COURT OF APPEALS
DECISION
DATED AND FILED

October 29, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP736 **Cir. Ct. No. 2012CV7841**

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

BONSTORES REALTY ONE, LLC,

PLAINTIFF-APPELLANT,

V.

CITY OF WAUWATOSA,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Curley, P.J., Fine and Brennan, JJ.

¶1 FINE, J. Bonstores Realty One, LLC appeals an order granting summary judgment to the City of Wauwatosa dismissing Bonstores complaint challenging its 2011 tax assessment. The circuit court dismissed the complaint because Bonstores stipulated to having the 2011 assessment determined by the

outcome of the trial on the 2009 and 2010 assessments. Bonstores argues: (1) the Stipulation did not tie the 2011 assessment to the outcome of the 2009 and 2010 assessments; (2) a subsequent oral stipulation during the 2009 trial superseded the initial Stipulation; (3) Wauwatosa is equitably estopped from claiming that the 2011 assessment must be the same as the 2009 assessment; and (4) Wauwatosa waived its right to enforce the 2011 Stipulation by going to trial on the 2009 and 2010 assessments. We affirm.

I.

¶2 Wauwatosa assessed Bonstores' property at $25,595,300 for 2009, 2010 and 2011. Bonstores appealed the 2009 and 2010 assessments to the circuit court, and, in connection with that appeal, stipulated:

> Bonstores Realty One, LLC is the owner of a property located at 2400 N. Mayfair Road, Wauwatosa, (tax key #335-9998-16) and otherwise known as the Boston Store at Mayfair Mall. In its letter dated May 10, 2011, the attorneys for Bonstores Realty requested that the 2011, 2010 and 2009 tax years be combined and that the Board of Review waive the requirement of an appearance before it for the 2011 objection. Bonstores Realty One, LLC through its attorneys did previously appear before the Wauwatosa Board of Review with respect to its 2009 assessment and did timely file a claims [*sic*] for refund with the City Council by the filing due dates of January 31, 2010 and 2011. The City Council has denied the 2009 and 2010 claims; therefore Bonstores Realty One, LLC has satisfied the conditions precedent for the filing of a claim for excessive assessment under § 74.37(3)(d) Stats.
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> Bonstores Realty One, LLC has commenced an action under § 74.37(3) and that action is currently pending in circuit court in Milwaukee County. *The assessed valuation for the subject property for the year 2011 is the same as the assessed valuation for the years 2010 and 2009. Bonstores Realty One, LLC wishes to accordingly also contest the 2011 real property tax assessment. Furthermore, Bonstores Realty One, LLC has acknowledged that it has no new evidence to submit to the*

> *Board in conjunction with its 2011 objection. Accordingly, the parties agree that the 2009, 2010 and 2011 assessments will be based on the January 1, 2009 valuation*. The undersigned lawyer on behalf of Bonstores Realty One, LLC waives its right to appeal the 2011 assessment via a certiorari appeal under § 70.47(13), Stats. as part of its request for a waiver of a Board of Review valuation hearing.
>
> Pursuant to the decision in *Duesterbeck v. Town of Koshkonong*, 2000 WI App 6, 232 Wis.2d 16, 605 N.W.2d 904 (2000) the court held that it is not necessary for a taxpayer to file an objection with the board and hold a hearing when a challenge is pending and the current year assessment is unchanged. *Accordingly, by their signatures below, the attorneys hereby stipulate and agree that the Board of Review may issue a decision sustaining the 2011 assessment, without additional testimony, consistent with a combined 2009, 2010 and 2011 claim for excessive assessment pursuant to § 74.37 Stats based on a valuation date of January 1, 2009.*

(Emphasis added.). The circuit court held a five-day trial on Bonstores' WIS. STAT. § 74.37 appeal challenging the 2009 and 2010 assessments. At the start of the trial, Bonstores' lawyer told the circuit court:

> It's my understanding of the discussions and what opposing counsel and I have discussed in the past and since we have no evidence of additional value, we have before you a complaint and amended complaint that challenges the assessments for both 2009 and 2010. Neither party has appraisals or evidence specifically relating to 2010 values, but neither parties have changed their positions. So it's my understanding that the parties are agreeing that for purposes of the 2010 assessment, whatever the court determines for the 2009 assessment will apply accordingly without anybody needing to provide an express testimony specific to the 2010 assessment.

Wauwatosa's lawyer confirmed this was correct: "Yes, Your Honor. The stipulation would essentially be that the value the court decides from 2009 would then be the value for 2010." As we have seen, the parties had earlier agreed "that the Board of Review may issue a decision sustaining the 2011 assessment, without

additional testimony, consistent with a combined 2009, 2010 and 2011 claim for excessive assessment pursuant to § 74.37 Stats based on a valuation date of January 1, 2009."

¶3 The circuit court ultimately upheld the $25,595,300 assessment for 2009 and entered a final order in June of 2012. We upheld that assessment in ***Bonstores Realty One, LLC v. City of Wauwatosa***, No. 2012AP1754, slip op. (WI App Oct. 8, 2013) (recommended for publication). In July of 2012, Bonstores filed a summons and complaint in circuit court appealing the 2011 assessment under WIS. STAT. § 74.39(3), which permits a circuit court to nullify an assessment "if the court finds that to do so is in the best interests of all parties to the action and if the court is able to determine the amount of unlawful taxes with reasonable certainty." As noted, Wauwatosa asked the circuit court to dismiss the complaint arguing that the parties agreed that the 2011 assessment would be that determined in the 2009/2010 case. Wauwatosa attached an affidavit and the 2011 Stipulation in support of its "Motion to Dismiss." The circuit court converted the motion into a motion for summary judgment, as it is authorized to do when a party submits matters outside the pleadings. *See* WIS. STAT. RULE 802.06(2)(b) & (3); ***Schopper v. Gehring***, 210 Wis. 2d 208, 216, 565 N.W.2d 187, 191 (Ct. App. 1997). At the end of the summary judgment hearing, the circuit court ruled:

> I framed the issue as this. In Bonstores' stipulation is the 2011 claim for excessive taxation would be determined by the results of the consolidated '09, '10, 74[.]37 litigation that was pending, and the answer to that is yes in my view.
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> The stipulation can only reasonably be read in my view in one way and to tie that valuation to the results of the 74[.]37 would be the issue.
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> The purpose of the stipulation is to bypass the board of review because it was unnecessary. The valuation had not changed. 2009 had been upheld. 2010 had been upheld for all intent and purposes by the Duesterbeck stipulation.

> Bonstores specifically stipulated that they had no additional evidence to present on valuation. The 74[.]37 action relating to the 2009 and 2010 claims had been commenced. Bonstores specifically indicated they wished to accordingly also contest the 2011 valuation.
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> To that end, they stipulated that the 2009, '10 and '11 assessments will be based upon the January 1, 2009 valuation. At that point, pursuant to this stipulation, the January 1, 2009 valuation was going to be determined in one and only one way. That was in the litigation that was pending [in the circuit court].
>
> The waiver of the cert review was simply to acknowledge that they were appealing by way of the existing 74[.]37 review, and they didn't have the right to bring a cert review. Certainly you wouldn't have a cert review with the Duesterbeck stipulation because it would be in effect no Record to review….
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> ….
>
> But it does occur to me that if the intention was to preserve an independent right to maintain a 74[.]37 appeal as to this 2011 valuation, it seems to me that you would say right after the waiver of the right to do a cert review that you would say, while preserving the right to maintain an independent 74[.]37 appeal as to the 2011 particularly given all the references to the 2009, 2010 determination.
>
> ….
>
> I think it leads only to the conclusion that everybody was stipulating for [tying] the 2011 valuation to what's determined in the 2009 and 2010 74[.]37 litigation.

II.

A. *Dismissal*.

¶4 A circuit court grants summary judgment if "there is no genuine issue as to any material fact" and a party "is entitled to a judgment as a matter of law." WIS. STAT. RULE 802.08(2). We review *de novo* the circuit court's summary-judgment decision, and apply the governing standards "just as the

[circuit] court applied those standards." ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314–317, 401 N.W.2d 816, 820–821 (1987). This appeal requires us to review the parties' stipulations, which are contracts, the interpretation of which we also review *de novo*. *See* ***Krieman v. Goldberg***, 214 Wis. 2d 163, 173, 571 N.W.2d 425, 430 (1997).

¶5 As we have seen, the 2011 Stipulation clearly stated: "Bonstores Realty requested that the 2011, 2010 and 2009 tax years be combined and that the Board of Review waive the requirement of an appearance before it for the 2011 objection." It did so because all three years had been assessed at the same amount, the Board of Review had already upheld the 2009 and 2010 assessments, and thus would most likely also uphold the 2011 assessment. ***Duesterbeck v. Town of Koshkonong***, 2000 WI App 6, 232 Wis. 2d 16, 605 N.W.2d 904, permits a landowner to bypass the Board of Review if the landowner challenged the assessment for "the year immediately previous" when the assessment for the bypassed year is the same amount. *See* ***id.***, 2000 WI App 6, ¶23, 232 Wis. 2d at 30, 605 N.W.2d at 911. By tying 2011 to the 2009 assessment, Bonstores skipped the Board of Review step and allowed the 2011 assessment to be determined by the outcome in its already filed circuit court appeal without having to start a separate case. Of course, at this point, Bonstores hoped the circuit court would reduce the $25 million dollar assessment for 2009/2010 to what Bonstores believed the property assessment should have been—$11 million dollars.

¶6 The Stipulation then noted that:

- Bonstores had "commenced an action under § 74.37(3) and that action is currently pending in circuit court in Milwaukee County."

- "The assessed valuation for the subject property for the year 2011 is the same as the assessed valuation for the years 2010 and 2009."
- "Bonstores Realty One, LLC wishes to accordingly also contest the 2011 real property tax assessment."
- Bonstores "has no new evidence to submit to the Board in conjunction with its 2011 objection."
- "[T]he parties agree that the 2009, 2010 and 2011 assessments will be based on the January 1, 2009 valuation.

This language clearly and unambiguously supports the circuit court's determination that the 2011 Stipulation tied the 2011 assessment to whatever the circuit court decided the 2009 valuation should be.

¶7 Bonstores' contends that the Stipulation only waived the Board of Review procedure and a certiorari review on the 2011 assessment, but that it did not waive a WIS. STAT. § 74.37 circuit-court appeal. We disagree. First, the language of the Stipulation could have said that but does not. Second, the Stipulation references § 74.37 twice: (1) in prefacing why Bonstores wanted the 2011 assessment tied to the 2009 assessment, the Stipulation said that Bonstores "has commenced an action under § 74.37"; and (2) later, they "stipulate and agree that the Board of Review may issue a decision sustaining the 2011 assessment, without additional testimony, consistent with a combined 2009, 2010 and 2011 claim for excessive assessment pursuant to § 74.37 Stats. based on a valuation date of January 1, 2009." Further, a circuit-court review of an assessment must presume that the assessment is correct unless the party challenging the assessment presents "significant contrary evidence." ***Allright Properties, Inc. v. City of***

Milwaukee, 2009 WI App 46, ¶12, 317 Wis. 2d 228, 239, 767 N.W.2d 567, 572 (internal quotation marks and quoted source omitted). As we have seen, Bonstores said that it did not have *any* evidence to add to what the assessor considered in making the 2009 assessment. Bonstores' argument that the references to § 74.37 were only included as background information does not wash. *See* ***Three T's Trucking v. Kost***, 2007 WI App 158, ¶8, 303 Wis. 2d 681, 688, 736 N.W.2d 239, 243 (It is the "'established rule that a contract is to be construed so as to give a reasonable meaning to each provision of the contract, and that courts must avoid a construction which renders portions of a contract meaningless, inexplicable or mere surplusage.'") (one set of quotation marks and quoted source omitted).

¶8 Bonstores also argues that the oral stipulation at the start of the circuit court trial in the 2009 and 2010 assessments superseded the 2011 Stipulation. Again, we disagree. As we have seen, the parties stipulated at the start of the circuit court trial in the 2009 and 2010 case that: "The stipulation would essentially be that the value the court decides from 2009 would then be the value for 2010." Thus, that stipulation relieved both parties from having to deal separately with both the 2009 and the 2010 assessment years. Once the assessments for those years were determined, the stipulation for the 2011 assessment year kicked in. The two stipulations are complementary not contradictory.

B. *Equitable Estoppel*.

¶9 Bonstores also contends that Wauwatosa is equitably estopped from claiming the 2011 assessment must be the same as the 2009 assessment because it did not insist that the year 2011 be added to the judgment in the 2009 and 2010 circuit court appeal. This argument, too, is a non-starter.

¶10 "'Equitable estoppel requires proof of three elements: (1) an action or an inaction that induces; (2) reliance by another; and (3) to his or her detriment.'" ***Hendrick v. Hendrick***, 2009 WI App 33, ¶14, 316 Wis. 2d 479, 488, 765 N.W.2d 865, 869 (quoted source omitted). In light of its concession that it had nothing to add to the evidence it adduced in connection with the 2009 assessment, Bonstores has not shown any prejudicial reliance.

C. *Waiver.*

¶11 Bonstores also asserts that Wauwatosa waived its right to rely on the 2011 Stipulation by going to trial on the 2009 and 2010 assessments. This assertion is wholly undeveloped and, indeed, is at odds with the parties' two stipulations. We do not address it further. *See* ***M.C.I., Inc. v. Elbin***, 146 Wis. 2d 239, 244–245, 430 N.W.2d 366, 369 (Ct. App. 1988) (we need not address undeveloped arguments).

By the Court.—Order affirmed.

Publication in the official reports is not recommended.