COURT OF APPEALS
DECISION
DATED AND FILED

May 6, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2626 **Cir. Ct. No. 2013FO477**

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

CITY OF SUPERIOR,

PLAINTIFF-RESPONDENT,

V.

GLEN CUNNINGHAM,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Douglas County: KELLY J. THIMM, Judge. *Affirmed*.

¶1 HOOVER, P.J.[1] Glen Cunningham, pro se, appeals a summary judgment entered in favor of the City of Superior. He also appeals an order

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

denying his motion for reconsideration. Cunningham argues the City is not entitled to summary judgment and the circuit court failed to properly apply the summary judgment methodology. He also objects to the forfeiture amount. We affirm.

BACKGROUND

¶2 The underlying dispute between the City and Cunningham began in 2012. In May 2012, while inspecting another property, the City's code compliance officer, Tammy Thibert, observed Cunningham's residence had "large pieces of curled and flaking paint … readily visible from the public street." City of Superior Ordinance § 104-272 provides:

> All exterior surfaces, including but not limited to, doors, door and window frames, cornices, porches, trim, balconies, decks and fences shall be maintained in good condition. Exterior wood surfaces, other than decay-resistant woods, shall be protected from the elements and decay by painting or other protective covering or treatment. *Peeling, flaking and chipped paint shall be eliminated and surfaces repainted.* All siding and masonry joints as well as those between the building envelope and the perimeter of windows, doors, and skylights shall be maintained weather resistant and water tight. All metal surfaces subject to rust or corrosion shall be coated to inhibit such rust and corrosion and all surfaces with rust or corrosion shall be stabilized and coated to inhibit future rust and corrosion. Oxidation stains shall be removed from exterior surfaces. Surfaces designed for stabilization by oxidation are exempt from this requirement.

CITY OF SUPERIOR, WIS. ORDINANCES § 104-272 (emphasis added).

¶3 Based on the exterior's chipped and peeling paint, Thibert began issuing notices to Cunningham to correct the violation. When Cunningham failed to correct the violation after three notices, Thibert began issuing citations. She

issued four citations to Cunningham in 2012, and he was found guilty on each citation. These citations are not at issue in this case.

¶4 In 2013, Thibert continued her practice of routinely inspecting Cunningham's property. She performed inspections on March 20, March 27, April 10, and April 30, 2013. Each time she noticed no improvement and photographed the property. She also issued a citation to Cunningham after each inspection for his continued violation of City of Superior Ordinance § 104-272. These citations are at issue in this case.

¶5 Cunningham filed a written answer in response to each citation. In each answer, Cunningham pleaded not guilty. He then identified other properties in the City that he believed violated the ordinance. He made assertions that the ordinance was unconstitutional, the City's enforcement amounted to an unlawful taking, and the City's enforcement was arbitrary and capricious. He also made statements such as the house was his personal residence and not used for commercial or rental use, "paint is not stain, and stain is not paint," "siding is commonly understood as a different product than shingles," "cedar shingles are known as a decay resistant wood," and the appearance of his house "expresses my personal political and moral convictions on more than one issue."

¶6 Cunningham then served a set of interrogatories on the City. The interrogatories asked, among other things, about the City's authority to enforce the ordinance, why the City enforced the ordinance against him, and the ordinance's history. The City responded to Cunningham's interrogatories, and the interrogatories were filed with the court on May 8, 2013.

¶7 On June 6, 2013, the City moved for summary judgment. In support of its motion, the City attached an affidavit from Thibert as well as photographs of

the exterior of Cunningham's property. The City argued it was entitled to summary judgment because the photographs clearly depicted peeling paint, which was prohibited by City of Superior Ordinance § 104-272.

¶8 In response, Cunningham filed an affidavit in which he made numerous averments. For example, Cunningham averred the City made misrepresentations to the court; the City's ordinance was unreasonably vague; other properties in the City violated the ordinance; his residence was not used for commercial or rental purposes; the City's actions constituted a taking; the City was acting in an arbitrary and capricious manner; it was his personal choice that his residence remain unpainted; his home expressed his personal political and moral convictions; cedar shingles are known as a decay-resistant wood; the condition of his home's exterior existed before the City adopted the ordinance; the City does not "require[] surfaces, once painted, to remain painted"; and the weather has been such that he has been unable to come into compliance.

¶9 After each party made arguments at the summary judgment motion hearing, the circuit court granted summary judgment in favor of the City. The court determined there was no genuine issue of material fact and the City established it was entitled to judgment as a matter of law. In making its determination, it acknowledged that Cunningham had attempted to raise some defenses, such as the ordinance was unconstitutional, the City was not properly exercising its police powers, and the City's actions amounted to a taking. However, the court stated these defenses could not defeat the City's motion because they were simply unsupported conclusory allegations.

¶10 Cunningham moved for reconsideration. The circuit court denied his motion. He appeals.

DISCUSSION

¶11 On appeal, Cunningham renews his argument that the City is not entitled to summary judgment and the circuit court erred in applying the summary judgment methodology. We review a grant of summary judgment de novo using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶12 "The purpose of the summary judgment procedure is to avoid trials when there is nothing to try." ***Tews v. NHI, LLC***, 2010 WI 137, ¶42, 330 Wis. 2d 389, 793 N.W.2d 860. When determining whether a party is entitled to summary judgment, we first examine the complaint to determine if it states a claim, and then the answer to ascertain whether it presents a material issue of fact. ***Brownelli v. McCaughtry***, 182 Wis. 2d 367, 372-73, 514 N.W.2d 48 (Ct. App. 1994). If they do, we then look to the moving party's affidavits to determine if a prima facie case for summary judgment has been established. ***Id.*** If it has, we then examine the opposing party's affidavits to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. ***Id.***

¶13 Applying this methodology to this case, we first observe that the City alleged Cunningham violated its ordinance by failing to remedy the peeling paint on his house's exterior. Cunningham answered and through his answer denied these allegations, thus presenting a material issue of fact.

¶14 The City then moved for summary judgment, arguing there was no genuine issue of material fact. It showed through Thibert's affidavit and photographs that the paint was peeling on the exterior of Cunningham's residence

and had been peeling since May 2012 despite three notices and four previous citations. It argued it was entitled to judgment as a matter of law because the peeling paint showed Cunningham's residence continued to violate City of Superior Ordinance § 104-272, which prohibits peeling paint.

¶15 We conclude the City made a prima facie case for summary judgment by establishing through the photographs and Thibert's affidavit that there was no genuine issue of material fact as to whether the paint on Cunningham's residence was peeling. The exterior condition of Cunningham's residence is contrary to City of Superior Ordinance § 104-272, which provides that exteriors must remain in good condition and that "[p]eeling, flaking and chipped paint shall be eliminated and surfaces repainted." *See* CITY OF SUPERIOR, WIS. ORDINANCE § 104-272.

¶16 Cunningham, nevertheless, argues the City failed to make a prima facie case because it failed to "identify" the allegations he raised in his answer and failed to make a factual showing to defeat his defenses. However, to the extent the City did not acknowledge the factual allegations Cunningham made in his answer, it seems apparent that these facts were not vital to the City's claim and therefore they were not genuine issues of material fact. At the summary judgment hearing, the City argued Cunningham's legal arguments in support of his purported defenses were conclusory. The City properly made a prima facie case for summary judgment.

¶17 Because the City made a prima facie case for summary judgment, we turn to Cunningham's response to the City's summary judgment motion. To defeat the City's summary judgment motion, Cunningham needed to establish the existence of disputed issues of material fact requiring trial, convince us there are

competing reasonable inferences leading to opposite results, or establish that the law does not support the City's claim even on the undisputed facts. *See* ***Gray v. Marinette Cnty.***, 200 Wis. 2d 426, 435, 446, 546 N.W.2d 553 (Ct. App. 1996).

¶18 Cunningham's affidavit, however, does not show the existence of any genuine issues of material fact that would defeat the City's claim. Although Cunningham alleges facts in his affidavit—i.e., the length of time he lived at his residence, that his residence is not used for commercial or rental purposes, that other buildings in the City violate the ordinance, and so forth, these facts do not put into dispute any material fact as to whether the paint on Cunningham's exterior was peeling. To the extent Cunningham included these facts to support a legal defense to these citations, the significance of these facts is lost when they are not tied to such a defense.[2]

¶19 Further, the legal conclusions Cunningham avers in his affidavit are not "facts," and these conclusory statements do not establish that the City is not entitled to judgment as a matter of law. As the circuit court recognized, Cunningham's averments such as the ordinance is unconstitutional, that the City is engaged in an unlawful taking, or that the City is acting arbitrarily and

[2] We observe that, on appeal, Cunningham attempts to develop some of these facts into various legal defenses. For example, in his answer and in his affidavit, Cunningham stated simply that he has "cedar shingles" and "cedar shingles are known as a decay resistant wood." On appeal, he argues that, because the exterior of his house is covered in cedar shingles, and because cedar shingles are a decay-resistant wood, the ordinance does not apply to him. He asserts the ordinance does not apply to him because, although the ordinance prohibits peeling paint, the ordinance also states decay-resistant wood does not need a protective covering. Cunningham, however, does not show where in the record this defense was raised, and we will not consider this argument for the first time on appeal. *See* ***Gruber v. Village of N. Fond du Lac***, 2003 WI App 217, ¶27, 267 Wis. 2d 368, 671 N.W.2d 692 (Although the court engages in summary judgment review de novo, we need not address arguments raised for the first time on appeal.).

capriciously, are simply conclusory legal statements that needed to be supported by legal argument.

¶20 Cunningham, nevertheless, appears to object to the premise that he needed to develop a legal argument in support of his legal defenses. He takes issue with the circuit court's statements that if he wanted to allege the ordinance was unconstitutional, the court needed something other than a conclusory statement, and that he bore the burden of proving the ordinance unconstitutional beyond a reasonable doubt. Cunningham argues the circuit court erred because he is the nonmoving party and the City, as the moving party, bears the burden of proof.

¶21 The City's "burden of proof" in a summary judgment motion is to set forth "proof" in the form of evidentiary facts that would be admissible at trial that show there is no genuine issue of material fact. *See* WIS. STAT. § 802.08(3). The City did this. The City is not required to prove evidentiary facts to defeat Cunningham's conclusory legal assertions. Once the moving party makes a prima facie case for summary judgment, a nonmoving "party may not rest upon the mere allegations or denials of the pleadings," but must come forward with evidence supporting those allegations. *See* ***id.***

¶22 In short, the City made a prima facie showing that it was entitled to summary judgment. Cunningham's response, in turn, failed to establish the existence of disputed issues of material fact requiring trial, convince us there were competing reasonable inferences leading to opposite results, or establish the law did not support the City's claim even on the undisputed facts. *See* ***Gray***, 200 Wis. 2d at 435, 446. Accordingly, we conclude the City is entitled to summary judgment. *See* WIS. STAT. § 802.08(2).

¶23 Cunningham, however, next suggests summary judgment was inappropriate because the circuit court "had not allowed [a] fair opportunity to complete discovery" and did not care whether discovery was complete at the time of the summary judgment hearing. However, the record reflects that the City responded to Cunningham's interrogatories, and the interrogatories were filed in the circuit court on May 8, 2013. The City then filed its summary judgment motion on June 6, 2013. Cunningham filed his affidavit in response to the City's summary judgment motion on June 25, 2013. On July 2, 2013, Cunningham asked the court for more time so that he could complete additional discovery. The circuit court gave Cunningham more time, and it scheduled the summary judgment motion for August 26, 2013. Although Cunningham filed a motion to compel discovery on the day of the summary judgment hearing, which alleged the City failed to sufficiently answer two of the interrogatory questions from May, the fact that the court did not delay the summary judgment hearing at this time does not by itself establish that the court did not allow a "fair opportunity to complete discovery." Cunningham does not offer any explanation as to why the court's decision to hold the summary judgment hearing despite his last-minute motion to compel was erroneous, and we will not consider his argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not consider undeveloped arguments).

¶24 Cunningham next argues that summary judgment may not have even been available in this case. In support, he cites ***State v. Ryan***, 2012 WI 16, 338 Wis. 2d 695, 809 N.W.2d 37. In that case, our supreme court held summary judgment procedure is not permitted in forfeiture actions for violations of WIS. STAT. ch. 30 (relating to navigable waters, harbors, and navigation). ***Ryan***, 338 Wis. 2d 695, ¶¶1, 69. The court reached that determination by analyzing the

statutes that govern the prosecution of ch. 30 violations, WIS. STAT. §§ 23.50-23.85. ***Ryan***, 338 Wis. 2d 695, ¶¶60, 63. The court determined that, because the §§ 23.50-23.85 statutory schedule did not expressly authorize summary judgment, and because the court could not reconcile the relevant procedural statutes with summary judgment procedure, summary judgment was unavailable for ch. 30 forfeiture actions. ***Ryan***, 338 Wis. 2d 695, ¶¶60, 63, 69.

¶25 Here, Cunningham tells us simply that, based on ***Ryan***, "[I]t is open for the court to hold that summary judgment is not available in this municipal ordinance/forfeiture action." This argument is undeveloped, and we will not consider it further. *See* ***Pettit***, 171 Wis. 2d at 646.

¶26 Finally, Cunningham objects to the forfeiture amount. He argues the court erroneously assessed him twice for the same day because the second and third citations both identify March 27 as a violation date. He also argues he was erroneously assessed court costs[3] four times, even though the cases were consolidated. He states "[t]he court's conduct is that the days of violation or costs imposed are beneath the court's dignity to direct." (Capitalization omitted.) Cunningham, however, provides no record citation showing where he raised his assertions that he was improperly assessed twice for the same day and that he was subject to excess court costs, and where the court refused to consider his arguments. Accordingly, we need not consider his arguments on appeal. *See* ***State v. Huebner***, 2000 WI 59, ¶¶10-12, 235 Wis. 2d 486, 611 N.W.2d 727 (arguments raised for the first time on appeal need not be considered).

[3] Cunningham refers to these only as "court costs," but they also include statutory surcharges. *See* WIS. STAT. § 814.75.

¶27 In any event, the City responds that, although there was an error in the way one of the citations was written, Cunningham was not assessed twice for the same day. The City states that the four citations represent forty-one different days of violation and, at a daily $100 forfeiture rate, Cunningham was properly assessed $4,100. Cunningham responds there are only forty-one days of violation if one counts March 27 twice. We disagree. We observe the four citations represent a time period starting, and including, March 20, 2013, and continuing through, and including, April 29, 2013. This time period constitutes forty-one days; therefore, Cunningham was not assessed twice for the same day.

¶28 As for Cunningham's claim of excess court costs, Cunningham offers no legal argument or legal authority in support of his assertion that costs and surcharges may be imposed on only one of the citations because the underlying cases were consolidated. We will not consider his argument further. *See* ***Pettit***, 171 Wis. 2d at 646.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.