COURT OF APPEALS
DECISION
DATED AND FILED

October 1, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1157 **Cir. Ct. No. 2013SC3476**

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

KILBOURN WOODS HOMEOWNERS ASSOCIATION, INC.,

PLAINTIFF-RESPONDENT,

V.

VALARIA BROOKS,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Kenosha County: DAVID M. BASTIANELLI, Judge. *Reversed and cause remanded with directions.*

¶1 GUNDRUM, J.[1] Valaria Brooks appeals pro se from a judgment of the circuit court following the court's grant of Kilbourn Woods Homeowners

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

Association, Inc.'s (Kilbourn) motion for reconsideration. Because Kilbourn's legal action was untimely under the terms of the Declaration for Kilbourn Woods (Declaration), we reverse and remand for dismissal of the complaint.

Background

¶2 In August 2013, Kilbourn filed this small claims action against Brooks for nonpayment of homeowners association dues. Following a court trial, the circuit court found that the Declaration, which contained the dues requirement, was not brought to Brooks' attention prior to her entering into the contract for the purchase of her home and, as a result, she was not liable for the association dues. The court entered judgment in favor of Brooks.

¶3 Kilbourn moved for reconsideration and submitted additional evidence purporting to show that Brooks knew or should have known the property she purchased was subject to the terms of the Declaration. While the motion for reconsideration was pending, Brooks filed a Motion for Plea of Autrefois Acquit, arguing that the court should consider Kilbourn's request for reconsideration to constitute double jeopardy and therefore reject it.

¶4 After hearings on the motion for reconsideration, the circuit court granted the motion and entered judgment in favor of Kilbourn. Brooks appeals.

Discussion

¶5 The circuit court treated Kilbourn's motion for reconsideration as a motion to reopen. Whether treated as a motion for reconsideration or to reopen, we review the circuit court's decision for an erroneous exercise of discretion. ***Koepsell's Olde Popcorn Wagons, Inc. v. Koepsell's Festival Popcorn Wagons, Ltd.***, 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853 (motion for

reconsideration); ***Kovalic v. DEC Int'l***, 186 Wis. 2d 162, 166, 519 N.W.2d 351 (Ct. App. 1994) (motion to reopen). Under this standard, we examine the record to determine if the circuit court "employed a process of reasoning in which the facts and applicable law are considered in arriving at a conclusion based on logic and founded on proper legal standards." ***Rohde-Giovanni v. Baumgart***, 2003 WI App 136, ¶5, 266 Wis. 2d 339, 667 N.W.2d 718 (quoting ***Murray v. Murray***, 231 Wis. 2d 71, 78, 604 N.W.2d 912 (Ct. App. 1999)).

¶6 We interpret contract language, however, independently of the circuit court. ***Estate of Kriefall v. Sizzler USA Franchise, Inc.***, 2012 WI 70, ¶14, 342 Wis. 2d 29, 816 N.W.2d 853. Ordinary contract rules apply to the interpretation of contracts such as the Declaration in this case. *See* ***Solowicz v. Forward Geneva Nat'l, LLC***, 2010 WI 20, ¶34, 323 Wis. 2d 556,780 N.W.2d 111. Our ultimate goal is "to determine and give effect to the parties' intention." ***Id.*** (citation omitted).

¶7 Brooks claims that she does not owe money to Kilbourn because (1) the association "didn't exist, therefore no contract existed and no money should have been collected"; (2) double jeopardy protections prevent the court from reconsidering its decision and finding for Kilbourn; and (3) the circuit court incorrectly read a determinative clause in the Declaration provision related to the assessment, resulting in the court erring because "the case should not have proceeded because [Kilbourn] had missed its window of opportunity," i.e., the time had passed for it "to file for judgment on the money."

¶8 The first two issues are nonstarters. On the first issue, Brooks claims Kilbourn did not exist because it had been inactive for several years and "therefore no contract existed and no money should have been collected." Brooks

does not cite to any law in support of this claim of error and the claim is completely undeveloped; therefore, we will not address it. *See* ***ABKA Ltd. P'ship v. Board of Review***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) (we do not address undeveloped arguments).

¶9 On the second issue, Brooks claims that the circuit court erred in rejecting her double jeopardy claim "on the singular fact that it was a civil case and no crime had been committed." The circuit court did not err.

> The Double Jeopardy Clauses protect a person against three types of action: (1) subsequent prosecution for the same offense after acquittal; (2) subsequent prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. In each of these scenarios, it has been our long-standing interpretation, as well as that of the U.S. Supreme Court, that the Double Jeopardy Clause protects against subsequent *criminal* prosecutions. Consequently, if we conclude that one of the actions in question is civil and does not impose a criminal punishment, our double jeopardy analysis ends there.

State v. Rachel, 2002 WI 81, ¶20, 254 Wis. 2d 215, 647 N.W.2d 762 (citations omitted); *see also* ***Hudson v. United States***, 522 U.S. 93, 96 (1997). This is a civil lawsuit by one private party against another private party and in no way involves criminal punishment. The Double Jeopardy Clauses of the state and federal constitutions simply do not apply.

¶10 On the third issue, Brooks claims that Kilbourn's action is barred because it was not brought within six months from when the unpaid assessment was due. Here, she gains traction. Article 7.03 of the Declaration reads in relevant part:

> 7.03 NON-PAYMENT OF CHARGES: Any charge which is not paid to the Association when due shall be deemed delinquent. Any Charge which is delinquent for thirty (30) days or more shall bear interest at the rate of

> eighteen percent (18%) per annum or the maximum rate permitted by law, whichever is less, from the due date to the date when paid. *After sixty (60) days, but not more than 6 months, from the due date of the assessment the Association may* (i) *bring an action* against the Owner personally obligated to pay the Charge *to recover the Charge* (together with interest, costs and reasonable attorney's fees for any such action, which shall be added to the amount of the Charge and included in any judgment rendered in such action), and (ii) enforce and foreclose any lien which it has or which may exist for its benefit…. (Emphasis added.)

¶11 In its response brief, Kilbourn rewrites some of the operative language in this provision as follows: "the Association *may* (i) bring an action against the Owner personally … *and* (ii) enforce … any lien…." It then claims the two-to-six month window for bringing an action does not apply in this case because "Kilbourn is not bringing an action *to* enforce and foreclose any lien in this matter." (Emphasis added.) Kilbourn misreads the provision. The actual language of the provision does not say that (i) applies to actions "to enforce and foreclose any lien," as Kilbourn creatively writes, but instead the plain language says that the relevant actions are those "to recover the charge," here "the assessment." Thus, under the Declaration's plain language, an action such as this one, which is "against the Owner … to recover the charge," must be brought "[a]fter sixty (60) days, but not more than 6 months, from the due date of the assessment," just as it reads.[2]

[2] We also note that Article 6.08 of the Declaration states:

> 6.08 PAYMENT OF ASSESSMENTS: Assessments levied by the Association shall be collected from each Owner by the Association and shall be a lien on the Owner's Lot *and also shall be a personal obligation of the Owner* in favor of the Association, all as more fully set forth in Article Seven. (Emphasis added.)

¶12 Citing to neither the record nor case law, Kilbourn asserts that "Article 7.03 was intended to advise the homeowners of the requirements contained in WIS. STAT. § 779.70(4), relating to the filing and foreclosure of maintenance liens." Kilbourn cites to no language in the Declaration indicating that this is the intent behind Article 7.03, nor have we found any. We will not speculate on such an intent which was not clearly included in the Declaration.

¶13 Kilbourn next claims that "the term 'may' is used in Article 7.03 indicating it is permissive, but not required [and that n]othing in Article 7.03 indicates Kilbourn has waived its right to collect past due assessments if it does not bring an action within six months of the assessment due date." Kilbourn's reading distorts the plain language of the provision. While Kilbourn is correct that Article 7.03 uses the term "may"—indicating it is permitted to bring an action—Kilbourn ignores preceding language which clearly identifies the parameters for exactly *when* Kilbourn may bring an action. According to the plain language, an action to "recover the Charge" may be brought "[a]fter sixty (60) days, *but not more than 6 months*, from the due date of the assessment." (Emphasis added.) Thus, while the language permitted Kilbourn to bring an action to collect charges between two to six months from the due date of the assessment, it also, by clear implication, does not permit such an action to be brought later than six months after the due date.

¶14 Kilbourn criticizes such a reading of this Declaration provision, saying that with such a reading, "Kilbourn would be required to bring lawsuits every year against all homeowners that failed to pay their assessments or completely waive its right to collect said assessments." If that is the result of such a reading, that result comes from the drafting of the provision.

¶15 Lastly, Kilbourn claims that, even if the two-to-six month window of Article 7.03 does apply to this lawsuit, Kilbourn may nonetheless still bring this action pursuant to Article 7.06 of the Declaration, which reads:

> 7.06 OTHER REMEDIES OF THE BOARD: In addition to or in conjunction with the remedies set forth above, to enforce any of the provisions contained in this Declaration or any rules and regulations adopted hereunder the Board may levy a fine or the Board may bring an action at law or in equity by the Association against any person or persons violating or attempting to violate any such provision, either to restrain such violation, require performance thereof, to recover sums due or payable or to recover damages or fines, and against the land to enforce any lien created hereunder; and failure by the Association or any Owner to enforce any provision shall in no event be deemed a waiver of the right to do so thereafter.

It claims that this provision "clearly shows Kilbourn intended to preserve its right to bring … actions against homeowners who violated the provisions of the Declaration even when Kilbourn chose not to enforce Article 7.03 and foreclose on the homeowners properties." We disagree.

¶16 The rules of contract interpretation teach that a specific provision addressing a matter trumps a general provision. *See* ***Thomsen-Abbott Constr. Co. v. City of Wausau***, 9 Wis. 2d 225, 234, 100 N.W.2d 921 (1960) (specific contract provisions take precedence over general provisions). Here, Article 7.03 is very specific that the window during which Kilbourn could "bring an action against the Owner … to recover the Charge (together with interest, costs and reasonable attorney's fees for any such action ….)" was "[a]fter sixty (60) days, but not more than 6 months[] from the due date of the assessment." The language of Article 7.06 is much more general and provides no specific or conflicting language regarding *when* an action to recover charges may or must be filed. Indeed, we are required to harmonize provisions of a contract where possible, *see* ***Isermann v.***

MBL Life Assurance Corp., 231 Wis. 2d 136, 153-54, 605 N.W.2d 210 (Ct. App. 1999), and observe that the language of Article 7.06 could all still have meaning while adhering to the two-to-six month window identified in Article 7.03. On the other hand, Kilbourn's reading of Article 7.06 would effectively nullify the specific language limiting the filing of actions to recover an overdue charge to six months after the assessment was due. *See* ***id.*** at 153. Article 7.06 does not trump the two-to-six month provision of Article 7.03.

¶17 It is undisputed that Kilbourn did not bring this action within the two-to-six month window from "the due date of the assessment."[3] Accordingly, we must reverse the judgment of the circuit court and direct the circuit court to dismiss Kilbourn's complaint and enter judgment in favor of Brooks.

By the Court.—Judgment reversed and cause remanded with directions.

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

[3] Kilbourn filed the complaint in this action on August 30, 2013. Neither party contests that the complaint was filed more than six months after the most recent assessment due date. Additionally, a representative of the current management company testified at the January 9, 2014 court trial to the timing and amount of all of the assessments charged to Brooks, and Kilbourn's trial exhibits support this testimony. Exhibit P-4 notes that through January 1, 2012, each annual assessment was applied on January 1 of that assessment year. Exhibit P-3 notes that on January 1, 2013, "Association Dues (01/2013)" were added to previous assessment charges due and owing by Brooks on the "CondoOwnerLedger" maintained by the management company. Accordingly, the most recent due date for the assessment of charges to Brooks appears to be January 1, 2013, which places the August 30, 2013 filing of the complaint outside the two-to-six month time period provided in Article 7.03.