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DISTRICT II

January 20, 2021

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You are hereby notified that the Court has entered the following opinion and order:

2019AP2090

Claudia B. Bauer v. Wisconsin Energy Corporation
(L.C. #2016CV215)

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

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).

Claudia B. Bauer appeals the dismissal of her suit against Wisconsin Energy Corporation (We Energies), which sought, among other things, the removal of a gas line that runs through her property providing gas to her neighbor. The gas line was installed thirty-six years earlier with permission from the former owner of Bauer's property. Based upon our review of the briefs and

record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2017-18).¹ We affirm the circuit court's dismissal of Bauer's action.²

In 1980, Bauer's predecessor in title gave We Energies³ permission to install a gas line through the property so as to provide gas service to her neighbor. Bauer purchased the property in July 1996. We accept Bauer's assertion that she did not know of the gas line when she bought the property. In 2014, We Energies asked Bauer for permission to install a larger diameter pipe to serve the neighbor's home. Bauer refused and commenced this action against We Energies seeking to have the pipe removed from her property.⁴

We Energies filed a motion for summary judgment, arguing that pursuant to WIS. STAT. § 893.28(2), We Energies acquired a prescriptive right to continued use of Bauer's property to provide gas service to her neighbor based on its continued use for more than ten years. The circuit court granted We Energies' motion, concluding that We Energies held a prescriptive easement under § 893.28(2) and that notice to Bauer was not required under the statute.

¹ All references to the Wisconsin Statutes are to the 2017-18 version.

² Bauer appeals from the circuit court's judgment, entered September 19, 2019, recognizing a prescriptive easement on Bauer's property in favor of We Energies, granting We Energies' motion for summary judgment, and dismissing Bauer's claims against We Energies. Bauer also appeals from the court's order denying reconsideration, entered October 4, 2019. We affirm both the judgment and order.

³ The gas line was installed by Wisconsin Southern Gas Company, Inc., which was eventually merged into We Energies. We will refer to the companies as We Energies throughout.

⁴ Bauer's claims also included nuisance, trespass, and property damage against other defendants. None of those issues are raised on appeal.

Bauer filed a motion for reconsideration, arguing that the lack of notice to Bauer resulted in an unconstitutional taking. In Bauer’s reply, she alleged, for the first time, disputed issues of fact related to the purported “[r]elocation” of the gas line in 1984 and 1989, arguing that there was a second gas line installed and “the only gas line approved by [the former owner] no longer exists.” The court denied Bauer’s motion for reconsideration, reasoning that “even assuming that there is a second pipe in the ground” its existence is not newly discovered evidence as the pipe is “not an additional pipe or an additional grant of permission per se, it’s more a continuation of the old permission that was clearly granted.” The court also concluded that Bauer lacked standing to challenge the constitutionality of the alleged taking.

The circuit court entered a judgment in favor of We Energies, dismissing Bauer’s action, and an order denying Bauer’s motion for reconsideration. Bauer appeals.

On appeal, Bauer maintains that the circuit court erred in granting summary judgment to We Energies based on its reading of WIS. STAT. § 893.28(2) and in concluding, on reconsideration, that the “second pipe” would have no impact on the prescriptive easement vis-à-vis § 893.28(2).⁵ Bauer argues that the statute requires “continuous use”; thus, the prescriptive easement could not vest until ten years after the new gas line was installed. We disagree.

⁵ We review a summary judgment decision de novo, applying the same methodology as the circuit court. *Koepsell’s Olde Popcorn Wagons, Inc. v. Koepsell’s Festival Popcorn Wagons, Ltd.*, 2004 WI App 129, ¶2, 275 Wis. 2d 397, 685 N.W.2d 853. A circuit court’s decision on a motion for reconsideration is reviewed by the court for an erroneous exercise of discretion. *Id.*, ¶6. To prevail on the motion, the movant must show either newly discovered evidence or establish a manifest error of law or fact. *Id.*, ¶44.

WISCONSIN STAT. § 893.28(2) provides in pertinent part:

(2) *Continuous use of rights in real estate of another for at least 10 years* by a domestic corporation organized to furnish telegraph or telecommunications service or transmit heat, power or electric current to the public or for public purposes, by a cooperative association organized under [WIS. STAT.] ch. 185 or 193 to furnish telegraph or telecommunications service, or by a cooperative organized under ch. 185 to transmit heat, power or electric current to its members, *establishes the prescriptive right to continue the use*, except as provided by [WIS. STAT. §] 893.29.

(Emphasis added.) We addressed prescriptive easements in *Williams v. American Transmission Co.*, 2007 WI App 246, ¶15, 306 Wis. 2d 181, 742 N.W.2d 882, explaining that our legislature has concluded that if a utility has continuously used rights in property of another for at least ten years, then prescribing a right to continue that use is consistent with sound public policy. We made clear that “[b]y omitting any requirement that a use be ‘adverse’ ..., the legislature indicated that the elements for ‘adverse’ use under § 893.28(1) are not necessary for prescriptive rights under § 893.28(2)” and that the statute negates any attempt to withdraw permissive use after the ten-year period has passed. *Williams*, 306 Wis. 2d 181, ¶¶8-9.

In our case, We Energies was granted the “use of rights” in the property in 1980, and We Energies has continued that use for thirty-six years. *See* WIS. STAT. § 893.28(2). As the gas line on Bauer’s property was permissibly installed in 1980 and has been in continuous use since its installation, a prescriptive easement clearly exists on Bauer’s property. Bauer’s motion for reconsideration (based upon Bauer’s discovery of a “second pipe”) does not change our analysis. Even if a second pipe exists, we agree with the circuit court that it was a “continuation of the old permission,” i.e., continuation of “use of rights.” As to Bauer’s lack of notice argument, we conclude that no notice was necessary by operation of law. Section 893.28(2) requires only

“continuous use” of the property, and the prescriptive right had already vested at the time Bauer purchased her property, regardless of the existence of a “second pipe.”

Bauer’s constitutional claims on reconsideration are also meritless. Bauer argues that the grant of a prescriptive easement under the circumstances of this case amounts to an unconstitutional taking under both the United States and Wisconsin Constitutions. We agree with the circuit court that “Bauer lack[ed] standing to challenge the constitutionality of this taking even if there was one,” as any claim would have been that of her predecessor in interest. *See Riley v. Town of Hamilton*, 153 Wis. 2d 582, 585-86, 451 N.W.2d 454 (Ct. App. 1989).

Upon the foregoing reasons,

IT IS ORDERED that the judgment and order of the circuit court are summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

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

Sheila T. Reiff
Clerk of Court of Appeals