COURT OF APPEALS
DECISION
DATED AND FILED

January 31, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-0890 **Cir. Ct. No. 99-CV-92**

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

TOWN OF MONROE, A MUNICIPAL CORPORATION,

PLAINTIFF-RESPONDENT,

V.

BOWMAR APPRAISAL, INC., A WISCONSIN CORPORATION,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Adams County: DUANE POLIVKA, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 DEININGER, J. Bowmar Appraisal, Inc. appeals a judgment which awarded some $60,000 to the Town of Monroe for Bowmar's breach of a contract. Bowmar contends that the Town lacked standing to bring the contract claim because the Town was neither a party to nor a third-party beneficiary of Bowmar's

contract with the Department of Revenue. We agree and reverse the appealed judgment.

BACKGROUND

¶2 Several residents of the Town of Monroe in Adams County filed a complaint in 1994 with the Wisconsin Department of Revenue alleging that property assessments in the Town were not in compliance with the law. After investigating the complaint, the department found that "inequities in assessment exist within and between the major classes of property," and that the overall assessment in the Town for 1994 was at 114% of market value. The department concluded that the 1994 assessment was not made in compliance with the law and "[t]hat the interests of all the taxpayers of the district will best be promoted by special supervision … to the end that the assessment of the district shall thereafter be lawfully made." Accordingly, it ordered a supervised assessment of all taxable property in the Town. *See* WIS. STAT. § 70.75(3) (1999-2000).[1]

¶3 The department entered into a contract with Bowmar for it "to revalue the real and personal property in the Town." Following Bowmar's assessment for 1995, two residents of the Town again complained that their assessments were not in compliance with the law. They filed complaints against the Town in circuit court alleging that Bowmar under-assessed some parcels and over-assessed others.[2] The taxpayers sought the recovery of excess taxes allegedly paid as a result of their over-assessments and they requested that another

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] *See* WIS. STAT. § 74.37.

reassessment of town property be ordered. The circuit court concluded that Bowmar's 1995 assessment "was not performed in accordance with" the law, and it ordered the Town to conduct another reassessment in 1998 and to refund the excess taxes paid by the complaining parties.

¶4 The Town then commenced the present litigation against Bowmar, alleging claims of breach of contract and negligence for Bowmar's failure to accurately assess the parcels of land that had been declared overvalued. Both Bowmar and the Town moved for summary judgment. The circuit court granted the Town's motion. Bowmar appeals the ensuing judgment, which awarded the Town a total of $60,856.85 for the cost of the court ordered 1998 reassessment, the taxes the Town was ordered to refund, attorney fees it expended in the taxpayer litigation, a payment the Town had made to Bowmar for work in 1996, and costs. Bowmar appeals the judgment.

ANALYSIS

¶5 We review a circuit court's grant or denial of summary judgment de novo, owing no deference to the trial court's decision. ***Waters v. United States Fid. & Guar. Co.***, 124 Wis. 2d 275, 278, 369 N.W.2d 755 (Ct. App. 1985). "[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." ***M&I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 497, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2). We will reverse a decision granting summary judgment if either (1) the trial court incorrectly decided legal issues, or (2) material facts are in dispute. ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis. 2d 548, 555, 508 N.W.2d 610 (Ct. App. 1993).

¶6 Both the Town and Bowmar moved for summary judgment. When the parties file cross-motions for summary judgment and neither argues that factual disputes bar the other's motion, the "'practical effect is that the facts are stipulated and only issues of law are before us.'" *See* ***Lucas v. Godfrey***, 161 Wis. 2d 51, 57, 467 N.W.2d 180 (Ct. App. 1991) (citation omitted). That is the case here. Bowmar's arguments on appeal challenge the trial court's legal conclusions regarding the Town's status as a third-party beneficiary, the availability of issue preclusion regarding its alleged breach of contract, and allowable damages. Neither party asserts a dispute of material fact that would preclude awarding summary judgment to the other.

¶7 We first address whether the Town may sue Bowmar for a breach of contract. It is undisputed that the Town was not a party to the contract between the Department of Revenue and Bowmar for the 1995 supervised assessment. The general rule is that only a party to a contract may recover for its breach. ***Schilling v. Foy***, 212 Wis. 2d 878, 886, 569 N.W.2d 776 (Ct. App. 1997). There is, however, an exception to this general rule: "'[W]hen one person, for a valuable consideration, engages with another, by simple contract, to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act may maintain an action for the breach of such engagement.'" ***State Dep't of Pub. Welfare v. Schmidt***, 255 Wis. 452, 455, 39 N.W.2d 392 (1949) (citation omitted).

¶8 Bowmar argues that the Town, contrary to the Town's assertion and the trial court's conclusion, is not a third-party beneficiary because there is no provision in the Department of Revenue-Bowmar contract indicating that the contract was specifically intended to benefit the Town. We agree. In order for a person to be declared a third-party beneficiary, the person must show that the contract was entered into "directly and primarily" for the person's benefit.

Goossen v. Estate of Standaert, 189 Wis. 2d 237, 249, 525 N.W.2d 314 (Ct. App. 1994). An "indirect benefit, merely incidental to the contract" is not sufficient. ***Id***.

¶9 The Town asserts that "everything contained in the contract between the [department] and Bowmar is directed to and for the benefit of the Town," and that "the direct benefit to the Town in the contract … is spelled out in detail and the Town is named as the benefiting party." Neither of these assertions, however, is supported with citations to the record, and we deem them to be arguments characterizing the contract terms, not factual assertions regarding the language of the contract. We reject the Town's contentions.

¶10 Quite simply, there is no provision in the contract that comes even close to saying "the parties enter into and intend this contract specifically for the benefit of the Town of Monroe." To the contrary, the preamble makes it clear that it is the Department of Revenue that is in need of Bowmar's professional services, and that Bowmar is willing to render the same "to the Department." The department secretary is to "review and approv[e]" contracted work, and designated department personnel are to "monitor and direct" performance under the contract. Moreover, the department is given the authority to approve and the responsibility to pay Bowmar's invoices for work done. Finally, the contract also provides that the department may terminate the contract "at any time at its sole discretion," and that "[a]ll materials produced under this Contract are and shall remain property of the State."

¶11 The contract attaches and incorporates by reference a set of "Standard Specifications for Revaluation of the Town of Monroe." Several provisions in the specifications refer to the Town, and it is these provisions which

the Town claims establish that it is the direct and primary beneficiary of Bowmar's services under the contract. Among the provisions cited by the Town are the following: (1) the Town (as well as the department) may request Bowmar to remove for cause any employee whose performance is deemed unsatisfactory; (2) sales data gathered by Bowmar "shall become and remain the property" of the Town; (3) other forms and records generated by Bowmar are to be "left with" the Town; (4) Bowmar is required to appear at "open book conferences" at a place designated by the Town and to attend the Town's Board of Review to explain and defend the assessments; and (5) Bowmar is required to "meet monthly or upon request" with the Town board to discuss such things as "progress, procedures, valuations, and problems."

¶12 We thus acknowledge that the contract plainly required Bowmar to interact with the Town and its officials while performing the assessment work, and it specifically required Bowmar to participate in statutory post-assessment review processes. By specifying that certain data and records were to be left with the Town on completion of the contract, the contract also recognized the Town's future need for information gathered by Bowmar when the Town undertakes assessments in subsequent years. We conclude, however, that these items are at most "incidental benefits" conferred on the Town, and they do not render the Town a "direct and primary" beneficiary of the Bowmar contract.

¶13 We conclude that the direct and primary beneficiary of Bowmar's services under the contract was the department, which was in need of Bowmar's services to discharge its statutory responsibility to conduct a supervised assessment in the Town in 1995, given the findings it had made regarding the

Town's 1994 assessment.[3] Notwithstanding the facts that the Town was ultimately required to reimburse the department for its costs, *see* WIS. STAT. § 70.75(4), and that the Town might benefit in future years from data and records compiled by Bowmar under the contract, the Town has failed to make the requisite showing of an express intent by the contracting parties to directly and primarily benefit the Town.

¶14 The Town contends, however, that the "very purpose" of the contract was to do what its own assessor failed to do in the 1994 assessment, and that "[e]verything Bowmar was obligated to do under the contract was exclusively for the Town." It cites ***Pappas v. Jack O.A. Nelsen Agency, Inc.,*** 81 Wis. 2d 363, 260 N.W.2d 721 (1978), where the supreme court explained that, "the precise identity of the third-party beneficiary need not be ascertainable at the time of the agreement so long as the agreement specifies or identifies a group or class to whom the party must belong to benefit thereby." ***Id***. at 372. We have no quarrel with the cited proposition but conclude it has no application on the present facts. Just as the contract does not indicate an intent to confer a direct and primary benefit on the Town, neither does it "specif[y] or identif[y] a group or class" of third-party beneficiaries.

[3] In a 1996 letter to an attorney for one of the complaining taxpayers, a department administrator explained that the department had several options after concluding that the Town's 1994 assessment was not in substantial compliance with the law. He further explained that the department "felt that it would be in the best interests of all the taxpayers of the district to order special supervision of the 1995 assessment. Special supervision is merely a total revaluation under the supervision of the Department of Revenue. The Department hired Bowmar Appraisals to perform the special supervision (revaluation) of all properties in the Town of Monroe for 1995 …."

¶15 Rather, we conclude that our discussion and holding in ***Schilling*** is controlling on the present facts. There, we concluded that, although a student was an indirect or incidental beneficiary of a teacher's employment contract with the school district, "this does not satisfy the burden of showing that this teacher and this school board entered into this contract primarily and directly for the benefit of students." ***Schilling***, 212 Wis. 2d at 890. In reaching our conclusion, we distinguished both ***Pappas*** and ***Mercado v. Mitchell***, 83 Wis. 2d 17, 264 N.W.2d 532 (1978), on which the Town also relies. We explained:

> There is nothing in the record of this case comparable to the ordinance and policy certificate in ***Mercado***—no evidence that a primary purpose of the contract between [the teacher] and the school district was to benefit the students. Similarly, in each of the other cases [the plaintiff] cites, there was specific language either in the written contract or, if the contract was oral, in the conversation between the parties, indicating that both contracting parties contemplated benefiting the group to which the third party belonged when they agreed to the contract or the provision sought to be enforced.

Schilling, 212 Wis. 2d at 891. We then concluded that there was "no comparable evidence" in ***Schilling***. We now reach the same conclusion here.

¶16 In summary, after reviewing the contract at issue, we conclude that its primary purpose was to allow the department to obtain Bowmar's professional services to aid the department in the discharge of its duties under WIS. STAT. § 70.75. Although the Town received certain benefits incidental to the contract's underlying purpose, the Town was not intended to be a direct or primary beneficiary of the contract. The Town may not therefore maintain an action for breach of the contract, and its claim against Bowmar on that theory must thus be dismissed. Given this result, it is not necessary for us to address whether the Town could preclude Bowmar from "relitigating" whether it had breached the

contract, or to consider the proper measure of the Town's damages for the alleged breach.

¶17 As we have noted, however, the Town also alleged a cause of action against Bowmar sounding in negligence. Bowmar sought dismissal of the negligence claim in its motion for summary judgment and in its brief supporting the motion, but the issue does not appear to have been further addressed in subsequent submissions and argument by either party. The Town moved for summary judgment on only its contract claim. Neither the trial court in its ruling nor the parties in their briefs to this court mention the negligence claim. Nonetheless, we conclude that it is in the interest of judicial economy for this court to decide the issue in our de novo review of the summary judgment record.

¶18 In its trial court brief, Bowmar asserted both that (1) a "bad result" is not necessarily evidence of professional negligence, which requires expert testimony to establish, and (2) any deficiency in its performance of its contractual duty to the department cannot give rise to a claim in tort in favor of the Town. Bowmar cited legal authority in support of both propositions. It also submitted a letter from the department stating that Bowmar's employees "were supervised by the Department throughout the entire [1995] assessment process and their work found to be satisfactory."

¶19 The Town submitted no affidavit or report from a property appraisal expert to indicate that Bowmar had failed to meet professional standards in conducting the 1995 assessment. Instead, in its "Brief in Opposition to Defendant's Motion for Summary Judgment and in Support of Plaintiff's Motion for Summary Judgment," the Town maintained that "[t]he issue of whether or not Bowmar … was negligent in breaching its contract is a moot point because breach

of contract does not require proof of negligence but only a finding that the services promised by the contract were not performed." And in a document entitled "Trial Brief," the Town stated that it "views this case as involving two issues":

> 1. Did Bowmar Appraisal, Inc. breach its contract with the state in conducting the 1995 revaluation of the Town of Monroe?
>
> 2. What are the Plaintiff's damages for breach of Bowmar Appraisal, Inc.'s contract with the State?

The "Trial Brief" concluded with the Town's contention that "the only issue for decision by the Court is the nature and extent of the Town's damages for breach of contract."

¶20 Based on the foregoing, we conclude that the Town abandoned its negligence claim by failing to counter Bowmar's motion to dismiss the claim on summary judgment. As we explained in ***Moulas v. PBC Productions Inc.***, 213 Wis. 2d 406, 570 N.W.2d 739 (Ct. App. 1997):

> "[I]t is the burden of the party asserting a claim on which it bears the burden of proof at trial 'to make a showing [in opposition to a summary judgment motion] sufficient to establish the existence of an element essential to that party's case.'" Stated otherwise, once the motion is made and demonstrates the support required by the statute, the opponent does not have the luxury of resting upon its mere allegation or denials of the pleadings, but must advance specific facts showing the presence of a genuine issue for trial.

Id. at 410-11 (citations omitted). By focusing its response to Bowmar's motion exclusively on the breach of contract claim, and by declaring Bowmar's alleged negligence a "moot point" instead of submitting evidence of Bowmar's negligence, the Town failed to meet this burden. Accordingly, Bowmar is entitled to summary judgment on the Town's negligence claim as well.

CONCLUSION

¶21 For the reasons discussed above, we reverse the appealed judgment and direct that on remand judgment be entered in Bowmar's favor, dismissing the Town's claims against it.

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

Not recommended for publication in the official reports.