COURT OF APPEALS
DECISION
DATED AND FILED

February 12, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1375 **Cir. Ct. No. 2011CX4**

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

DOOR COUNTY,

PLAINTIFF-RESPONDENT,

V.

KENNETH F. WERKHEISER,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Door County: PETER C. DILTZ, Judge. *Affirmed*.

¶1 CANE, J.[1] Kenneth Werkheiser, pro se, appeals a default judgment entered following a trial. Werkheiser moved for summary judgment, but then failed to appear at the trial where the summary judgment motion was heard. The

[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.

circuit court denied his summary judgment motion and, after taking evidence, determined the default judgment against Werkheiser was proper. On appeal, Werkheiser argues the court erred by failing to grant him summary judgment. This court affirms.

BACKGROUND

¶2 On December 30, 2011, Door County filed a complaint against Werkheiser, alleging that a private onsite wastewater treatment system (POWTS) on his property met the statutory definition of a failing system, pursuant to WIS. STAT. § 145.245(4) and DOOR COUNTY, WIS., CODE ch. 21 (2010). The County sought an order that Werkheiser cease using the failing POWTS and either abandon the system or install a code compliant POWTS to serve the property.

¶3 Werkheiser answered, asserting that "Kenneth F. Werkheiser" was "fictional" and he was "Kenneth Francis Werkheiser," that the County needed to prove its corporate existence, that his property was not in violation of the code, and that the County was impermissibly prosecuting him. In response, the court scheduled a court trial for April 18, 2012.

¶4 Werkheiser then moved for summary judgment. In support of his motion, Werkheiser generally made the same allegations contained in his answer. The County opposed Werkheiser's summary judgment motion, asserting summary judgment was not proper because its complaint and attachments stated a claim for which relief could be granted. The County pointed out that it had alleged Werkheiser owned real property serviced by a POWTS, its sanitarian workers had inspected Werkheiser's POWTS and deemed it failing, and the system was failing because there was not suitable soil separation between the system and the bedrock—specifically, Werkheiser's system had zero inches of soil separation and

there needed to be at least twenty-four inches of soil separation.[2] The County also attached affidavits from the sanitarian workers who inspected Werkheiser's property.

¶5 On April 18, 2012, Werkheiser failed to appear at the court trial. The court determined that Werkheiser had been properly notified of the hearing. It then concluded that, after reviewing all of the pleadings, summary judgment was improper. It explained why the various allegations Werkheiser made in his summary judgment motion would not entitle him to judgment as a matter of law and concluded there existed a genuine issue of material fact as to whether Werkheiser had a failing POWTS. The court proceeded to the court trial. Following the trial, the court determined Werkheiser had a failing POWTS and ordered him to either abandon the system or bring the system into compliance.

DISCUSSION

¶6 On appeal, Werkheiser objects to the court's denial of his motion for summary judgment. An appellate court reviews a grant of summary judgment de novo, but applies the same methodology as the circuit court. ***Tews v. NHI, LLC***, 2010 WI 137, ¶40, 330 Wis. 2d 389, 793 N.W.2d 860. This court must examine the pleadings to determine whether claims have been stated, and then determine whether any material factual issues have been presented. ***Id.***, ¶41. Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***, ¶42. "The

[2] *See* DOOR COUNTY, WIS., CODE § 21.02C.(3)(d) (2010) ("An existing POWTS installed prior to December 1, 1969 with an infiltrative surface of a treatment and dispersal component that is located less than 2 feet above groundwater or bedrock shall be considered to discharge final effluent that is sewage, unless proven otherwise.").

purpose of the summary judgment procedure is to avoid trials when there is nothing to try." ***Id.***

¶7 From what this court can discern, Werkheiser asserts he was entitled to summary judgment because the County failed to allege any facts that would show he violated a Door County ordinance or Wisconsin law and the County already prosecuted him for this violation. He also argues he was entitled to summary judgment because the County failed to prove its existence as a corporation and the existence of "Kenneth F. Werkheiser."

¶8 This court concludes that Werkheiser was not entitled to summary judgment. First, the County's complaint stated a claim for relief. Specifically, the County's complaint stated that Werkheiser owned property located in Door County and the sanitarian department investigated and determined the POWTS serving Werkheiser's property was failing because there were not twenty-four inches of soil between the system and the bedrock as required by DOOR COUNTY, WIS., CODE ch. 21. The County requested that Werkheiser either abandon the POWTS or make it compliant with the code.

¶9 Second, as for Werkheiser's assertion that he was already prosecuted for a failing POWTS, the circuit court determined this was not a bar to the County's current case because the court had dismissed the previous case without prejudice. Specifically, the dismissal order shows that the County sought dismissal without prejudice because, based on how the County filed the case, its relief was limited to monetary sanctions and the County instead wanted compliance. A dismissal without prejudice does not preclude the County from refiling the case. *See* ***Estate of Engebose v. Moraine Ridge Ltd. P'ship***, 228 Wis. 2d 860, 865, 598 N.W.2d 584 (Ct. App. 1999) ("[W]hen a dismissal without

prejudice is granted, the defendant continues to be exposed to the risk of further litigation.").

¶10 Third, Werkheiser's assertion that the County needed, but failed, to prove it was a corporation under WIS. STAT. § 891.31[3] does not entitle Werkheiser to relief as a matter of law. It appears this argument stems from the County's complaint, where it referred to itself as "A Body Corporate." Werkheiser contends that, because he denied the County's existence in his answer, it needed to engage in litigation to prove its existence as a "body corporate" before it could obtain relief against Werkheiser. However, as the circuit court noted, the County's "body corporate" status is conferred by statute. Specifically, WIS. STAT. § 59.01 provides: "Each county in this state is a body corporate, authorized to sue and be sued …." Werkheiser offers no explanation as to why the County does not fall under § 59.01. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (appellate court need not consider undeveloped arguments).

¶11 Fourth, in regard to Werkheiser's argument relating to the County's identification of "Kenneth F. Werkheiser" as the defendant instead of "Kenneth Francis Werkheiser," he states in his brief that "Kenneth F. Werkheiser" is "legal fiction" and is "not duly organized into the corporate state of Wisconsin" (capitalization omitted). From this argument it is unclear whether Werkheiser is objecting to the County's use of his middle initial in lieu of his full middle name or whether he believes the County needed to prove that he, too, was a corporation

[3] WISCONSIN STAT. § 891.31 is entitled, "Corporate existence," and provides: "In an action or proceeding by or against any corporation or limited liability company, it shall not be necessary to prove the existence of such corporation or limited liability company unless its existence is specially denied by an answer."

under WIS. STAT. § 891.31. As for the former argument, this court agrees with the circuit court that because the warranty deed attached to the complaint shows that Werkheiser holds title to the property as "Kenneth F. Werkheiser," the County's use of "Kenneth F. Werkheiser" was proper. Moreover, Werkheiser does not argue that he is not the owner of the property. In regard to the latter argument, nothing in the County's complaint or any pleadings indicates it brought suit against Werkheiser in a capacity as a corporation. The suit was against Werkheiser as an individual; therefore, the County need not prove he was a corporation.

¶12 Finally, incorporated within his argument that the court erred by failing to grant his summary judgment motion, Werkheiser objects to the court's fact-finding hearing and subsequent default judgment. He first asserts that the court held the court trial without notifying him. However, the circuit court found that Werkheiser was notified of the hearing. Moreover, a review of the record indicates that notice was mailed to Werkheiser on January 30, 2012, stating that a court trial was scheduled for April 18, 2012, at 9:00 a.m.

¶13 Werkheiser also objects to the evidence presented at the fact-finding hearing, arguing that it does not support the court's determination. At the hearing, assistant sanitarian Gregory Thiede testified that Werkheiser's POWTS was installed before 1967, and he and another sanitarian worker inspected Werkheiser's property, pursuant to an inspection warrant. Because old systems are completely buried and Werkheiser would not tell Thiede where the POWTS was located, Thiede drilled two soil borings in the approximate areas where the POWTS would reasonably be located. The first was within fifty feet of Werkheiser's residence and the second was within 100 feet of the residence. The soil borings revealed that solid bedrock existed six and fifty-three inches below

grade, respectively. Thiede explained that a typical POWTS drywell is five feet deep and the Door County Code and the Wisconsin Administrative Code[4] require there to be two feet of soil between the bottom of the drywell and the bedrock. Thiede opined that, because the borings revealed bedrock six inches and fifty-three inches below grade, it would be impossible to have two feet of soil between the bottom of the drywell and the bedrock. Thiede then explained that if there are not two feet of soil between the bottom of the drywell and the bedrock, it is presumed that the system is discharging sewage and therefore a failing system pursuant to WIS. STAT. § 145.245(4)(c).[5] This court concludes that the evidence presented at the fact-finding hearing sufficiently supports the court's determination that Werkheiser had a failing POWTS.

By the Court.—Judgment affirmed.

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

[4] *See* DOOR COUNTY, WIS., CODE § 21.02C.(3)(d) (2010); *see also* WIS. ADMIN. CODE § SPS 383.03(2)(b)2.b. (Feb. 2012) ("An existing POWTS installed prior to December 1, 1969 with an infiltrative surface of a treatment and dispersal component that is located less than 2 feet above groundwater or bedrock shall be considered to discharge final effluent that is sewage, unless proven otherwise.").

[5] WISCONSIN STAT. § 145.245(4) provides, in relevant part: "A failing private on-site wastewater treatment system is one which causes or results in any of the following conditions: … (c) The discharge of sewage to a drain tile or into zones of bedrock …."