COURT OF APPEALS
DECISION
DATED AND FILED

April 16, 2002

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 01-1854 **Cir. Ct. No. 00 SC 12516**

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

BENEDICT REISCHEL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: THOMAS R. COOPER, Judge. *Reversed*.

¶1 SCHUDSON, J.[1] Benedict Reischel, *pro se*, appeals from the order denying his motion to reopen a default summary judgment awarding the City of Milwaukee $5000 plus costs as recovery for the cost of razing his property.

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(a), (3) (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated.

Reischel argues that the court, in denying his motion to reopen the judgment, incorrectly concluded that he was the owner of the property when it was razed. This court reverses.

¶2 According to the undisputed facts contained in the summary judgment submissions, on April 16, 1999, the City mailed to Charles Nootens a copy of the raze order for 2443 North 35th Street in Milwaukee;[2] on April 19, the City posted a copy of the order on the main entrance of the building at that address. Substituted personal service upon Reischel was accomplished on April 25. The raze order was published on April 26 and recorded with the register of deeds on April 28. On November 9, 1999, the City razed the property.

¶3 On May 1, 2000, the City filed a complaint in small claims court seeking recovery of "certain demolition and razing expenses" for the property. On September 19, 2000, when Reischel failed to appear for the scheduled hearing on the City's motion for summary judgment, the court entered default judgment for the City.

¶4 On March 14, 2001, Reischel moved to reopen, maintaining that he had missed the September 19, 2000 court date because, in error, he had gone to the municipal court building instead of the county courthouse where the hearing was scheduled. In his application to reopen the judgment, he asserted that he was not the owner of the property "at the time raze order was issued (on 4/16/99)." In an April 10, 2001 hearing, a transcript of which is not included in the appellate record, the court denied Reischel's motion.

[2] According to the Chicago Title Insurance Company report dated February 15, 1999, Benedict J. Reischel was the property's last owner of record and Charles Nootens was the mortgagee.

¶5 On appeal, the City responds only that Reischel failed to advance the affirmative defense of non-ownership of the property in his responsive pleadings, thus waiving the issue he now attempts to present on appeal. Reischel replies that his supplemental affidavit in opposition to the City's motion for summary judgment, averring that the City had gained title to the property on June 24, 1999, and remained the owner of the property at the time it was razed, allows this court to consider his claim, and should have required the small claims court to address the merits. Reischel is correct. Not only did he present his non-ownership argument in his supplemental affidavit, Reischel also raised it explicitly in his motion "for court to rule as to subject property's rightful ownership; as of its razing thereof." In small claims actions, "[a]ll pleadings except the initial complaint may be oral." WIS. STAT. § 799.06(1).[3]

¶6 Reischel contends:

> Trial Court should have looked further within the Statutes; and; thereby found, that, in accordance with s. 74.53(1[](]b), Wis. Stats., that was in effect on date said property in question was razed (on or about November 9, 1999), the City … can *only* make a person personally responsible for razing cost incurred … "if the person owned the property when the property was razed" ….

(Emphasis added.) Reischel is correct. WISCONSIN STAT. § 74.53 (1997-98), the version that was in effect at the time of the razing, provided, in relevant part:

> **Personal liability for delinquent taxes and other costs. (1)** RECOVERY OF … COSTS AGAINST PERSONS. … [A] municipality may bring a civil action against a person to recover …:
>
> ….

[3] Despite any possible inadequacy in Reischel's responsive pleadings, the small claims court allowed him to proceed, apparently on the basis of his motions and oral responses. *See* WIS. STAT. § 802.01(1) ("No other pleading shall be allowed, except that the court may order a further pleading to a reply or to any answer.").

> (b) The cost of razing and removing property and restoring the site … if the person owned the property when the property was razed and removed and the site restored ….

Thus, Reischel is personally liable under § 74.53(1)(b) (1997-98) only if he owned the property when it was razed and removed.

¶7 Effective April 26, 2000, however, WIS. STAT. § 74.53(1)(b) was amended to read: "The cost of razing and removing property and restoring the site … if the person owned the property when the property was razed and removed and the site restored …, *or if the person owned the property while the order to raze the property was recorded in the register of deeds[']* *office*." (Emphasis added.) *See* 1999 Wis. Act 68, § 1; WIS. STAT. § 991.11 ("Every act … which does not expressly prescribe the time when it takes effect shall take effect on the day after its date of publication …."). Thus, if the amended statute applies retroactively, Reischel's "ownership" could be established by virtue of the recording of the raze order with the register of deeds.

¶8 Whether a statute has retroactive application is a question of law subject to our *de novo* review. ***Salzman v. DNR***, 168 Wis. 2d 523, 528, 484 N.W.2d 337 (Ct. App. 1992). As this court explained in ***Lins v. Blau***, 220 Wis. 2d 855, 584 N.W.2d 183 (Ct. App. 1998):

> The general rule of statutory construction is that statutes are construed prospectively and not retroactively. However, if the statute at issue is remedial or procedural, it will be applied retroactively unless there is a clearly expressed legislative intent to the contrary or unless retroactive application will interfere with contracts or vested rights. The distinction between substantive and procedural laws is relatively clear. If the statute merely prescribes a method for enforcing a right or remedy, it is deemed to be procedural; if it creates, defines, or regulates rights or obligations, it is deemed to be substantive.

Id. at 862 (citations omitted). There is no question that WIS. STAT. §74.53(1)(b) is substantive; it delineates who has personal liability for the cost of razing and removing property. Accordingly, the statutory change, effective April 26, 2000, may not be applied retroactively to establish Reischel's "ownership."

¶9 Summary judgment methodology is used to determine whether a legal dispute requires a trial. ***U.S. Oil Co. v. Midwest Auto Care Servs., Inc.***, 150 Wis. 2d 80, 86, 440 N.W.2d 825 (Ct. App. 1989). A circuit court must enter summary judgment when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show 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." WIS. STAT. § 802.08(2). When we review a grant of summary judgment, we apply the same methodology employed by the circuit court. ***Doe v. Archdiocese of Milwaukee***, 211 Wis. 2d 312, 332, 565 N.W.2d 94 (1997). Accordingly, we will reverse a summary judgment decision only when "the record reveals that one or more genuine issues of material fact are in dispute or the moving party is not entitled to judgment as a matter of law." ***Strasser v. Transtech Mobile Fleet Serv., Inc.***, 2000 WI 87, ¶30, 236 Wis. 2d 435, 613 N.W.2d 142.

¶10 The record contains a copy of a March 30, 1999 settlement agreement by which Reischel purportedly conveys to First National Finance Corporation (FNFC) "title and possession" of the property and warrants that title to the property is "free and clear from any and all encumbrances, with the exception of the Mortgage" by which FNFC had secured its loan to him. Although the agreement states that FNFC agreed to accept title to the property, the copy is signed only by Reischel—the space for the signature of FNFC's vice president is empty. The agreement, however, also contains the following

provision: "The parties agree that this Agreement may be executed in multiple counterparts which may be signed and delivered separately."

¶11 Reischel's motion to reopen the judgment identifies Charles Nootens as "continuous Encumbrance (1st Mortgage) Holder-of-Record of Razed Property in question" and "original fiduciary" of the repair escrow account "established by Nootens as an integral part of 1st Mortgage," and it identifies FNFC as "Owner-of-said-Property in question Since 4/16/99." It alleges that Nootens had the chief executive officer of FNFC list the property for sale with a realtor and "collect monthly rents from tenant(s) residing in said razed property, until said tenant(s) was/were forced to vacate upon said notice of razing being posted thereon." Reischel's motion also alleges that FNFC purposely failed to file the "Warranty Deed, granted; pursuant to March 30, 1999, Settlement Agreement between [FNFC] & [himself], regarding subject property; to [FNFC], by [himself], in lieu of foreclosure action being brought against [the] property."

¶12 The record also contains a copy of a November 15, 1999 judgment granting the City ownership of the property pursuant to tax lien foreclosure; the judgment was issued in response to the City's June 24, 1999 petition for judgment. Attached to the judgment is a cover sheet labeled "MOTION AND ORDER VACATING JUDGMENT." In her affidavit in support of the City's motion for summary judgment, Beverly Temple, Assistant City Attorney, explains: "Due to a clerical error in the process of recording the judgment with the Register of Deeds, my office used the wrong document as a cover sheet. There was no order vacating the foreclosure judgment issued on that date or any other date."

¶13 Thus, there clearly is a disputed genuine issue of material fact regarding ownership of the property at the time of the razing. Accordingly, this court reverses. *See* ***Strasser***, 2000 WI 87 at ¶30.

By the Court.—Order reversed.

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