COURT OF APPEALS
DECISION
DATED AND FILED

August 26, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP2304 **Cir. Ct. No. 2013CV2177**

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

CHAN LEE AND C. LEE DEVELOPMENT LLC,

PLAINTIFF-RESPONDENT,

V.

STATE OF WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Waukesha County: PATRICK C. HAUGHNEY, Judge. *Affirmed*.

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

¶1 PER CURIAM. This case arises from a dispute over the planned removal of a driveway connecting a highway and commercial property in the city of Waukesha. The Wisconsin Department of Transportation (DOT) appeals a grant of summary judgment in favor of Chan Lee and C. Lee Development, LLC

(collectively, Lee). The DOT contends that summary judgment should have been granted in its favor instead because (1) Lee failed to exhaust his administrative remedies before filing suit; and (2) the driveway at issue is not an irrevocable compensable property right but rather a temporary connection subject to permitting and revocation by the DOT. We reject the DOT's arguments and affirm.

¶2 Lee is the owner of commercial property located at 1851 East Moreland Boulevard and United States Highway (USH) 18 in Waukesha. There, he operates a business, JK Lee Black Belt Academy. The property has three driveway entrances: one on the north side from USH 18 and two on the south side from Paramount Drive.

¶3 In 2009, the DOT announced a project involving the reconstruction of USH 18 from Manhattan Drive in Waukesha to Interstate 94. As part of the project, Lee's USH 18 driveway connection will be removed for safety reasons. The DOT informed Lee of its intent to remove the driveway without eminent domain proceedings and the payment of just compensation.

¶4 A subsequent title search revealed that Lee's USH 18 driveway connection stemmed from a 1983 quit claim deed. That deed was drafted by the DOT and granted the previous owner of the property:

> The right to one private driveway, to be constructed pursuant to the provisions of Section 86.07(2), Wisconsin Statues, between USH 18 and the lands of the grantees ….
>
> The purpose of this instrument is to authorize one private driveway in lieu of two residential access points reserved to the grantees in that certain instruments recorded in Volume 1037 of Deeds, page 133 as Document 653195 in the office

> of the Waukesha County Register of Deeds, which access points will be released by granters [sic] by deed.[1]

¶5 Lee provided a copy of this quit claim deed to the DOT and asked it to reconsider its position. The DOT initially did so, pledging to compensate Lee for the "value associated with this access rights acquisition." However, two years later, it reversed itself and reaffirmed its original intent to remove the driveway without eminent domain proceedings and the payment of just compensation.

¶6 On January 30, 2013, the DOT issued a formal notification of its intent to remove Lee's USH 18 driveway connection. The notification explained, "Every driveway on the state highway system is there by permit whether or not the paperwork can be located. This letter is formal notice of the revocation of your driveway permit." Lee sought review of the DOT's decision.

¶7 Before the Division of Hearings and Appeals (DHA), Lee sought an adjudication that, due to the quit claim deed, his USH 18 driveway connection could not be taken without eminent domain proceedings and the payment of just compensation. The DOT objected, noting that the DHA had no authority to consider such an argument. The Administrative Law Judge (ALJ) agreed, explaining in relevant part:

> In their brief in support of their motion, the petitioners state that the petitioner[s'] driveway access is granted by deed, not permit, and, therefore, is not revocable without providing just compensation to the petitioners. *If this was true, the petitioners are in the wrong forum.* The Division

[1] Consistent with this language, in another quit claim deed from 1983, the then-owner of the property (Western Development) surrendered to the DOT "[a]ll right of title or interest" it had in "two residential access points." The "two residential access points" had been obtained by the previous owners of the property (William and Marjorie Fuchs) in a 1966 transaction with the DOT.

> has neither the statutory authority nor the expertise to interpret the provisions of the quit claim deed beyond any possible relevance to the Department's decision to revoke the driveway access permit referenced in the quit claim deed.
>
> ….
>
> The petitioners' request for a hearing seeking a determination that the Department should be required to close the driveway access in compliance with the requirements of the eminent domain provisions of Chapter 32 of the Wisconsin Statutes is beyond the scope of the Division's authority…. (Emphasis added.)

¶8 Having been told that he was making his claim in the wrong forum, Lee did not see the administrative proceedings through to the end. Instead, he filed suit in the circuit court.[2] Lee eventually moved for summary judgment, seeking a declaration that the USH 18 driveway connection was an irrevocable compensable property right. The DOT responded with its own request for summary judgment.

¶9 Following briefing and a hearing on the matter, the circuit court granted summary judgment in favor of Lee on his declaratory judgment claim. The court declared that the driveway connection was "a valid property right … pursuant to an irrevocable quit claim deed … not a revocable permit." Accordingly, if the DOT wanted to remove the driveway, it needed do so in accordance with eminent domain proceedings and the payment of just compensation. This appeal follows.

[2] While Lee's civil suit was underway, the DHA proceedings continued. On the merits, the ALJ upheld the revocation of the driveway permit because Lee had reasonable alternative access to his property, and the existing driveway was "unnecessary and reduces traffic safety."

¶10 We review a grant of summary judgment 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 one party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2) (2013-14).[3]

¶11 On appeal, the DOT contends that summary judgment should have been granted in its favor instead of Lee for two reasons: (1) Lee failed to exhaust his administrative remedies before filing suit; and (2) the driveway at issue is not an irrevocable compensable property right but rather a temporary connection subject to permitting and revocation by the DOT. We consider each argument in turn.

¶12 Judicial relief is generally denied until the parties have exhausted all of their administrative remedies. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977). "The premise of the exhaustion rule is that the administrative remedy (1) is available to the party on [the party's] initiative, (2) relatively rapidly, and (3) will protect the party's claim of right." ***Id.***

¶13 Courts do not apply the exhaustion rule when they determine that the reasons supporting the rule are lacking. ***Id.*** at 425-26. For example, the rule does not apply where the administrative agency would not have afforded the party adequate relief because the agency did not have the authority to provide the remedy sought. ***Id.*** at 426. On this point, the case of ***Fazio v. Department of***

[3] All references to the Wisconsin Statutes are to the 2013-14 version.

Emp. Trust Funds, 2002 WI App 127, 255 Wis. 2d 801, 645 N.W.2d 618 is instructive.

¶14 In ***Fazio***, a plaintiff filed suit against the Department of Employee Trust Funds (DETF), alleging that the retention of a death benefit due her constituted unjust enrichment and a taking without just compensation contrary to the Wisconsin Constitution. ***Id.***, ¶1. The circuit court dismissed the complaint on the ground that the plaintiff had not exhausted her administrative remedies. ***Id.*** This court reversed, concluding that the plaintiff "was not required to appeal to the DETF Board before filing [her] action because the Board did not have authority to decide [her] claims and grant the relief she seeks." ***Id.***[4]

¶15 Like the plaintiff in ***Fazio***, Lee seeks relief that an administrative agency cannot provide. Indeed, the ALJ told Lee that he was making his claim in the wrong forum. Although the DOT submits that Lee might have prevailed on a different argument before the DHA (e.g., arguing that the revocation permit was a misapplication of the DOT's police powers), such an argument presumes that the driveway was a temporary connection subject to permitting and revocation. It was Lee's position that the driveway was an irrevocable compensable property right pursuant to the quit claim deed. Given his stance, Lee could only obtain relief from the circuit court.

[4] The DOT suggests that ***Fazio*** may conflict with the Wisconsin Supreme Court's decision in ***Nick v. State Highway Commission***, 13 Wis. 2d 511, 109 N.W.2d 71 (1961), *reh'g denied*, 13 Wis. 2d 511, 111 N.W.2d 95 (1961). We disagree. In ***Nick***, the court rejected a property owner's attempt to substitute a circuit court action for her administrative remedy because the action "better adapted to her desire" for monetary compensation. ***Id.*** at 518a (citing per curiam op. on motion for rehearing). Aside from the owner's stated preference, there was no suggestion that the administrative remedy was otherwise inadequate. By contrast, in ***Fazio***, the administrative remedy was wholly inadequate because the agency lacked power to grant the plaintiff relief.

¶16 The DOT also asserts that the circuit court's evaluation of Lee's claim would have been enhanced by a final decision from the DHA. It is true that "the process of agency review may provide a court with greater clarification of the issues if a matter is not resolved before the agency." ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, ¶8, 242 Wis. 2d 94, 624 N.W.2d 150. However, that is not the case here. As explained by the ALJ, the DHA did not have the authority or expertise to interpret the provisions of the quit claim deed and determine whether Lee possessed an irrevocable compensable property right to the driveway connection. We fail to see how the DHA's explanation of that lack of authority and expertise would have aided a reviewing court in resolving's Lee's claim.

¶17 For these reasons, we decline to apply the exhaustion rule to this case. We therefore conclude that Lee was not required to exhaust his administrative remedies before filing suit in the circuit court.

¶18 We next address the driveway at issue and the merits of Lee's claim. As noted, Lee's USH 18 driveway connection stemmed from a 1983 quit claim deed. The deed was drafted by the DOT and granted the previous owner of the property the right to one private driveway to USH 18 in exchange for the release of two residential access points. Lee submits that the deed provides him with an irrevocable compensable property right. The DOT, meanwhile, maintains that the deed provides Lee with nothing more than a temporary driveway connection subject to permitting and revocation.[5]

[5] In making this argument, the DOT concedes that it has not been able to locate a copy of the permit for the USH 18 driveway connection.

¶19 The rules of contract construction apply to interpreting a deed, which "shall be construed according to its terms[.]" WIS. STAT. § 706.10(5); *see also* ***Schorsch v. Blader***, 209 Wis. 2d 401, 409, 563 N.W.2d 538 (Ct. App. 1997). "We interpret contracts to give them common sense and realistic meaning." ***MS Real Estate Holdings, LLC v. Donald P. Fox Family Trust***, 2015 WI 49, ¶38, 362 Wis. 2d 258, 864 N.W.2d 83 (citation and internal quotation marks omitted). "[A]mbiguities are resolved against the drafter." ***Marlowe v. IDS Prop. Cas. Ins. Co.***, 2013 WI 29, ¶48, 346 Wis. 2d 450, 828 N.W.2d 812.

¶20 Reviewing the deed at issue, we are persuaded that it conveys to Lee an irrevocable compensable property right for two reasons. First, the deed is recorded as a quit claim deed, and quit claim deeds "pass all of the interest in or appurtenant to the land described which the grantor could lawfully convey…." WIS. STAT. § 706.10(4). Thus, whatever ownership rights the DOT possessed in the driveway connection in 1983 were conveyed to the previous owner of the property by virtue of this legal instrument.

¶21 Second, even if we were to look past the title of the deed, the language in it conveys "the right" to the private driveway and does not identify any condition, reservation, exception, or contingency upon which the owner's access is encumbered, limited, or extinguished. *See* WIS. STAT. § 706.02(1)(c). As the drafting party, the DOT had the power to choose the words of the deed and

explicitly make the driveway connection subject to permitting and revocation. It chose not to, and we will not rewrite the deed for it.[6]

¶22 Although we conclude that the DOT conveyed its rights to the USH 18 driveway connection via the 1983 quit claim deed, that does not mean that it cannot reacquire them. However, to do so, it will have to commence eminent domain proceedings and pay just compensation.

By the Court.—Judgment affirmed.

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

[6] The deed does reference the permitting statute, WIS. STAT. § 86.07(2), in regard to the driveway's construction. However, we do not read this reference as subjecting the driveway itself to permitting and revocation. To the extent that the reference to § 86.07(2) creates an ambiguity in the deed, we resolve it against the drafter, DOT.