COURT OF APPEALS
DECISION
DATED AND FILED

August 18, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP746-FT **Cir. Ct. No. 2009CV1760**

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

CAROL UEBELACKER,

PLAINTIFF-APPELLANT,

V.

MICHAEL BEGLER AND KELLY BEGLER,

DEFENDANTS-RESPONDENTS,

ABC CONSTRUCTION COMPANY AND DEF CARPENTRY COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: MICHAEL O. BOHREN, Judge. *Affirmed.*

Before Brown, C.J., Neubauer, P.J, and Anderson, J.

¶1 PER CURIAM. Carol Uebelacker appeals from an order dismissing her complaint against Michael and Kelly Begler for building a detached boathouse in violation of an amendment to an agreement for land use and building restrictions. The circuit court invalidated the 2003 amendment to the agreement.[1] We affirm the order of the circuit court.

¶2 The parties are next door neighbors and are bound by a 1961 agreement amongst owners in the Upper Oconomowoc Lake Association which prohibits any building on a residential lot other than a three-car garage, excepting a boathouse as "permitted with consent of the Architectural Control Committee." The agreed upon restrictions were binding for twenty-five years from recording and automatically extended for ten-year periods thereafter "unless an instrument signed by a majority of the then owners of the lots has been recorded, agreeing to change said covenants in whole or in part." In response to the holding in ***Pertzsch v. Upper Oconomowoc Lake Association***, 2001 WI App 232, ¶16, 248 Wis. 2d 219, 635 N.W.2d 829, that the subdivision's Architectural Control Committee "can control construction of boathouses using the criteria in paragraph two [of the 1961 agreement], it cannot ban them entirely," a ballot was circulated to lot owners proposing a change to the language concerning detached boathouses. Based on thirty-three votes of lot owners in favor of amended language, three members of the Architectural Control Committee signed and recorded an amendment to the 1961 agreement. This is referred to as the 2003 Amendment and adds to the agreement, immediately after the provision that a boathouse may

[1] Pursuant to a presubmission conference and this court's order of April 8, 2010, the parties submitted memorandum briefs. *See* WIS. STAT. RULE 809.17(1) (2007-08). All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

be permitted by consent, "Such boat house must be attached to and be an integral part of the house structure."

¶3 In late April 2009 the Beglers commenced construction of a detached boathouse on their property. Relying on the 2003 Amendment, Uebelacker commenced this action to enjoin construction.[2] Within one month of the commencement of the action, the Beglers moved for summary judgment dismissing the complaint. On August 13, 2009, the circuit court found it undisputed that there were more than six property owners in Upper Oconomowoc Lake Association when the 2003 Amendment was recorded and thus, a majority of owners did not sign the recorded 2003 Amendment. It granted the motion for summary judgment and declared the 2003 Amendment void and invalid.[3] Uebelacker moved for reconsideration of the summary judgment ruling and filed a motion for leave to file a second amended complaint. Attached to the proposed second amended complaint, which intended to join all lot owners in the Upper Oconomowoc Lake Association as involuntary plaintiffs, were the ballots related to the 2003 Amendment. On December 21, 2009 the circuit court denied the

[2] An amended complaint alleged that the Beglers had failed to comply with the 1961 agreement by not submitting their plan for their house and boathouse to the Architectural Control Committee. On May 26, 2009, the Beglers submitted their plans and specifications to the Architectural Control Committee. Subsequently Uebelacker filed an affidavit that "I am willing to abide whatever the determination of the Architectural Control Committee may be in regard to the Defendant's construction plans as they relate to all structures to be built on the Defendant's site including the previously constructed boathouse." Uebelacker moved for summary judgment claiming that the Beglers' late submission of their plans to the Architectural Control Committee admitted her claim that they had failed to do so as required by the 1961 agreement.

[3] The circuit court also gave Uebelacker the opportunity to file a new motion to amend her complaint or indicate a desire to proceed on the previously filed motion to amend her complaint.

motion for reconsideration and denied leave to file a second amended complaint. During the litigation the boathouse was completed.[4]

¶4 We review decisions on summary judgment de novo, applying the same methodology as the circuit court. *See* ***M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.***, 195 Wis. 2d 485, 496-97, 536 N.W.2d 175 (Ct. App. 1995); WIS. STAT. § 802.08(2). That methodology has been recited often and we need not repeat it here except to observe that summary 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. *See* ***M & I First Nat'l Bank***, 195 Wis. 2d at 496-97. We view the summary judgment materials in the light most favorable to the nonmoving party. ***Summers v. Touchpoint Health Plan***, 2008 WI 45, ¶15, 309 Wis. 2d 78, 749 N.W.2d 182.

¶5 It is undisputed that the 2003 Amendment is signed by only three owners of lots in the Upper Oconomowoc Lake Association. The Beglers' attorney filed an affidavit that:

> Upon my review of the records maintained by the Waukesha County Register of Deeds Office, available at http://www.waukeshacounty.gov, I determined that there were thirty-nine (39) separate lot owners at the time the 2003 Amendment was recorded, thirty-seven (37) of whom did not sign the 2003 Amendment. (Footnote omitted)

[4] A temporary injunction was denied. Uebelacker's June 19, 2009 affidavit stated that from her vantage point it appeared that the boathouse was essentially completed.

¶6 Uebelacker first argues that the Beglers' proof that there were more than six different lot owners is based on impermissible hearsay.[5] It was not necessary for the circuit court to rely on the attorney's summary of his record search. Attached to the attorney's affidavit were records from the Waukesha County Register of Deeds demonstrating at least five different lots within the Upper Oconomowoc Lake Association owned by persons who did not sign the 2003 Amendment. The circuit court properly took judicial notice of those records.[6] WIS. STAT. § 902.01(2)(b). Michael Begler's affidavit stated there were at least forty lots in the subdivision. Uebelacker offered nothing to dispute that fact. Moreover, Uebelacker's motion to file a second amended complaint acknowledged that there were more than six different owners of lots in the subdivision as she sought to join fifty-four sets of property owners. Uebelacker later produced forty-one signed ballots relating to the 2003 Amendment which also reflects that there were more than six lot owners when the amendment was recorded. Any defect in the Beglers' proof was cured by Uebelacker's own filings.

¶7 Uebelacker's other claim is that the actual number of signatures on the recorded 2003 Amendment is irrelevant and approval of the amending

[5] She also argues that if the Beglers' attorney provides substantive evidence via affidavit, then that attorney cannot represent the Beglers under SCR 20:3.7(a)(1). The argument is not developed. We will not consider an argument that is inadequately briefed. ***Fryer v. Conant***, 159 Wis. 2d 739, 746 n.4, 465 N.W.2d 517 (Ct. App. 1990). The argument is specious in that WIS. STAT. § 802.08(3) authorizes affidavits setting forth "such evidentiary facts as would be admissible in evidence" and contemplates the type of affidavit filed by the Beglers' attorney to bring public documents into the summary judgment record.

[6] Uebelacker argues for the first time in her reply memorandum that it was wrong for the circuit court to take judicial notice of the documents. We will not, as a general rule, consider arguments raised for the first time in a reply brief. ***Schaeffer v. State Personnel Comm'n.***, 150 Wis. 2d 132, 144, 441 N.W.2d 292 (Ct. App. 1989).

language by a majority of lot owners (thirty-three out of fifty-three) as reflected by the ballots is good enough. The simple answer is that wanting to amend the 1961 agreement and actually doing so are two different things. The 1961 agreement unambiguously requires that changes to the agreement be by a recorded "instrument signed by a majority of the then owners of the lots." That provision cannot be ignored or excised from the agreement. Nothing else is sufficient. In light of the specific procedure adopted in the 1961 agreement, there is no place for Uebelacker's public policy argument that collective interest should nonetheless control. The 2003 Amendment was signed by only three lot owners, not the majority of lot owners; the amendment is not valid.[7]

By the Court.—Order affirmed.

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

[7] The closing sentence of the Beglers' memorandum brief requests an award of costs and attorney fees under WIS. STAT. RULE 809.25(3), in responding to Uebelacker's frivolous appeal. We will not act on a statement in a brief that asks that an appeal be held frivolous. ***Howell v. Denomie***, 2005 WI 81, ¶19, 282 Wis. 2d 130, 698 N.W.2d 621. A separate motion is necessary to raise frivolousness. ***Id.***