COURT OF APPEALS
DECISION
DATED AND FILED

March 15, 2005

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 04-2175 **Cir. Ct. No. 04-SC-65**

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

ENGELKING CORPORATION,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF SUPERIOR,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Douglas County: GEORGE L. GLONEK, Judge. *Affirmed*.

¶1 CANE, C.J.[1] Engelking Corporation, pro se, appeals a summary judgment order dismissing its case against the Village of Superior for return of money paid under protest for sewer service. Although Engelking's arguments are

[1] This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

difficult to discern, it appears to argue summary judgment was inappropriate because (1) it was not given timely notice of the motion; and (2) while it was connected to the sewer system it was not actually running water through it so he should not be charged. We conclude Engelking waived its right to contest the timeliness of the notice of the motion. We further conclude that the Village's sewer sytem ordinance provides that users are charged upon connection regardless of whether water is actually run through the sewer. We therefore affirm the judgment.

BACKGROUND

¶2 On June 10, 1999, the Village of Superior issued Engelking building permits for two lots in the Stardusk Estates subdivision in the Village. That same day, Engelking applied for and received permits for sewer service to both houses that were constructed and connected to the sewer in 1999. The houses were incomplete and vacant from 1999 until 2003.

¶3 On May 15, 2003, Engelking received a letter from the Village asking about the status of the construction and stating that "normally homes are completed within a six month period." The Village requested payment of $102 for sewer services for the first two quarters of 2003. When Engelking failed to pay, the Village sent another letter on October 14, 2003. The Village now asked for payment for the first three quarters plus a late penalty charge.

¶4 Engelking protested the bill at a November 13 Village board meeting. Engelking stated that the houses had been connected to the sewer since 1999 but no water had passed through the sewer. The board responded that it was not aware that the houses had been connected since 1999. The board also stated that charges are related to connection to the sewer, not its use. It determined that

Engelking should have been charged for sewer services since 1999 and on November 18 sent Engelking a bill for $1,795.20.

¶5 Engelking paid the bill under protest and sued the Village in small claims court for the return of the money. It argued the Village improperly charged fees for sewer service and that the Village acted in bad faith. The Village moved for summary judgment, arguing it was authorized by the Village's sewer ordinance to charge Engelking for sewer service since 1999. The circuit court concluded the Village properly charged Engelking, granted the Village's motion and dismissed the case.

DISCUSSION

¶6 We review summary judgment de novo, applying the same method as the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when there is no material factual dispute and the moving party is entitled to judgment as a matter of law. ***Germanotta v. National Indem. Co.***, 119 Wis. 2d 293, 296, 349 N.W.2d 733 (Ct. App. 1984). Summary judgment methodology is well established and need not be repeated here. *See, e.g.*, ***Lambrecht v. Estate of Kaczmarczyk***, 2001 WI 25, ¶¶20-24, 241 Wis. 2d 804, 623 N.W.2d 751. This case also involves the interpretation of the Village's sewer ordinance, which is a question of law we also review de novo. *See* ***Hansman v. Oneida County***, 123 Wis. 2d 511, 514, 366 N.W.2d 901 (Ct. App. 1985).

¶7 Engelking first argues it did not have timely notice of the Village's summary judgment motion. WISCONSIN STAT. § 802.08(2) states that a summary judgment motion shall be served at least twenty days before the hearing. The Village concedes that its motion was filed and served only seven days before the

motion hearing was scheduled. However, it argues, and we agree, that Engelking waived any objection to the timeliness of the notice.

¶8 The Village filed a notice of motion for summary judgment on June 21, 2004, and the court set the hearing for June 28. Engelking protested that it was unavailable on that date. It argued they should proceed to trial on July 2, the date previously set for trial. On July 2, the court asked Engelking about its objection to the timing of the summary judgment motion. The court stated it understood that the summary judgment motion was to be heard that day. Engelking stated it had no objection to proceeding. Therefore, Engelking waived any right it had to protest the timing of the notice.

¶9 Engelking next argues summary judgment was inappropriate because, although the houses connected to the sewer since 1999, it never ran water through it. The circuit court concluded the ordinance "does provide for a sewer fee upon connection. The fee is being based upon the availability of the sewer system, not necessarily the use of the system." However, Engelking contends the ordinance does not specifically state that fees are charged upon connection. Instead, it argues fees are charged to "users" and that it never used the sewer system.

¶10 When the language of an ordinance is clear on its face, our review is limited to the ordinance itself. *See* ***Swanson Furniture Co. v. Advance Transp. Co.***, 105 Wis. 2d 321, 326, 313 N.W.2d 840 (1982). An ordinance is not rendered ambiguous merely because the parties disagree about its meaning. ***Forest County v. Goode***, 219 Wis. 2d 654, 663, 579 N.W.2d 715 (1998). Whether an ordinance is ambiguous is a question of law we review de novo. *See* ***Boltz v. Boltz***, 133 Wis. 2d 278, 284, 395 N.W.2d 605 (Ct. App. 1986).

¶11 We conclude the ordinance unambiguously makes clear that one is a user upon connection to the sewer. The sewer ordinance, VILLAGE OF SUPERIOR, DOUGLAS COUNTY, WI, ORDINANCE NO. 21-K, § 3, states that the rules, regulations and sewer rates apply to "every person, company, or corporation who is *connected* with the sewer system." (Emphasis added.) Furthermore, in § 4 of the ordinance, entitled "USERS," it states:

> The owner of each parcel of land adjacent to a sewer main on which there exists a building usable for human habitation or in a block through which such system is extended, shall connect to such system within 10 days of notice in writing from the Village. Upon failure to do so the Village may cause such connection to be made and bill the property owner for such costs.

Engelking connected to the sewer in 1999. Therefore it was a user since 1999 and is responsible for sewer charges since that time.

¶12 Engelking argues the buildings were not usable for human habitation so § 4 of the ordinance cannot apply. We conclude that had Engelking not connected to the sewer, the Village might not have been authorized to require a connection. However, whether it was mandatory for Engelking to connect is not at issue here. Instead, our discussion of § 4 simply points out that the ordinance implies that one becomes a user when it connects to the sewer system. Engelking was connected and thus it was a user.

¶13 Next, Engelking argues that WIS. STAT. § 196.635(1) mandates public utilities to bill within two years. Engelking argues that the Village billed him on November 18, 2003, so it could only charge him for the two previous years, not back to 1999. However, the statute Engelking cites does not apply to a governmental unit, which the Village is. *See* WIS. STAT. § 196.01(5)(a)1. It cites

no statute that prevents the Village, as a governmental unit, from charging Engelking back to the time of connection. We therefore reject its argument.

¶14 Finally, Engelking argues there are several factual disputes that would prevent summary judgment. Without belaboring each factual dispute Engelking lists, we conclude none are disputes regarding material facts and therefore do not prevent summary judgment. For example, Engelking contends it is disputed when the Village became aware Engelking was connected to the system. He argues the Village knew well before the board meeting when Engelking informed the board it had been connected since 1999. However, when the Village became aware of the connection is immaterial. Nothing in the ordinance ties sewer fee liability to the Village's knowledge that someone is connected. The ordinance simply states that upon connection, the user is liable for sewer charges. Engelking connected in 1999 and thus is liable for fees since that time.[2]

By the Court.—Judgment affirmed.

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

[2] The Village also raises issues of whether governmental immunity applies and whether Engelking gave proper notice of his claims. Because we conclude the Village has authority to charge Engelking based on the ordinance, we do not discuss the Village's additional issues.