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**DISTRICT II**

March 4, 2020

To:

Hon. Jennifer Dorow  
Circuit Court Judge  
Waukesha County Courthouse  
515 W. Moreland Blvd.  
Waukesha, WI 53188

Gina Colletti  
Clerk of Circuit Court  
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You are hereby notified that the Court has entered the following opinion and order:

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2018AP2167

City of Waukesha v. Stephen Green (L.C. #2018CV126)

Before Neubauer, C.J., Gundrum and Davis, JJ.

**Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).**

Stephen Green appeals pro se from an amended order granting summary judgment to the City of Waukesha and enjoining him from permitting more than one family as defined in the Waukesha Municipal Code to reside in his single-family dwelling. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18). We affirm.

The City of Waukesha brought an action against Green alleging that his use of his single-family home violated applicable provisions of the Waukesha Municipal Code as follows:

the home, a single-family dwelling, is occupied by multiple persons such that it is being used as a multiple-family dwelling in violation of the code; Green failed to obtain approval for the change in use of the dwelling from a single family to a multiple-family home; Green did not obtain a building permit for the alterations he made to the dwelling to create separate living areas for multiple families; and Green's use of the dwelling constituted a public nuisance. The City sought a permanent injunction against Green's continued violations of the code.

Each party sought summary judgment. In support of its summary judgment motion, the City submitted the affidavit of a city building inspector who inspected Green's property in July 2017. The affidavit averred that the dwelling is subject to a single-family dwelling certificate of occupancy. On each level of the dwelling, the inspector saw hallways with two doors each. Green stated that a family of five lived behind one of the doors, and he lived behind another of the doors. The inspector found that the dwelling contained separate living units, and Green was not cohabiting with the family of five in their separate living unit. Based on the inspector's observations, the inspector opined that the property contained a total of four separate living units each featuring a kitchen, bedrooms, living room and bathroom.

Green submitted two affidavits on summary judgment. Green's own affidavit stated that he resides in the dwelling and maintains a single household with the family of five. Two adult members of the family of five averred that they reside in a single household with each other and with Green.

At the motion hearing, the circuit court concluded that Green did not establish the existence of material factual issues. Among the undisputed facts were that more than one family was residing in the dwelling (Green and an unrelated group of five other persons who themselves

constituted a family group), only one family could reside in the dwelling, and the circumstances at the dwelling constituted a public nuisance. The circuit court imposed a forfeiture and costs of \$5647 and permanently enjoined Green from permitting more than one family unit to reside in the dwelling. Green appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

On appeal, Green argues that genuine issues of material fact should have precluded summary judgment. We disagree. Green's affidavits did not counter the factual showing made in the city building inspector's affidavit about the circumstances at the dwelling or that the dwelling's certificate of occupancy is for a single-family dwelling, i.e., a building to be "occupied by one family." WAUKESHA, WIS., WISCONSIN MUNICIPAL CODE § 22.05(69) (2015). Section § 22.05(69) defines "family" as follows:

One or more persons related by blood, adoption or marriage; or a group of no more than three adults regardless of relation; who live, sleep, and eat together, maintaining a single household unit. A group of more than three adults who are not related by blood, adoption or marriage shall be deemed a family if necessary to comply with applicable Federal or State law. Related by adoption, as used herein, includes foster children.

*Id.*

Green's affidavits merely parroted the above definition of "family." Parroting that language did not put in dispute the building inspector's detailed description of the modifications

Green made to the dwelling and how the dwelling was being used. In his brief opposing the City's summary judgment motion, Green elaborated on the nature of his cohabitation with the family of five in the dwelling, claiming that they live, eat and sleep together and maintain a single-household unit. The circuit court properly ignored the factual assertions in Green's brief that were not supported by an affidavit. The party opposing summary judgment must affirmatively counter with evidentiary materials demonstrating a factual dispute. *Dawson v. Goldammer*, 2006 WI App 158, ¶¶30-31, 295 Wis. 2d 728, 722 N.W.2d 106. When the party opposing summary judgment fails to respond or raise an issue of material fact, summary judgment can be rendered on that basis alone. See *Bank of Two Rivers v. Zimmer*, 112 Wis. 2d 624, 632, 334 N.W.2d 230 (1983). Because Green did not raise issues of material fact, the circuit court properly granted summary judgment to the City.

Green next argues that his equal protection rights were violated by the circuit court's interpretation of "family" in WAUKESHA, CODE §22.05(69). He also argues that §22.05(69) is unconstitutionally overbroad. Green did not raise either of these issues in the circuit court. We will not address these issues for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21 (2017-18).

IT IS FURTHER ORDERED that this summary disposition order will not be published.

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*Sheila T. Reiff*  
*Clerk of Court of Appeals*