chelt's counterclaim against the City. Both the claim and the counterclaim arose out of a development agreement between the City and Chelt. For the reasons that follow, we conclude that the circuit court properly granted the summary judgment in favor of the City on both its claim and Chelt's counterclaim. Accordingly, we affirm.

BACKGROUND

¶2 Chelt owns commercial property located at 1011 East Spruce Street in Abbotsford, Wisconsin (hereinafter, the property). On January 4, 2010, the City and Chelt entered into an agreement for the purpose of developing the property into a shopping mall (hereinafter, the agreement). Section 3.2 of the agreement—titled "Required Improvements"[2]—provided that Chelt was to make certain improvements to the property. As relevant to this appeal, Chelt was to complete a hardware store build out by the end of 2010, a pharmacy drive-up window and mall parking lot entrance change also by the end of 2010 (hereinafter, the pharmacy window), and a hardware store/Dollar General loading dock extension

[1] Chelt Development, LLC is a Wisconsin limited liability company with its principal place of business located in Wausau, Wisconsin, and Lon H. Waldinger is the owner of Chelt. Accordingly, we will refer to Chelt and Waldinger collectively as "Chelt."

[2] "Required Improvements" was defined in Section 1.1(f) of the agreement as "those public improvements and work *required to be performed* by [Chelt] as specified under Article 3 of this [a]greement or elsewhere in this [a]greement." (Emphasis added.)

by the end of 2015 (hereinafter, the loading dock extension). Section 3.4 also required Chelt to obtain an irrevocable letter of credit in the amount of $50,000 and submit it to the City before January 1, 2016.

¶3 In consideration for the above actions, Section 4.1 of the agreement required the City to obtain a loan in the amount of $100,000 from the State of Wisconsin Trust Fund. Per the agreement, the $100,000 was to be provided to Chelt "for use on [r]equired [i]mprovements to the [p]roperty" and was to be paid back by Chelt "through tax increment generated from the improvements to the property."

¶4 On June 28, 2019, Daniel Grady, then-city administrator, sent Chelt a letter notifying Chelt that it was in breach of the agreement. Grady explained:

> To date, most of [the] items [on the required improvements list] were never completed by the end of 2016 as required by the [d]evelopment [a]greement. In addition, the City … was never repaid the $100,000.00. Finally, I can find no record of an irrevocable letter of credit in the amount of $50,000.00.

Grady's letter further instructed that Chelt was required to repay the $100,000 loan and that Chelt was required to pay the City a $50,000 penalty "or pay the tax increment shortfall for failing to make the required improvements by the end of 2016." Further, Chelt was responsible for "all attorney's fee's [sic] associated with [the] City's attempt to collect" on the agreement.

¶5 When Chelt failed to comply with the City's demands, the City commenced this lawsuit against Chelt. The City alleged claims for breach of contract and unjust enrichment based on Chelt's failure to perform under the agreement. Chelt responded with its own breach of contract counterclaim, asserting that the City's commencement of this litigation violated the agreement's

implied duty of good faith and fair dealing. Chelt also filed a third-party complaint against Grady, alleging a claim for civil conspiracy to interfere with prospective contracts based on Grady and the City "conspir[ing] to use information obtained under auspices of a business relationship with [Chelt] to drive business development away from the [p]roperty."

¶6 The City moved for summary judgment on its breach of contract and unjust enrichment claims. In that motion, the City alleged that it "performed its end of the [a]greement"—providing the $100,000 loan—but that Chelt "did not perform [its] obligations" by "not completing [r]equired [i]mprovements" and by being "unable or unwilling to provide any evidence that [it] ever obtained the [l]etter of [c]redit." As to its unjust enrichment claim, the City argued that Chelt spent approximately $200,000 less than it was obligated to under the agreement, "mak[ing] it unfair for Chelt … to retain the City's $100,000.00 without paying the value thereof."

¶7 Chelt opposed the City's motion. Aside from other defenses that are not relevant to this appeal, Chelt claimed that the City waived or excused Chelt's compliance with many of the agreement's terms, and therefore Chelt disputed that it was in default of the agreement. According to Chelt, it "kept in communication with the City through [its] point of contact," Jennifer Lopez, who was the City's clerk and treasurer. In an affidavit Chelt submitted with its response brief in opposition to the motion, Lopez explained that she communicated with the City's mayor, the city attorney, and the city council regarding the development of the property. Based on those conversations, Chelt claimed that Lopez told Chelt that the City agreed that the loading dock extension and the pharmacy window improvements were no longer required.

¶8 Chelt further asserted that it submitted a letter of credit to the City. Although Chelt did not introduce a copy of the letter of credit to the circuit court on summary judgment, Chelt points to Lopez's affidavit—where she confirmed that she was "aware that [Chelt] had delivered to the City a letter of credit"—as evidence of the letter's existence. Additionally, Lopez stated that "[w]hen [she] left her employment with the City …, the new [m]ayor requested that the file regarding the [d]evelopment [a]greement be placed on the [m]ayor's desk. [She] believe[d] that the letter of credit was part of the file at that time."[3]

¶9 Finally, Chelt objected to the affidavit of Josh Soyk—the then-interim city administrator—submitted by the City in support of its motion. The City then filed a second Soyk affidavit and an additional affidavit with its reply brief. As a result, Chelt wrote the circuit court to request oral argument at the summary judgment motion hearing. The court denied Chelt's request, and Chelt responded with a motion to strike the City's two reply affidavits.

¶10 The circuit court held a nonevidentiary hearing on the City's motion for summary judgment. The court also addressed Chelt's motion to strike after soliciting arguments from the parties, ultimately refusing to strike the City's reply affidavits. The court then issued an oral ruling, granting the City's motion for summary judgment on the breach of contract claim, dismissing the City's claim for unjust enrichment, and ordering further briefing on the issue of damages. Five

[3] Chelt suggests, without citation to the record, that Lopez also served as the city administrator. After Lopez's departure, Grady became the new city administrator. It was the City's position on summary judgment that the file contained no letter of credit and that the City never received a letter of credit.

months later, the court issued its decision as to damages. Both oral rulings were later memorialized in written orders.

¶11 Based on the circuit court's decision on the first summary judgment motion, the City filed a second motion for summary judgment, seeking dismissal of Chelt's breach of contract counterclaim. The City argued that the court had "already ruled that the City had a valid breach of contract claim … based in part on the failure of [Chelt] to timely make the required improvements." As a result, "the commencement of the lawsuit by the City as a matter of law cannot be 'bad faith'—the City was doing exactly what it was expressly authorized to do under the terms of the [a]greement."

¶12 Chelt opposed the City's second summary judgment based on "the factual differences in the parties' versions of events before, during, and after the enactment of the" agreement, which "preclude any grant of [s]ummary [j]udgment in this case." According to Chelt, "[t]he City, by and through its agent, made [Chelt] aware that [it was] not required to complete the improvements" to the property, and Chelt "relied upon those representations to [its] detriment, as to estop enforcement of the written terms of the" agreement. Chelt subsequently moved the circuit court, pursuant to WIS. STAT. § 806.07(1)(h) (2021-22),[4] to vacate its prior order granting summary judgment to the City.

¶13 The circuit court entered a written order denying Chelt's motion to vacate the court's prior order. The court's order also granted the City's second motion for summary judgment and dismissed Chelt's counterclaim. The court

[4] All references to the Wisconsin Statutes are to the 2021-22 version unless otherwise noted.

subsequently entered a judgment that awarded damages to the City and, again, dismissed Chelt's counterclaim. Chelt appeals.

DISCUSSION

¶14 "In reviewing the grant or denial of a summary judgment, we apply the same methodology as the circuit court and review de novo whether the circuit court properly granted or denied summary judgment." ***Kaitlin Woods Condo. Ass'n v. North Shore Bank, FSB***, 2013 WI App 146, ¶9, 352 Wis. 2d 1, 841 N.W.2d 562. Summary judgment is appropriate only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.*** "The well-established purpose of summary judgment procedure is to determine the existence of genuine factual disputes in order to 'avoid trials where there is nothing to try.'" ***Lodl v. Progressive N. Ins. Co.***, 2002 WI 71, ¶16, 253 Wis. 2d 323, 646 N.W.2d 314 (citation omitted).

¶15 On appeal, Chelt presents several issues for our consideration. For the reasons that follow, we reject each of Chelt's arguments.

I. Estoppel

¶16 Chelt's first argument is that the City should have been estopped from arguing a breach of the agreement because of the representations Lopez made to Chelt on the City's behalf. "There are four elements of equitable estoppel: (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; (4) which is to the relying party's detriment." ***Affordable Erecting, Inc. v. Neosho Trompler, Inc.***, 2006 WI 67, ¶33, 291 Wis. 2d 259, 715 N.W.2d 620. According to Chelt, when its "point-of-contact with the City agreed

that some of the improvements specified in the [d]evelopment [a]greement did not make sense, [Chelt] could reasonably rely on those representations." Chelt asserts that the City was aware that the pharmacy window and loading dock extension had become unnecessary, and the City did not allege any breach of the agreement on or before the deadline for performance set in the agreement.

¶17 The circuit court disagreed. Based on its review of the agreement, the court concluded that the evidence demonstrated that Chelt was in default. Specifically, Chelt failed to complete construction related to the pharmacy window and the loading dock extension, and it failed to provide the letter of credit. Importantly, the court stated that it considered the agreement "as the complete agreement" and that the City had not "given any modifications or waiver of that agreement at any time that would in any way change the nature of the agreement."

¶18 On appeal, Chelt faults the circuit court for failing to address Chelt's arguments "regarding the communications of the City (through Lopez)" as to the pharmacy window and the loading dock or the City's allegation that Lopez's communications were an invalid modification under the ultra vires doctrine.[5] Chelt cites ***Goebel v. First Federal Savings & Loan Ass'n of Racine***, 83 Wis. 2d 668, 677, 266 N.W.2d 352 (1978), in support of its position that "the failure to do something which the other party to the contract no longer considers necessary is not a breach, and the party for whose benefit a contract provision has been drafted always has the ability to waive that provision." Chelt asserts that it briefed the

[5] "Ultra vires" is defined as "[u]nauthorized; beyond the scope of power allowed or granted by a corporate charter or by law." *Ultra Vires*, BLACK'S LAW DICTIONARY (12th ed. 2024).

subject of contract law allowing for oral modifications, yet the court erred by not "distinguish[ing] the cited case law" or "even mention[ing] the word 'estoppel.'"

¶19 Section 7.9 of the agreement provides that "[t]his [a]greement contains the full understanding and entire agreement between the parties" and that "[t]he terms and conditions of this [a]greement may not be amended, nor any of its provisions waived, except by a writing executed by both parties." Additionally, Section 7.5 provides that "[n]o course of dealing between City and [Chelt] shall operate as a waiver of any of City's rights or any of [Chelt's] rights under this [a]greement…. No waiver shall be binding unless it is in writing and signed by one authorized to execute this [a]greement."

¶20 Nevertheless, as Chelt notes, parties to a written contract may amend the contract orally or by their conduct, even where those contracts require that a modification be in writing. *See* ***S&M Rotogravure Serv., Inc. v. Baer***, 77 Wis. 2d 454, 468-69, 252 N.W.2d 913 (1977). Further, waiver of a written contract's provision—such as a provision requiring that all amendments or modifications be in writing—may be shown by evidence of oral agreements between the parties or by the parties' conduct. *See* ***Royster-Clark, Inc. v. Olsen's Mill, Inc.***, 2006 WI 46, ¶¶21-32, 290 Wis. 2d 264, 714 N.W.2d 530.

¶21 Chelt does not present evidence of a written modification between the parties waiving Chelt's responsibility to complete the pharmacy window and the loading dock extension improvements. Instead, Chelt asserts that Lopez's affidavit provides competent evidence that the City excused performance of these improvements. Thus, without specifically stating as much, Chelt appears to be

arguing that Chelt and Lopez—the latter exercising authority on behalf of the City—executed an oral modification of the agreement.[6]

¶22 We conclude that no competent evidence in the record provides a basis for this court to conclude that there is a material issue of fact as to whether an oral amendment to the agreement was reached. Chelt admitted to signing the agreement, and it also admitted that it never executed a written modification of the agreement. Therefore, given Chelt's consent to the agreement's modification and waiver terms, Chelt must provide sufficient evidence showing a material issue of fact as to the existence of an alleged oral modification to establish reasonable reliance sufficient to avoid summary judgment. Chelt has failed to do so.

¶23 The extent of Chelt's "evidence" of an alleged modification to the agreement is Lopez's affidavit. On appeal, Chelt claims that the Lopez affidavit

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[6] The City protests, explaining that "Lopez never had any authority" with regard to negotiating and executing the agreement because "[t]hose things were only ever in the purview of the [c]ity [c]ouncil." *See* WIS. STAT. § 62.11(5). Further, the City presented affidavits stating that the city council never considered modifications to the agreement or consented to modifications through Lopez. Given that Lopez did not have this authority, argues the City, "Lopez[] was not a point of contact *on behalf of* the City," and, therefore, "[t]here is no way that Chelt … would have been able to *reasonably* rely upon representations by Lopez even if they had discussions."

In response, Chelt cites ***Village of McFarland v. Town of Dunn***, 82 Wis. 2d 469, 475, 263 N.W.2d 167 (1978), for the proposition that "[w]here … the power to make the contract is clearly vested in the municipality and the power may have been improperly or irregularly exercised by the municipality and its officers and agents, the doctrine of equitable estoppel is properly invoked." According to Chelt, as ***Village of McFarland*** "makes clear, the City's agent improperly or irregularly exercising the City's contracting power does not make the modification void under the ultra vires doctrine." *See* ***id.*** Chelt asserts that "the City placed Lopez in [a] position to speak on behalf of the City, and accordingly Chelt … had reason to believe Lopez as to what improvements were no longer necessary under the [d]evelopment [a]greement."

We do not address Chelt's argument related to Lopez's authority to act on behalf of the City for the reasons stated in the body of this opinion. *See infra* ¶¶22-25.

was based on personal knowledge, as demonstrated by Lopez's averment that she was employed as the City's clerk and treasurer for eighteen years (until April 2018). Lopez stated in her affidavit that she had frequent telephone conversations with Chelt and that the "contents of those conversations were shared with the [City's] [m]ayor, the [c]ity [a]ttorney, as well as the [c]ity [c]ouncil." Based on those conversations, Lopez averred that the City "consented" to Chelt not making the improvements required under the agreement.

¶24 Despite the above averments, we conclude that there is no evidence that either party waived the condition that modifications be made in writing. *See* ***S&M Rotogravure***, 77 Wis. 2d at 468-69; ***Allen & O'Hara, Inc. v. Barrett Wrecking, Inc.***, 898 F.2d 512, 518 (7th Cir. 1990) ("We divide this issue into two parts: whether there was sufficient evidence … to conclude that the written modification provisions were waived and whether an agreement to modify the contract … was supported by sufficient evidence."). Lopez's base assertion of "consent[]" does not establish the existence of a factual dispute regarding whether an agreement to modify the contract to remove certain required improvements was in fact reached. Beyond Chelt failing to make the required improvements, there is also no evidence that the parties intended to modify the agreement by their conduct.

¶25 Further, Lopez's affidavit itself is insufficient evidence of an oral modification because the circuit court correctly found that it could not rely upon her affidavit.[7] The court determined that the Lopez affidavit constituted hearsay and was inadmissible on summary judgment. However, it did so specifically in

[7] *See infra* ¶38 for a further discussion of the Lopez affidavit.

the context of Lopez's discussion of the letter of credit. We conclude that the statements in her affidavit, which relayed that she had conversations with "the [m]ayor, the [c]ity [a]ttorney, as well as the [c]ity [c]ouncil," were also hearsay because they were out-of-court conversations with those individuals offered for the truth of the matter asserted—i.e., her claim that "[t]he City consented" to Chelt not making the improvements. Thus, Lopez was conveying what she was told by those individuals, which Chelt is using to prove the existence of the oral modification. On appeal, Chelt does not argue that any exceptions to hearsay apply to the Lopez affidavit. Chelt provides no other evidence of any oral modification.

¶26 Accordingly, the circuit court did not err by concluding that Chelt breached its agreement with the City. Further, the court did not err by not addressing Chelt's estoppel argument because Chelt provided no admissible evidence in support of that claim.

II. Motion to vacate

¶27 Next, Chelt asserts that "a motion to vacate is an appropriate means to address an issue which could not be fully developed during summary judgment"; therefore, the circuit court erred by denying Chelt's motion to vacate under WIS. STAT. § 806.07(1)(h) because it considered the motion a relitigation of the court's prior rulings. (Formatting altered.) Generally, § 806.07 authorizes courts "to relieve parties from judgments, orders and stipulations." ***Sukala v. Heritage Mut. Ins. Co.***, 2005 WI 83, ¶9, 282 Wis. 2d 46, 698 N.W.2d 610. In particular, § 806.07(1)(h) "is a 'catch-all' provision allowing relief from judgment for 'any other reasons justifying relief.'" ***Sukala***, 282 Wis. 2d 46, ¶9. "Whether to grant relief from judgment under … § 806.07(1)(h) is a decision within the

discretion of the circuit court." ***Sukala***, 282 Wis. 2d 46, ¶8. "We will not reverse a discretionary determination by the [circuit] court if the record shows that discretion was in fact exercised and we can perceive a reasonable basis for the court's decision." ***Id.*** (citation omitted). "We look for reasons to sustain the circuit court." ***Id.***

¶28 Chelt's assertion of circuit court error is not persuasive. First, Chelt faults the court for citing ***Sukala*** for the proposition that WIS. STAT. § 806.07(1)(h) is not an avenue to relitigate claims. *See* ***Sukala***, 282 Wis. 2d 46, ¶20. Chelt argues that § 806.07(1)(h) "runs parallel to the appellate authority to reverse judgments under" WIS. STAT. § 752.35. Thus, Chelt asserts that "[w]here the [circuit] court failed to address the defenses raised"—i.e., estoppel—that is the equivalent of the real controversy not being fully tried or justice having been miscarried, and § 806.07 "gives the same [circuit] court a vehicle to re-address the issue." *See* ***Vollmer v. Luety***, 156 Wis. 2d 1, 7-8, 456 N.W.2d 797 (1990).

¶29 Chelt's argument on this point is based on a faulty premise. Although unclear, Chelt appears to assume that by stating that claims should not be relitigated under WIS. STAT. § 806.07(1)(h), the circuit court was also suggesting that it did not have the authority to reverse its prior summary judgment decision. That was not the case. As the court explained, it denied Chelt's motion to vacate because it "remain[ed] convinced that the original ruling on [the summary judgment] motion was correct."

¶30 "In exercising its discretion by determining whether it should grant relief from [a] judgment or stipulation, the circuit court should consider whether unique or extraordinary facts exist that are relevant to the competing interests of finality of judgments and relief from unjust judgments" as well as the factors

noted in ***Sukala***.[8] ***Sukala***, 282 Wis. 2d 46, ¶11. By determining that the summary judgment motion was properly decided and that none of Chelt's arguments provided a basis for disturbing the prior order, the circuit court also implicitly determined that the WIS. STAT. § 806.07(1)(h) factors did not weigh in Chelt's favor. Chelt has not demonstrated that it is a unique victim of circumstance. In essence, the success of Chelt's motion to vacate was based on the success of its estoppel argument, and, as determined above, Chelt presented no admissible evidence in support of that argument.

¶31 Chelt further argues that "[t]he equitable estoppel argument never received due consideration by the [circuit] court" because the court failed to allow oral argument; therefore, Chelt had no opportunity to address the arguments contained in the City's reply brief. However, as the court stated, "there is no entitlement to oral argument" for summary judgment motions. On appeal, Chelt does not cite any legal authority to the contrary.

¶32 The only mention of oral argument in WIS. STAT. § 802.08 provides that "[o]ral argument *permitted* on motions under this section may be heard as

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[8] The nonexhaustive list of factors includes:

> whether the judgment was the result of the conscientious, deliberate and well-informed choice of the claimant; whether the claimant received the effective assistance of counsel; whether relief is sought from a judgment in which there has been no judicial consideration of the merits and the interest of deciding the particular case on the merits outweighs the finality of judgments; whether there is a meritorious defense to the claim; and whether there are intervening circumstances making it inequitable to grant relief.

Sukala v. Heritage Mut. Ins. Co., 2005 WI 83, ¶11, 282 Wis. 2d 46, 698 N.W.2d 610 (citing ***State ex rel. M.L.B v. D.G.H.***, 122 Wis. 2d 536, 552-53, 363 N.W.2d 419 (1985)).

prescribed in [WIS. STAT. §] 807.13(1)." Sec. 802.08(7) (emphasis added). As the City argues, the use of the word "permitted" in the statute indicates that oral argument may be allowed or not. Further, the procedure under § 802.08 implicitly obligates the circuit court to evaluate the summary judgment motion on the basis of the *documentation* provided by the parties. For example, § 802.08(3) provides: "Supporting and opposing *affidavits* shall be made on personal knowledge and shall set forth such evidentiary facts as would be *admissible in evidence*." (Emphasis added.) Moreover, § 802.08(2) states that "judgment sought shall be rendered if the *pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits*, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Emphasis added.) Oral argument is not mentioned as a required consideration for summary judgment.

¶33 Accordingly, Chelt has failed to establish that the circuit court erroneously exercised its discretion by denying Chelt's motion to vacate the court's order on summary judgment under WIS. STAT. § 806.07(1)(h).

III. Admissibility of affidavits

¶34 Chelt next makes two arguments that the circuit court erred with regard to the submitted affidavits. Summary judgment affidavits "shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence." WIS. STAT. § 802.08(3). "On summary judgment, the party submitting the affidavit need not submit sufficient evidence to conclusively demonstrate the admissibility of the evidence it relies on in the affidavit." ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, ¶10, 324 Wis. 2d 180, 781 N.W.2d 503. Instead, the party need only make a prima facie showing as to the

admissibility of the evidence. ***Id.*** "If admissibility is challenged, the court must then determine whether the evidence would be admissible at trial." ***Id.*** Generally, we review the circuit court's evidentiary rulings for an erroneous exercise of discretion. *See* ***State v. Joyner***, 2002 WI App 250, ¶16, 258 Wis. 2d 249, 653 N.W.2d 290.

¶35 Chelt's first argument is that the circuit court impermissibly disregarded Lopez's affidavit with respect to the letter of credit. During its oral ruling on the City's first motion for summary judgment, the court expressed concerns regarding the Lopez affidavit. According to the court,

> I am at a loss as to why I'm not looking at a copy of [the letter of credit] in an affidavit. I understand in reading the affidavits that Jennifer Lopez indicated that one had been given, but there is … no information as to how, when, where it was delivered, who received it, what it looked like, who issued it or if there was a bank that issued it. There is absolutely no information on it ….

As a result, the court determined that there were no material issues of fact as to whether Chelt provided a letter of credit to the City as required by the agreement, concluding that the absence of the letter of credit was an additional breach of the agreement.

¶36 Chelt's subsequent motion to vacate argued that the circuit court improperly assessed Lopez's credibility on summary judgment. *See* ***Fortier v. Flambeau Plastics Co.***, 164 Wis. 2d 639, 665, 476 N.W.2d 593 (Ct. App. 1991) (explaining that on summary judgment, a circuit court "does not decide issues of credibility, weigh the evidence, or choose between differing but reasonable inferences from the undisputed facts"). The court explained in its written decision, however, that it "did not improperly assess the credibility of [the Lopez] affidavit;

the [c]ourt simply concluded that it did not meet the summary judgment standard of admissible evidence."

¶37 In particular, Chelt identifies Lopez's statement in her affidavit that "[w]hen [a]ffiant left her employment with the City of Abbotsford, the new [m]ayor requested that the file regarding the [d]evelopment [a]greement be placed on the [m]ayor's desk. Affiant believes that the letter of credit was part of the file at that time." This statement, argues Chelt, informs the court "how Lopez was aware of the delivery of a [l]etter of [c]redit," "that the City kept a file on the [d]evelopment [a]greement," that Lopez "would have been the custodian of that file," and that Lopez was familiar with the contents of the file as well as "with a tangible letter of credit document" in the file. Lopez also stated that she was "aware that [Chelt] had delivered to the City a letter of credit, issued by an area financial institution," which, according to Chelt, demonstrates "knowledge of an actual document, as well as a material dispute of fact as to whether the City had a copy of the same."

¶38 We conclude that the circuit court properly determined that the Lopez affidavit was not admissible on summary judgment to prove the existence of the letter of credit. As it pertains to WIS. STAT. § 802.08(3), "'[p]ersonal knowledge' means that the witness perceived the event through one of the five senses and is able to accurately narrate the memory of those perceptions in court." 7 DANIEL D. BLINKA, WISCONSIN PRACTICE SERIES: WISCONSIN EVIDENCE § 602.1 (4th ed. 2008). Although Lopez averred that she had personal knowledge of the letter, there is no basis in her affidavit to conclude that to be the case. *See* ***Gemini Cap. Grp., LLC v. Jones***, 2017 WI App 77, ¶24, 378 Wis. 2d 614, 904 N.W.2d 131 (concluding that an affiant's statement "[s]imply declaring he [or she] has personal knowledge of … events does not make it so"). Lopez's affidavit

is nonspecific, lacking in detail, and appears to be intentionally vague. That Lopez was "aware" that the letter, "issued by an area financial institution," had been "delivered" and that she "believe[d]" that the letter was in the file is insufficient. Further, the affidavit lacked any additional facts that could assist the court to reasonably infer that Lopez saw and read the letter of credit such that she had personal knowledge of the actual document.

¶39 Chelt's second argument asserts that the circuit court erred by failing to address Chelt's challenge to the Soyk affidavit and by considering one of the documents attached to that affidavit.[9] Chelt objected to the Soyk affidavit on the basis that the City appeared to be "attempting to use the affidavits to provide business records, thereby overcoming a hearsay exception" under WIS. STAT. § 908.03(6). In reply, the City argued that it was "not limited to a single method to admit evidence" and asserted that its exhibits were admissible under WIS. STAT. §§ 909.015(7), 910.05, or 908.03(8), which the City called "non-onerous exceptions related to public records."

¶40 On appeal, Chelt faults the circuit court for failing to reference Chelt's challenge to the Soyk affidavit in its oral ruling. According to Chelt, it challenged the Soyk affidavit because "the document itself [was] so barebones as

[9] The document attached to the Soyk affidavit that the circuit court said it considered was the actual agreement, which was also attached to the complaint and, thereby, incorporated by reference.

to lack any personal knowledge as to why the documents would qualify for admissibility under any of the standards suggested by the City in its reply brief."[10]

¶41 We conclude that the circuit court did not err by considering the Soyk affidavit and the attached exhibits. As an initial matter, by noting its consideration of the documents attached to the affidavit, the court implicitly denied Chelt's challenge to the admissibility of the Soyk affidavit. Further, as noted above, evidentiary rulings are reviewed for an erroneous exercise of discretion; "[w]hether a statement is admissible under a hearsay exception, however, is a question of law that we review de novo." *See* ***Joyner***, 258 Wis. 2d 249, ¶16.

¶42 We agree with the City that the Soyk affidavit is admissible under either the requirements for authentication of public records, WIS. STAT.

[10] We pause here to note that, within their briefing, the parties argue regarding the applicability of ***Palisades Collection LLC v. Kalal***, 2010 WI App 38, 324 Wis. 2d 180, 781 N.W.2d 503, to this case. The City asserts that ***Palisades*** has no applicability because "***Palisades*** stands for the extremely narrow proposition that the hearsay exception for business records is not established when the only affiant concerning the records in question lacks personal knowledge of how the records were made." *See* ***Central Prairie Fin. LLC v. Yang***, 2013 WI App 82, ¶9, 348 Wis. 2d 583, 833 N.W.2d 866. The City states that because it "never utilized the business records hearsay exception in this case, … ***Palisades*** is not relevant here."

In contrast, Chelt faults the City for attempting to distinguish ***Palisades***' "requirement of personal knowledge." According to Chelt, it cited ***Yang*** and ***Palisades*** as "example[s] of what it looks like to demonstrate personal knowledge in an affidavit." Accordingly, Chelt argues that "[t]he City's call for the [c]ourt to abandon ***Palisades*** cannot be heeded[.]"

We conclude that ***Palisades*** and ***Yang*** are both factually distinct from the issues in this case, such that neither case controls the result here. At the very least, ***Palisades*** and ***Yang*** both involved the hearsay exception for business records, which is not at issue in this case. *See* ***Palisades***, 324 Wis. 2d 180, ¶22; ***Yang***, 348 Wis. 2d 583, ¶13.

§ 909.015(7),[11] or the public records and reports exception to hearsay, WIS. STAT. § 908.03(8).[12] The Soyk affidavit begins by stating "that the foregoing [information] is true and correct," that Soyk is "currently serving as the [i]nterim [a]dministrator for" the City, and that Soyk is "competent to testify to the facts contained herein, the same being based on my personal knowledge and within my current duties for the City." The exhibits attached to the Soyk affidavit included a copy of the agreement, a copy of the June 2019 letter Grady sent to Chelt regarding the breach of the agreement, and a copy of a table of tax increment calculations pertaining to the property. The Soyk affidavit concludes by stating:

> The City has no copy of a letter of credit from Chelt …. The City has no record of ever having received a letter of credit from Chelt …. It is the City's position that Chelt … never provided the City with the letter of credit that is required under the [a]greement.

¶43 On appeal, Chelt fails to develop a persuasive argument for why the Soyk affidavit fails to satisfy either WIS. STAT. §§ 909.015(7) or 908.03(8). As to

[11] WISCONSIN STAT. § 909.015(7) operates as an illustration that conforms to the requirements of WIS. STAT. § 909.01, which provides that "[t]he requirements of authentication or identification as a condition precedent to admissibility are satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Section 909.015(7) includes "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept."

[12] WISCONSIN STAT. § 908.03(8) excludes from the hearsay rule

> [r]ecords, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (a) the activities of the office or agency, or (b) matters observed pursuant to duty imposed by law, or (c) in civil cases and against the state in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness.

§ 909.015(7), Chelt simply claims that "Soyk never identifies any of the documents as being 'authorized by law to be recorded or filed,' or being from a public office where the item would have been kept." Given the broad definition of public "[r]ecord" found elsewhere in our state statutes, *see* WIS. STAT. § 19.32(2), and the fact that we agree with the City that Soyk identified both the "public office"—i.e., the City of Abbotsford—and how his duties with the City (as interim administrator) relate to the exhibits, the City has properly established that these documents are "from the public office where items of this nature are kept," *see* § 909.015(7). Further, to the extent that Chelt is suggesting that certain "magic words" are required under the statute, we disagree. *Cf.* ***Nutt v. Union Pac. R.R. Co.***, No. 2018AP695, unpublished slip op. ¶18 (WI App Feb. 5, 2019) ("[A]n affidavit 'need not contain an explicit recital of personal knowledge when it can be reasonably inferred from its contents that the material parts thereof are within the affiant's personal knowledge.'" (citation omitted)).[13]

¶44 Chelt also asserts, in a conclusory manner, that the Soyk affidavit "fails to fall within any of the subsections of" WIS. STAT. § 908.03(8). Chelt's only purported basis for this claim, however, is that "the City tacitly admits [this problem] by describing the documents as 'obviously related to the official business of the [C]ity' rather than one of the actual subsections from the hearsay exception for public records and reports." We need not address undeveloped arguments. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646-47, 492 N.W.2d 633 (Ct. App. 1992). Nevertheless, at the very least, we conclude that the exhibits

[13] An unpublished opinion that is authored by a member of a three-judge panel and issued on or after July 1, 2009, may be cited for its persuasive value. WIS. STAT. RULE 809.23(3)(b).

qualified as records, statements, or data compilations of the city administrator setting forth the activities of that office. *See* § 908.03(8). The only foundation needed to introduce a public record under this hearsay exception is that the record "be identified by a competent witness." *See* ***State v. Keith***, 216 Wis. 2d 61, 77, 573 N.W.2d 888 (Ct. App. 1997). Consequently, the circuit court did not err by considering the Soyk affidavit and the attached exhibits.

IV. Affidavits filed in reply

¶45 Next, Chelt argues that the circuit court erred by denying its motion to strike the City's affidavits filed with its summary judgment reply brief. In denying the motion, the court explained that the affidavits were "information that this [c]ourt routinely would allow in to respond to … the summary judgment motion, and [the court] th[ought] that … more information is better than no information as long as it" is admissible.

¶46 Under the circumstances, we conclude that the circuit court did not erroneously exercise its discretion by denying Chelt's motion to strike.[14] Initially, we note that Chelt fails to cite any legal authority that *clearly* prohibits reply affidavits. Instead, Chelt crafts an argument based on the *absence* of words in the scheduling order: "[t]he [circuit] court [s]cheduling [o]rder clearly allows for 'responsive affidavits and briefs' but omits affidavits from the materials permitted to be filed in reply." Further, Chelt asserts that although FED. R. CIV. P. 56 is "virtually identical" to WIS. STAT. § 802.08, "[t]he insertion of a time limit for the

[14] Although it appears that Wisconsin courts have not specifically addressed our standard of review, elsewhere, a court's response to a motion to strike a summary judgment affidavit is treated as a matter of discretion. *See* ***Balderston v. Fairbanks Morse Engine Div. of Coltec Indus.***, 328 F.3d 309, 318 (7th Cir. 2003).

non-movant to file affidavits … substantially modifies the procedure with respect to materials filed in reply."

¶47 Chelt's arguments are not persuasive because they ignore the plain language of WIS. STAT. § 802.08. Section 802.08 does not prohibit reply affidavits. The statute does, however, allow circuit courts flexibility with regard to affidavits. For example, § 802.08(3) provides that "[t]he court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits." Section 802.08(4) further provides:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the motion for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

¶48 In its reply brief before this court, Chelt admits that "the [circuit] court could also have ruled on the motion to strike by allowing additional time for Chelt … to reply to the reply argument and reply affidavits." Chelt suggests, however, that because the court "ruled on the motion to strike immediately prior to giving its oral ruling on summary judgment, additional time to respond was never permitted."

¶49 Significantly, Chelt never requested an opportunity to respond to the City's reply affidavits. Although Chelt wrote the circuit court to request oral argument at the summary judgment motion hearing, it did not specify that its request was in response to the City's reply affidavits. Accordingly, Chelt's claim that the court *could have* allowed Chelt to respond to the City's reply affidavits is not well taken because Chelt failed to request that option—an option clearly authorized under WIS. STAT. § 802.08—as an alternative to striking the

affidavits.[15] Because Chelt failed to request the opportunity to respond, the court believed that Chelt was merely seeking to strike the affidavits and was unaware that allowing Chelt to respond to the affidavits would have been a sufficient resolution. *See* ***Bishop v. City of Burlington***, 2001 WI App 154, ¶8, 246 Wis. 2d 879, 631 N.W.2d 656 ("A litigant must raise an issue with sufficient prominence such that the [circuit] court understands that it is being called upon to make a ruling."). Thus, the court did not erroneously exercise its discretion by denying the motion to strike the City's affidavits.

V. Cumulative effect of errors

¶50 Chelt's next argument is that the circuit court erroneously exercised its discretion by failing to grant relief pursuant to WIS. STAT. § 806.07(1)(h) on the additional basis that "the cumulative effect of these errors"—i.e., the errors addressed above—"is greater than the sum of its parts."[16] Chelt's arguments as to this issue rely on the success of its previous arguments. Given that we determined

[15] Given Chelt's failure to request an opportunity to respond to the City's reply affidavits, we will not further address Chelt's hypothetical arguments regarding its concerns with the statutory filing deadline.

[16] In its reply brief, Chelt also observes that the City "for the first time on appeal, asserts a breach of contract due to an 'assignment for benefit of creditors'" as an additional basis to affirm the circuit court. Chelt asserts that we should not address that issue because it was raised for the first time on appeal.

Chelt misunderstands how the forfeiture doctrine works. We generally will not consider issues raised by *an appellant* for the first time on appeal, so that we do not "blindside [circuit] courts with reversals based on theories which did not originate in their forum." ***Schonscheck v. Paccar, Inc.***, 2003 WI App 79, ¶¶10-11, 261 Wis. 2d 769, 661 N.W.2d 476. However, as a matter of judicial efficiency, *a respondent* may advance for the first time on appeal any argument that would sustain the circuit court's ruling. ***State v. Holt***, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985), *superseded by statute on other grounds*, WIS. STAT. § 940.225(7). Nevertheless, as we affirm the circuit court for other reasons, we need not address the City's additional breach of contract argument.

above that these arguments fail to establish that the court erred, we conclude that the court's denial of Chelt's § 806.07(1)(h) motion is supported by the record and does not constitute an erroneous exercise of discretion. We agree with the circuit court that "the fact that [Chelt] disagree[s] with the [c]ourt's summary judgment ruling does not, in and of itself, create the unique or extraordinary circumstances required to invoke the [c]ourt's equity power and disturb the finality of a previously[ ]issued judgment."

VI. Damages

¶51 Finally, Chelt appeals the circuit court's award of damages. We review the court's decision regarding the enforceability of a liquidated damages clause as a mixed question of fact and law. *See* ***Wassenaar v. Panos***, 111 Wis. 2d 518, 525, 331 N.W.2d 357 (1983). We will uphold a circuit court's factual findings unless clearly erroneous, ***Phelps v. Physicians Ins. Co. of Wis.***, 2009 WI 74, ¶34, 319 Wis. 2d 1, 768 N.W.2d 615, but whether the facts satisfy a particular legal standard is a question of law that we determine independently, *see* ***Stern ex rel. Mohr v. DHFS***, 222 Wis. 2d 521, 528, 588 N.W.2d 658 (Ct. App. 1998). The interpretation of a contract and whether ambiguity exists in a contract are also questions of law that we review de novo. ***Osborn v. Dennison***, 2009 WI 72, ¶33, 318 Wis. 2d 716, 768 N.W.2d 20; ***Mattheis v. Heritage Mut. Ins. Co.***, 169 Wis. 2d 716, 720, 487 N.W.2d 52 (Ct. App. 1992).

¶52 The parties' agreement addressed the remedies available in the event of a breach. Section 3.3—titled "Personal Guarantee"—provides:

> (a) [Chelt] personally guarantees that it will complete the [r]equired [i]mprovements as identified in Section 3.2 within the required completion dates. In the event [Chelt] fails to make the required improvements within the identified timelines, [Chelt] may either:

> 1. Personally pay the City [$50,000]. In the event the City is required to initiate legal action to collect this sum, the City shall be entitled to recover its actual attorney fees and costs associated with collecting. The City also shall be paid twelve percent (12%) interest on the outstanding sum until paid in full; or
>
> 2. Pay tax increment shortfall payments, which shall be the difference between [$18,429] and the actual tax increment generated and payable in 2018. Tax increment shortfall payments shall be paid concurrently with property taxes due and owing on the [p]roperty.[17]

¶53 Based on its review of the agreement's terms and the parties' additional briefing, the circuit court concluded that the agreement was not ambiguous. It determined that of the two options available under Section 3.3(a), "the time ha[d] passed for number 2" because "[a]ny payments or any desire to do the tax incremental short-fall payment under number 2 would be untimely and would not be an option at this time." Accordingly, the court concluded that option number one—liquidated damages—"was a remedy in this case."

¶54 Chelt argues that Section 3.3 of the agreement "is unambiguous as to [Chelt] being given the right to elect between the options presented."[18] Accordingly, Chelt asserts that it "elected to be allowed to make tax increment shortfall payments, as the process was described in the document sent by the City alongside the demand letter." Given the differences between the amount of the

[17] Section 6.2 also states that the "City may avail itself of any or all remedies at law or equity" and that Chelt "is personally liable to the City for [$50,000] in the event that all [r]equired [i]mprovements are incomplete, or any other breach of this [a]greement occurs."

[18] Chelt also seems to suggest, however, that the agreement is ambiguous because Chelt was confused about "the '[d]eveloper' being given the right to elect between the options presented." Nevertheless, beyond expressing its confusion and stating that it would have acted differently had it understood the remedies provision, Chelt's arguments are conclusory and do not persuade us that the agreement was reasonably susceptible to more than one interpretation. *See* ***Chapman v. B.C. Ziegler & Co.***, 2013 WI App 127, ¶2, 351 Wis. 2d 123, 839 N.W.2d 425.

payment options, Chelt claims that "any rational party" would have chosen the payment option under Section 3.3(a)2. Ultimately, Chelt concludes that the circuit court's "interpretation is entirely inconsistent with the document and with the facts of record."

¶55 We conclude that Chelt fails to demonstrate that the circuit court's award of damages was in error. Based on the plain language of the agreement, we agree that in the event of a breach, Chelt had two options under Section 3.3(a). We also agree that option two was not exercised. Section 3.3(a) states that Chelt guaranteed that it would "complete the [r]equired [i]mprovements … within the identified timelines," of which the last was in 2016. Section 3.3(a)2. then provides that if Chelt fails to complete the improvements by those deadlines, it "may" make a payment calculated using "the actual tax increment generated and *payable in 2018*" and that it "shall be paid concurrently with property taxes due and owing on the [p]roperty." (Emphasis added.) Although Chelt argues that it *would have* chosen option two, the fact remains that Chelt never exercised that choice of remedy.

¶56 As the City observes, "[a]fter receiving notice of default and demand for performance[,] Chelt … paid [its] standard real estate property tax bill and *nothing else*." It is undisputed that Chelt never paid any amount to the City for a tax increment shortfall payment. To the extent Chelt now claims that "nothing in the [City's default letter] identified a tax increment shortfall payment" for it to pay, Chelt knew the terms of the agreement it signed and, by receipt of the letter, knew that the City believed it to be in breach of that agreement. Under those circumstances, Chelt could have taken steps to cure the default and/or investigate the tax increment shortfall payment amount, but it failed to do so and cannot now

claim ignorance as a result. Thus, we see no error in the circuit court's application of Section 3.3(a) to award liquidated damages to the City.

By the Court.—Judgment affirmed.

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