COURT OF APPEALS
DECISION
DATED AND FILED

September 8, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-2256

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

AMBROSE GROSHEK, D/B/A RIB MOUNTAIN HOMES,

PLAINTIFF-APPELLANT,

V.

DALE D. MILLER,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Marathon County: THOMAS G. GROVER, Judge. *Affirmed.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Ambrose Groshek, d/b/a Rib Mountain Homes, appeals from the order granting summary judgment to Dale D. Miller. Groshek argues that the trial court erred in concluding that claim preclusion required dismissal of his action. We need not address the parties' arguments about claim preclusion, however, because Groshek has offered nothing to counter Miller's

argument that he (Groshek) was not the proper party to bring the action. Therefore, we affirm.

Groshek and Miller were partners in real estate development. In 1990, however, Miller sued Groshek in an action related to the dissolution of their partnership. Ultimately, the case was dismissed for failure of either party to pursue it, and Groshek paid Miller $9,500 in what he claims was an agreement settling their dispute. Miller, however, never signed the proposed agreement and continues to deny that he and Groshek ever resolved their differences.

In the subsequent action leading to this appeal, Groshek sued Miller for $9,384 for what he claimed was Miller's share of the costs, incurred subsequent to their prior litigation, related to "paving and culvert, storm sewer, curb, gutter, and sign construction" in the Rib Mountain Heights condominium development where Miller owned four condo units. The trial court granted Miller's motion for summary judgment, concluding:

> It would appear to be the classic case of claim preclusion. These parties were involved in a lawsuit with these same issues which was dismissed with prejudice. If the plaintiff wanted to pursue the matters that he is now bringing before this Court, he should have brought them in the previous case ….

Groshek argues that the two actions were substantially different, that the issues were distinct, and that he could not have pursued them in the first lawsuit.

Summary judgment is appropriate if the submissions establish "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." RULE 802.08(2), STATS. Our review of a trial court's grant of summary judgment is *de novo*, *see* ***Green Spring Farms v.***

Kersten, 136 Wis.2d 304, 315, 401 N.W.2d 816, 820 (1987), and we may affirm a trial court decision for reasons that differ from those underlying the trial court's ruling, *see* ***Liberty Trucking Co. v. DILHR***, 57 Wis.2d 331, 342, 204 N.W.2d 457, 463-64 (1973).

In this case, the trial court did not explain how Groshek could have "pursue[d] the matters" in the prior litigation given that the alleged construction and Miller's alleged non-payment of the construction costs occurred subsequent to the dismissal of the first case. We need not resolve the claim preclusion issue, however, because Groshek fails to counter Miller's additional argument:

> [Groshek] claimed that the improvements were performed for the Rib Mountain Condominium Owners' Association and not for [Miller]. Under the Wisconsin condominium statute, … the owners' association is responsible to pay its own expenses:
>
> > 703.16(2) Funds for Payment of Common Expenses Obtained by Assessments. Funds for payment of common expenses and for the creation of reserves for the payment of future common expenses shall be obtained by assessments against the unit owners in proportion to their percentage interests in the common elements or as otherwise provided in the declaration.
>
> If the expenses were determined by the owners' association to be legitimate, and if an assessment among the unit owners was made by the owners' association, and if the respondent failed to pay the assessment to the owners' association, then the owners' association would be entitled to sue [Miller] under Sec. 703.16 (3) … :
>
> > 703.16 (3) Liability for Assessments. A unit owner shall be liable for all assessments, or installments thereof, coming due while owning a unit.
>
> In any event, the owners' association and not [Groshek] would be the proper party to bring such a claim.

Although the amended complaint claims that Groshek paid for the construction "individually and as agent for Rib Mountain Heights Condominium Association," and although Groshek's trial court brief on the cross-motions for summary judgment maintained that he was "now acting … as essentially an assignee of the condominium association[']s rights to collect from Miller," the record provides absolutely nothing that would link Groshek to the condo association, and Groshek offers absolutely nothing in reply to Miller's argument. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.***, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments not refuted are deemed admitted).

Miller, in his answer and affirmative defenses, maintained that Groshek "has failed to name one or more parties to this action, which parties are necessary to a full and fair adjudication of this matter." Indeed, Groshek's trial court brief acknowledges that the condo association members "are generally responsible for the obligations of the association," that "[i]f Miller does not pay for his share of these costs he has been unjustly enriched as he received and utilized benefits which he failed to provide any compensation for when adjoining property owners have paid their share," that "Miller's obligations to the condominium association continued," and that "the current case now involves *Miller's obligations to the condominium association … for unpaid assessments.*" (Emphasis added.) In short, Groshek's summary judgment brief all but concedes Miller's argument that if a claim for non-payment of assessments for the alleged construction costs exists, it belongs to the condo association.

Accordingly, although we offer a different rationale than that of the trial court, we affirm the order granting summary judgment to Miller.

By the Court.—Order affirmed.

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