

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 17, 2011

A. John Voelker
Acting 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. 2010AP2322

Cir. Ct. No. 2009CV154

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

ALLEN S. MUSIKANTOW TRUST,

PLAINTIFF-APPELLANT,

V.

TOWN OF LIBERTY GROVE,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Door County: D. T. EHLERS, Judge. *Affirmed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. The Allen S. Musikantow Trust appeals a summary judgment dismissing its tax assessment challenge. The Trust argues summary

judgment was improper because there was a factual dispute regarding the timeliness of the notice of reassessment.¹ We disagree and affirm.

BACKGROUND

¶2 The Trust owns real estate in the Town of Liberty Grove. In 2008, the Trust's property was reassessed from approximately \$3 million to just over \$6 million. The Trust filed an action in circuit court contesting the assessment. Liberty Grove moved for summary judgment, arguing the Trust had failed to challenge the assessment before the board of review. The Trust responded that it did not receive notice of the reassessment prior to the board of review meeting.

¶3 The circuit court initially denied Liberty Grove's motion, concluding there was a material issue of disputed fact. The court relied on two affidavits submitted by the Trust. The affidavit of Mary Fran McMahon stated:

1. I work at Suite 600, 100 E. Walton St., Chicago, IL 60611 and am the person to whom all mail addressed to Allen S. Musikantow Trust is delivered.
2. Attached is a notice of assessment for the year 2008 that was delivered, except for the handwriting in the upper right-hand corner that was subsequently added "REC'D in Chicago on Thursday of last week. [sic] 9/4/08."
3. The notice of assessment includes the Board of Review date and time of "8/20/08 1:00 p.m.—3:00 p.m."
4. Each business day I received said mail and open[ed] it for subsequent review by Allen S. Musikantow.
5. There was no delay or other matter on the part of my office to delay the delivery of the notice of assessment.

¹ The parties also dispute whether timely notice was necessary. We need not reach that issue. See *State v. Castillo*, 213 Wis. 2d 488, 492, 570 N.W.2d 44 (1997) (appellate courts not required to address every issue raised when one issue is dispositive).

The affidavit of Allen Musikantow stated:

1. I am trustee of the Allen S. Musikantow Trust, the Plaintiff in this matter.
2. Attached is a copy of a notice of assessment for the year 2008 that was delivered.
3. The person in charge of the office who receives all deliveries for the trust is Mary Fran McMahon.
4. On the date that each such letter is delivered she delivers, on the same date, the same to my office for review.
5. The notice of assessment was not delivered to the office of the trust until after August 20, 2008.

¶4 Following the denial of its motion, Liberty Grove deposed McMahon. It then moved again for summary judgment, submitting McMahon's clarifying deposition testimony. Her testimony included the following:

- a. Musikantow did not reside in Chicago in 2008 and had no office there;
- b. Mail received at the Trust's office was forwarded either to Musikantow's residence in Florida or his residence and office in Sister Bay, Wisconsin;
- c. McMahon did not know when the notice of changed assessment was received at the Trust's office in Chicago;
- d. McMahon did not know when the notice was mailed to Mr. Musikantow in Sister Bay;
- e. McMahon did not write "REC'D in Chicago on Thursday of last week, 9/4/08" on the notice. She did not know who wrote that language on the notice, but did not think it was Musikantow's handwriting;
- f. Mail received by the Trust was not date stamped, McMahon did not note the date of receipt on any mail received in 2008, and envelopes were not retained;

g. McMahon did not know whether the notice would have been sent to Musikantow in Sister Bay on the same day it was received;

h. Mail for Musikantow's ten to twelve other interests or businesses was also received at the Trust's office;

i. Mail delivered to Trust's office also includes mail related to three other individuals who have their own businesses. On delivery, the mail would not necessarily be given to McMahon. Rather, it could be given to one of the representatives of the other individuals, or could be simply left on a counter. Someone, but not necessarily McMahon, would sort the mail. Mail for the Trust and other Musikantow interests would then be either given to McMahon or left on the counter, where she would pick it up.

¶5 Musikantow did not submit any affidavit or other evidence in response to Liberty Grove's renewed motion. The court granted that motion, concluding there was no competent evidence that the notice was received late. The Trust now appeals.

DISCUSSION

¶6 Summary judgment is appropriate when there is no material fact in dispute and the movant is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2);² *Germanotta v. National Indem. Co.*, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Additionally:

Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be admissible in evidence. ... The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and

² All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party's response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against such party.

WIS. STAT. § 802.08(3).

¶7 The Trust argues the circuit court made determinations as to credibility and the weight of the evidence when granting the summary judgment motion, resulting in an improper trial upon affidavits and depositions. *See Lecus v. American Mut. Ins. Co.*, 81 Wis. 2d 183, 189, 260 N.W.2d 241 (1977). We disagree.

¶8 The two affidavits and the deposition testimony were all consistent—McMahon received all mail delivered to the Trust. There was no dispute that Musikantow was not physically in the same city, much less the same state, as the Trust office when the notice of reassessment was delivered to the Trust. There was no dispute that McMahon did not know when she received the notice or when she forwarded it to Musikantow. The only reasonable inference then, is that Musikantow could not, and did not, know when the notice was delivered.

¶9 The Trust's argument rests entirely upon Musikantow's averment that "the notice of assessment was not delivered to the office of the Trust until after August 20, 2008." As the circuit court observed, McMahon's deposition testimony "cast an entirely different light on the facts." In the absence of any explanation by Musikantow, McMahon's testimony reveals Musikantow's affidavit to be a sham. It is not enough that issues of fact be disputed, they must also be genuine. *See* WIS. STAT. § 802.08(3). A party opposing summary

judgment may not “rely upon unsubstantiated conclusory remarks, speculation, or testimony [that] is not based upon personal knowledge.” *Helland v. Froedtert Mem’l Luth. Hosp.*, 229 Wis. 2d 751, 756, 601 N.W.2d 318 (Ct. App. 1999). The circuit court therefore properly granted Liberty Grove’s summary judgment motion.

By the Court.—Order affirmed.

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

