

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 18, 2012**

Diane M. Fremgen  
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. 2012AP1471**

**Cir. Ct. No. 2011SC144**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**BARBARA L. BABLICK,**

**PLAINTIFF-APPELLANT,**

**V.**

**DR. DA PA DO ENTERPRISES, LLC,**

**DEFENDANT-RESPONDENT,**

**ROBERT L. WOELFEL AND GEORGE DIEM, JR.,**

**DEFENDANTS.**

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APPEAL from a judgment of the circuit court for Price County:  
PATRICK J. MADDEN, Judge. *Affirmed.*

¶1 MANGERSON, J.<sup>1</sup> Barbara Bablick appeals a judgment that dismissed her small claims action against Dr. Da Pa Do Enterprises, LLC, after a fact-finding hearing. Before the hearing, Bablick moved for summary judgment, and the court denied her motion. Bablick argues the circuit court erred by denying her summary judgment motion. We disagree and affirm.

## BACKGROUND

¶2 Bablick brought a small claims action against Robert Woelfel and George Diem, Jr., (collectively Woelfel) and Dr. Da Pa Do Enterprises, LLC (Da Pa Do). She asserted the defendants breached their contract with her by failing to construct an access road and building site on her property. Woelfel and Da Pa Do answered Bablick's complaint and filed cross-claims against each other for damages.

¶3 Bablick then moved for summary judgment. In support of her motion, she submitted an affidavit and averred that she had purchased land from Da Pa Do and that the real estate contract contained the following provision: "Seller to provide access road and building site; Buyer to determine building site. The access road and building site to be completed on or before June 15, 2007." Bablick further stated that Da Pa Do had entered into a separate real estate transaction with Woelfel that required him to construct an access road and building site for her on her property.<sup>2</sup> She averred that neither Da Pa Do nor

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2). All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>2</sup> In essence, before Bablick purchased the property, Da Pa Do granted Woelfel an easement over what ultimately became Bablick's property. In consideration for the easement, Woelfel was to construct an access road and building site on the grantor's property to the grantor's satisfaction and at Woelfel's expense.

Woelfel constructed the road or cleared the building site, that she incurred the cost of constructing the road and clearing the building site, and that she was entitled to damages. In support of her affidavit, Bablick attached her offer to purchase the property, copies of bills for the road and building site construction, and a copy of the recorded easement between Da Pa Do and Woelfel.

¶4 Woelfel responded to Bablick's summary judgment motion, averring that he never had a contract with Bablick and that he timely performed the contract he had with Da Pa Do, which required him to clear and construct an easement road and cut and establish a building site. Woelfel argued Bablick's averment that she incurred the expenses to construct the road and clear the building site, as well as her proposed damages, constituted genuine issues of material fact.

¶5 Da Pa Do did not file a response to Bablick's summary judgment motion. However, at the motion hearing, Da Pa Do questioned why it was a party to the lawsuit and argued Bablick was not entitled to summary judgment because "once the closing was done, the easement takes over, and it becomes an easement between the two parties that are sitting to my right." Da Pa Do further argued that there was a factual dispute as to damages and what, if any, communication Bablick had with Da Pa Do to try and enforce the June 15, 2007 deadline.

¶6 The circuit court denied Bablick's motion for summary judgment, reasoning Da Pa Do and Woelfel "have pointed out to the Court in their briefs and in their responses that there exist[] genuine issues of material fact as to what was the understanding of the parties, the requirements of the parties and the performance of the parties, and those issues are to be addressed at trial." The court then proceeded to the small claims trial. At the end of the hearing, the court

dismissed Bablick's claims against Da Pa Do. It also dismissed Bablick's claims against Woelfel.

## DISCUSSION

¶7 On appeal, Bablick argues the court erred by failing to grant her summary judgment against Da Pa Do.<sup>3</sup> She asserts that, because Da Pa Do failed to file a response to her summary judgment motion, the facts she alleged against it were undisputed and she was therefore entitled to judgment as a matter of law.

¶8 We review a circuit court's decision on a motion for summary judgment de novo, using the same methodology as the circuit court. *Palisades Collection LLC v. Kalal*, 2010 WI App 38, ¶9, 324 Wis. 2d 180, 781 N.W.2d 503. Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). "We examine the moving party's submissions to determine whether they constitute a prima facie case for summary judgment. If they do, then we examine the opposing party's submissions to determine whether there are material facts in dispute that entitle the opposing party to a trial." *Palisades*, 324 Wis. 2d 180, ¶9 (citations omitted). Summary judgment materials, including pleadings, depositions, answers to interrogatories, and admissions on file are viewed in the light most favorable to the non-moving party. *Rainbow Country Rentals v. Ameritech Publ'g*, 2005 WI 153, ¶13, 286 Wis. 2d 170, 706 N.W.2d 95.

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<sup>3</sup> Woelfel is not subject to this appeal. In her brief-in-chief, Bablick states that Woelfel's affidavit and response to her summary judgment motion created genuine issues of fact.

¶9 We conclude Bablick was not entitled to summary judgment. First, after examining Bablick’s summary judgment materials in the light most favorable to Da Pa Do, we observe that her submissions did not establish a prima facie case for summary judgment. Specifically, although Bablick averred Da Pa Do breached the contract by failing to complete the work by June 15, 2007, at least one bill Bablick submitted to support her averment that she had to hire workers and complete the project herself predates the June 15, 2007 deadline.<sup>4</sup> Nothing in her summary judgment motion or her submissions explains why she is entitled to judgment as a matter of law for Da Pa Do’s alleged breach of contract if she failed to give Da Pa Do time to perform under the contract.

¶10 Second, even assuming Bablick’s submissions were sufficient, the affidavit co-defendant Woelfel submitted to oppose Bablick’s summary judgment motion creates a genuine issue of material fact that also precludes summary judgment against Da Pa Do. Although Bablick suggests Woelfel’s affidavit can only be used to defeat the summary judgment motion as it pertained to Woelfel, she presents no legal authority in support of her assertion that an affidavit to oppose summary judgment can be considered only with respect to the document’s filer. *See State v. Pettit*, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992). We will not consider it.

¶11 Here, Woelfel averred he had a contract with Da Pa Do to construct a road and clear a building site and he performed under his contract with Da Pa Do. If Da Pa Do contracted with Woelfel to complete the work and

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<sup>4</sup> The remaining bills are either undated or simply dated June 2007. Further, the “bill” dated October 31, 2011 does not appear to be a bill because it is entitled “quotation.”

Woelfel properly constructed the required building site and access road, there is a genuine issue of material fact as to whether Da Pa Do breached the contract by requiring Bablick to hire her own contractors and incur the expenses herself. Judgment as a matter of law against Da Pa Do would have been inappropriate.

*By the Court.*—Judgment affirmed.

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

