

**COURT OF APPEALS
DECISION
DATED AND FILED**

November 21, 2007

David R. Schanker
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. 2006AP2796

Cir. Ct. No. 2006CV275

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

VAN ZEELAND OIL COMPANY, INC.,

PLAINTIFF-RESPONDENT,

V.

TOWN OF MENASHA,

DEFENDANT,

VALLEY GATEWAY DEVELOPMENT,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Winnebago County: SCOTT C. WOLDT, Judge. *Affirmed.*

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

¶1 PER CURIAM. Valley Gateway Development, LLC, appeals from the judgment entered against it and awarding money damages and attorney fees to Van Zeeland Oil Company, Inc. Valley Gateway argues that the circuit court did not have the equitable power to award attorney fees to Van Zeeland; that even if it did have the power to order fees, it should not have done so in this case because Valley Gateway defaulted; that the circuit court's award of damages was clearly erroneous; and that because Valley Gateway was in default and had not appeared in the law suit, the circuit court erred when it awarded Van Zeeland more than the amount of damages demanded in the complaint. We conclude that Valley Gateway did not default, but waived its right to challenge the damage and attorney fees awards by not objecting to them at the trial. Consequently, we affirm.

¶2 In 1997, Van Zeeland purchased some property in the Town of Menasha from Valley Gateway. At closing, Van Zeeland and Valley Gateway entered into an escrow agreement whereby \$65,000 was escrowed from the closing proceeds to ensure payment by Valley Gateway to the Town of Menasha for installing streets. Valley Gateway had previously represented that municipal sewer and water improvements had already been installed on the property.

¶3 In 1999, Valley Gateway and the Town of Menasha entered into a Development Improvement Agreement that covered the property sold to Van Zeeland. This agreement allowed the Town to impose a special assessment for the cost of installing water mains, sewer mains, and street improvements on the property. Shortly thereafter, Valley Gateway got Van Zeeland to authorize release of the escrowed funds to pay for street improvements. Valley Gateway, however, used the money for another purpose.

¶4 In 2004, the Town of Menasha imposed a special assessment for installing sewer mains, water mains, and street improvements against Van Zeeland. This was the first time Van Zeeland learned that the water and sewer improvements had not already been installed and that Valley Gateway had not used the escrowed funds to pay for the street improvements.

¶5 Van Zeeland brought a declaratory judgment action against the Town seeking to have the special assessments declared null and void. Van Zeeland subsequently amended the complaint to include a cause of action against Valley Gateway for breaching the escrow agreement, and seeking damages in the amount of \$26,041.29. Brian Pesman, the sole owner and a managing member of Valley Gateway, filed an answer to the complaint on behalf of Valley Gateway and appeared on its behalf at trial. Pesman is not an attorney. Van Zeeland did not object to the answer filed by Pesman and a default judgment was not entered.

¶6 After a trial to the court, the court awarded judgment to Van Zeeland in the amount of \$32,490.93, representing the amount of the Town's special assessment against Van Zeeland's property with interest through the date of trial at the rate of 7.5%. The court also found that Valley Gateway had committed fraud against Van Zeeland by misrepresenting at the time of the sale that there already were water and sewer improvements on the property and by its later actions when it took the money from the escrow account. Because this was an action in equity, the court awarded Van Zeeland attorney fees and the costs of the litigation in the amount of \$9187.50.

¶7 Valley Gateway now argues that the answer filed by Pesman was not valid because Pesman is not an attorney, and he had no authority to file an answer on Valley Gateway's behalf. Further, Valley Gateway argues that because the

answer filed was not valid, it defaulted in this action, and the circuit court erred when it awarded Van Zeeland more than the amount of damages demanded in the amended complaint. Valley Gateway also argues that the circuit court erred when it allowed Van Zeeland 7.5% interest on the damage award and that it had no equitable power to award Van Zeeland attorney fees in the absence of an applicable statute or contract. We disagree.

¶8 First, we conclude that Valley Gateway did not default. We acknowledge that the answer filed by Pesman is defective on its face. Pesman did not sign it as an attorney, nor did he list a state bar number or anything else that would identify him as an attorney. Neither Van Zeeland nor the trial court, however, challenged the answer on this basis. Instead, all of the parties and the trial court treated the answer as having been validly filed, and a full trial was conducted on the basis that the complaint had been answered. Valley Gateway may not now use its decision to file an invalid answer to protect it from the judgment entered by the court after trial.

¶9 Second, we conclude that the circuit court did not err when it awarded attorney fees and interest on the damage award. Pesman attended the trial, even though he did not actively participate. He did not object to these awards. Once again, Valley Gateway may not use its decision to appear at trial without an attorney as a shield against the award of attorney fees and the amount of damages. Pesman had the opportunity to object to both the damage award and the award of attorney fees at the trial, but he did not. He is now bound by those choices. See *Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140 (1980), *superseded by statute on other grounds as stated in Wilson v. Waukesha County*, 157 Wis. 2d 790, 460 N.W.2d 830 (Ct. App. 1990) (no issue or claimed error of the trial court may be reviewed on appeal unless it was raised first before the trial

court). Consequently, we conclude that Valley Gateway waived the right to challenge the awards of damages, interest and attorney fees because Valley Gateway did not raise these issues before the circuit court.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5 (2005-06).

