

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 25, 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. 2011AP1482

Cir. Ct. No. 2009CV624

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

**TERRY JOHNSON, PAMELA JOHNSON AND MARINA BAY BOAT RENTALS,
INC.,**

PLAINTIFFS-APPELLANTS,

V.

CITY OF LAKE GENEVA,

DEFENDANT-THIRD PARTY

PLAINTIFF-RESPONDENT,

V.

HARBOR COVE CONDOMINIUM ASSOCIATION, INC.,

THIRD PARTY DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Walworth County:
JOHN R. RACE, Judge. *Affirmed.*

Before Neubauer, P.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. Terry Johnson, Pamela Johnson, Marina Bay Boat Rentals, Inc. and Harbor Cove Condominium Association, Inc. (hereafter Marina Bay) appeal from a judgment dismissing their claims against the City of Lake Geneva relating to Marina Bay's pier on Geneva Lake. We conclude that summary judgment was appropriate, and we affirm.

¶2 We review decisions on summary judgment by applying the same methodology as the circuit court. *M & I First Nat'l Bank v. Episcopal Homes Mgmt., Inc.* 195 Wis. 2d 485, 496, 536 N.W.2d 175 (Ct. App. 1995). 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. *Id.* at 496-97.

¶3 Marina Bay is operated by the Johnsons and conducts its boat and slip rental business from a pier on Geneva Lake.¹ In 1983, the City adopted a pierhead ordinance that restricted piers to 100 feet in length from the shoreline. City of Lake Geneva Municipal Code § 90-142. In 1997, the City demanded that Marina Bay reduce the length of its 156-foot pier to conform with the ordinance. Marina Bay sued the City to maintain its entire pier. The litigation was resolved by a stipulation that required Marina Bay to reduce the length of its pier to 100 feet to bring the pier into compliance with the ordinance before the 2003 boating season (the 1998 stipulation). The 1998 stipulation further provided that if § 90-142 were ever amended, Marina Bay could extend the length of its pier to the

¹ Harbor Cove Condominium Association contracted with Marina Bay to maintain the pier and operate its boat and slip rental business from the pier.

maximum length allowed under the amended ordinance. The parties' entered into an amended stipulation in 2002 allowing Marina Bay to maintain its pier through the end of the 2007 season and requiring compliance with the 100-foot ordinance for the 2008 season.

¶4 In 2008, Marina Bay installed a pier that exceeded 100 feet. The City sought to enforce the 100-foot requirement. Marina Bay sued the City alleging breach of contract and seeking declaratory and injunctive relief to prevent the City from enforcing the 100-foot pier length ordinance. Marina Bay later added an equal protection claim based on the fact that municipal piers were exempt from the 100-foot pier length ordinance. The City counterclaimed for enforcement of § 90-142 and the parties' stipulations.

¶5 In its summary judgment ruling, the circuit court concluded that it was undisputed that the stipulation controlled, § 90-142 had not been amended to permit piers in excess of 100 feet, and the Marina Bay pier exceeded 100 feet contrary to § 90-142 and the stipulations. The court also rejected Marina Bay's equal protection and selective prosecution claims because municipal piers are subject to a different ordinance, City of Lake Geneva Municipal Code § 90-148, which exempts municipal piers from the length restriction of § 90-142. In addition, the court concluded that the municipal piers serve a public purpose and are a revenue source for the City. Private piers and slips, such as that operated by Marina Bay, do not similarly operate for the public benefit. The circuit court granted summary judgment to the City and dismissed Marina Bay's claims.

¶6 On appeal, Marina Bay raises multiple challenges to the City's insistence that its pier not exceed 100 feet. Marina Bay argues that the creation in 2005 of § 90-148, which exempts municipal piers from the 100-foot requirement

of § 90-142, constituted the amendment of § 90-142 contemplated by the stipulation and relieved Marina Bay of the 100-foot restriction. We disagree.

¶7 The stipulation in which Marina Bay agreed to reduce the length of its pier to 100 feet unambiguously incorporated the length limits of § 90-142. The stipulation expressly provided that if the pier length limits of § 90-142 should increase, Marina Bay would get the benefit of a longer pier. The creation of § 90-148 did not change the 100-foot limit expressed in § 90-142. We cannot read into § 90-142 language the ordinance does not contain.²

¶8 Marina Bay argues that it had a Department of Natural Resources (DNR) permit for its pier and therefore cannot be subject to a 100-foot limit. The DNR permit was granted in May 1999 and specifically identified the pier to be installed as that pier contemplated in the 1998 stipulation. We note that in 2007, Marina Bay stipulated to reduce the length of its pier to 100 feet for the 2008 boating season. The existence of the DNR permit does not help Marina Bay in this dispute.

¶9 Marina Bay argues that the City acted inconsistently with WIS. STAT. § 30.13(3)(b) (2005-06) when it enacted § 90-148 to exempt municipal piers from the 100-foot limit of § 90-142. Again, we point out that Marina Bay stipulated on two occasions to reduce its pier to 100 feet as required by § 90-142.

² Because the stipulation controls and the provisions of City of Lake Geneva Municipal Code § 90-142 have not changed, we need not address Marina Bay's arguments that the City exceeded its authority in enacting City of Lake Geneva Municipal Code § 90-148 to except municipal piers from the length requirements of § 90-142. Marina Bay's private pier is subject to § 90-142 and Marina Bay stipulated that it would bring its pier into compliance with the ordinance. For the same reason, we do not address Marina Bay's argument that § 90-148 is invalid.

The 1998 stipulation pre-dated the 2005 enactment of § 90-148. The 2007 stipulation post-dated the creation of § 90-148. The stipulations control.

¶10 Marina Bay argues that its equal protection rights were violated because its pier is treated differently than the City's municipal piers. A "class of one" equal protection claim arises when a plaintiff alleges that it has been intentionally treated differently from others similarly situated and there is no rational basis for the difference in treatment, "or the cause of the differential treatment is a 'totally illegitimate animus' toward the plaintiff by the defendant." *McDonald v. Village of Winnetka*, 371 F.3d 992, 1001 (7th Cir. 2004). To "be considered 'similarly situated,' comparators must be 'prima facie identical in all relevant respects.'" *Id.* at 1002 (citation omitted).

¶11 In this case, the record establishes a rational basis for the disparate treatment of privately and publicly owned piers and does not support a claim of the City's animus toward Marina Bay. The summary judgment record establishes that the Marina Bay pier and the municipal piers are not "prima facie identical in all relevant respects." *Id.*

¶12 The affidavit of City Administrator Dennis Jordan set out the public purposes and uses of the City's piers. The public may access the piers from 8:00 a.m. to 11:00 p.m. daily from April 15 through November 1. The public may sit or walk on the piers, patronize shops on the piers, fish from the piers, board commercial boats from the piers, purchase gas for boats and rent boat slips. The public may use other municipal piers for boat launching and boat storage. Jordan's affidavit stated that the revenue generated by the City's piers is used to

install and maintain the piers or to cover project costs in the tax incremental district in which the piers are located.³ One public pier gas facility was replaced because it was completely deteriorated. Another pier was newly constructed. Otherwise, the City's piers have not been reconstructed. Marina Bay's private enterprise pier does not have the same characteristics as the municipal piers. We conclude that there were no material factual issues precluding dismissal on summary judgment of Marina Bay's equal protection claim.

¶13 We affirm the circuit court's judgment dismissing Marina Bay's claims.⁴

By the Court.—Judgment affirmed

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

³ Marina Bay filed additional legal authority in this court relating to a recent statute affecting piers, 2011 Wis. Act 167 (published April 16, 2012, effective date April 17). The City has responded that the new statute does not apply. This statute was neither in effect nor considered by the circuit court when it decided this case in its April 14, 2011 memorandum decision. We will not address the applicability of this new statute, if any, for the first time on appeal. See *First Bank v. H.K.A. Enters., Inc.*, 183 Wis. 2d 418, 426 n.10, 515 N.W.2d 343 (Ct. App. 1994).

⁴ To the extent we have not addressed an argument raised on appeal, the argument is deemed rejected. *State v. Waste Mgmt. of Wis., Inc.*, 81 Wis. 2d 555, 564, 261 N.W.2d 147 (1978) (“An appellate court is not a performing bear, required to dance to each and every tune played on an appeal.”).

