

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

September 30, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2615

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

DONALD HALL and DENNIS HALL,

Plaintiffs-Appellants,

v.

AL NOWAK TRUCKING, INC.,

Defendant-Respondent.

APPEAL from a judgment of the circuit court for Wood County:
LEWIS MURACH, Judge. *Affirmed.*

Before Dykman, P.J., Vergeront, J., and Robert D. Sundby, Reserve
Judge.

PER CURIAM. Donald and Dennis Hall appeal from a summary judgment dismissing their complaint against Al Nowak Trucking, Inc. The issue is whether the proofs submitted on summary judgment reasonably allow an inference that would allow the Halls to recover on their breach of contract claim. We conclude that no such inference is available, and therefore affirm.

In July 1991, Donald applied to the Town of Sigel Zoning Committee for a conditional use permit to dig a pond on the Halls' property. Al Nowak, the owner of Al Nowak Trucking, was present when the committee granted Donald a permit, valid until the end of 1992. In June 1992, Donald and Nowak entered into the following written contract:

AGREEMENT

June 12, 1992

Between: Donald Hall, 4331 Finup Lane, Wisconsin Rapids, WI

and

Al Nowak Trucking, Inc., Wisconsin Rapids, WI

Subject: Excavation of material to construct pond for the above mentioned.

Price: Any materials taken from site will be considered Al Nowak property in exchange for the construction of the pond. Any topsoil left over will be birmed [sic] or spread on slopes of pond.

Haul Road & Fences: Al Nowak Trucking, Inc. will maintain roads. Materials needed to upgrade roads other than what Nowak traffic has damaged, will be landowner's responsibility. If fencing is required, landowner will provide and Nowak will maintain.

Length of Agreement: Five years with first option on a five year renewal. It is understood that Nowak will be the only contractor on the site.

In June 1993, Donald asked the zoning committee to extend the permit until the end of 1993. With Nowak again present, the committee approved the extension. When it became apparent to Donald later on in 1993 that Nowak would not complete the pond that year, he chose not to request another extension. Instead, he hired another firm to finish the job and commenced this action, alleging that Nowak breached the contract.

Nowak moved for summary judgment, relying solely on the "Length of Agreement" clause of the contract, providing for a five-year term with an option for a five-year renewal. In his opposing affidavit, Donald averred that the purpose of the five-year term was to permit Nowak to store the excavated soil on the Hall property for that period of time. The time for constructing the pond was governed by a separate contract, according to Donald, in which Nowak had agreed to meet the permit expiration date in December 1993. After the trial court denied summary judgment, Nowak asked for reconsideration based on subsequent testimony by Donald taken on deposition. After reviewing that testimony, the trial court reversed its earlier ruling and granted summary judgment. This appeal ensued.

If the material facts are undisputed or the only reasonable inferences that may be drawn from them favor one party, the issue is properly resolved on summary judgment. *Heck & Paetow Claims Serv., Inc. v. Heck*, 93 Wis.2d 349, 356, 286 N.W.2d 831, 834 (1980). We decide summary judgment in the same manner as the trial court and without deference to its decision. *In re Cherokee Park Plat*, 113 Wis.2d 112, 115-16, 334 N.W.2d 580, 582-83 (Ct. App. 1983).

The trial court properly granted Nowak's summary judgment motion. Because the parties' written contract did not expressly state that it incorporated all terms of the agreement, parole evidence was admissible to show the existence of a supplemental contract, providing additional terms. *See In re Spring Valley Meats, Inc.*, 94 Wis.2d 600, 607-08, 288 N.W.2d 852, 855 (1980). However, Donald's deposition testimony established that there was no supplemental agreement governing the time for completing the pond. Donald testified that an agreement existed because Nowak attended the zoning committee meetings and knew he only had until December 1993 to complete the pond. But Donald has no proof that Nowak affirmatively agreed to meet that deadline, even though he knew of it.

[T]he conduct of the parties must be such as to disclose sufficiently the fact that the minds of the parties have met, or have been in accord, on all the terms of the agreement One party cannot make an agreement; both parties must, by their words or actions, assent to the agreement.

WIS J I—CIVIL 3010. Without evidence that Nowak manifested an agreement to complete the pond by the permit expiration date, the Halls cannot prevail on their claim that Nowak breached their contract.

By the Court.—Judgment affirmed.

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