COURT OF APPEALS
DECISION
DATED AND FILED

November 19, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0219

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

KOHLER COMPANY,
A WISCONSIN CORPORATION,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF KOHLER,
A MUNICIPAL CORPORATION,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Sheboygan County: JAMES J. BOLGERT, Judge. *Affirmed.*

Before Snyder, P.J., Brown and Nettesheim, JJ.

PER CURIAM. The Kohler Company (Kohler) appeals from a judgment in favor of the Village of Kohler (the Village) in which the trial court held that the parties' 1981 "Projects Construction and Financing Agreement" terminates on December 31, 2000, and that Kohler does not have a right to have

the contract term extended. Because we agree with the circuit court that the contract unambiguously terminates on that date, we affirm.

The following facts are undisputed. In 1980, pursuant to the Tax Increment Law, § 66.46, STATS., the Village created two Tax Incremental Districts (TIDs) and adopted formal project plans for each. TID No. 1 was created for development of a commercial area around Wood Lake. TID No. 2 was intended to develop a residential area on the west side of the Village. Construction of the projects described in the project plans was financed through a private "Projects Construction and Financing Agreement" between the Village and Kohler which was executed on January 21, 1981.[1]

Under the Kohler-Village contract, Kohler agreed to advance funds to the Village to pay for improvements in the TID areas and the Village agreed to reimburse Kohler with interest out of the increased tax revenue increments generated by the increased valuation of the property within the TID.[2] That revenue would be placed in Special Funds from which Kohler would be paid pursuant to the contract. Revenue projections for TID No. 1 were not met and the amount in the Special Funds was insufficient to pay interest and reimburse Kohler for its expenditures for development in the district.[3] The contract contains a termination clause, § 7.02, which provides in pertinent part: "In all events it is

[1] In contrast to the private contract here, development of projects in a TID is often financed through the issuance of tax incremental bonds or notes authorized by § 66.46(9), STATS., or through another type of municipal bond.

[2] For a fuller explanation of the operation of TIDs, see ***Sigma Tau Gamma Fraternity House Corp. v. City of Menomonie,*** 93 Wis.2d 392, 288 N.W.2d 85 (1980).

[3] Revenues raised from TID No. 2 paid off Kohler's investment and interest in that district and that TID was dissolved in May 1994.

understood that the Village's obligations hereunder terminate upon distribution of the final increment allocations into the Special Funds as herein above specified or, in any event, as of December 31, 2000."

Based upon a 1995 change in the law governing the longevity of TIDs,[4] Kohler requested that the Village extend the contract to December 22, 2006, the termination date of the TID under the new statute, to give Kohler the maximum opportunity to be reimbursed for its investment. The Village declined to do so. Kohler then sued the Village to obtain a circuit court declaration that the Village breached § 6.02(k)(ii) of the contract by which it covenanted "not to take any action which would tend to discourage generation of tax increment allocations into the Special Funds." Kohler also alleged that the Village breached its duty of good faith and fair dealing when it refused to amend the contract's termination date to 2006. The Village denied any breach.

The parties filed cross-motions for summary judgment on the question of whether the contract's termination date could be extended under any theory.[5] The trial court concluded that the contract plainly and unambiguously terminates on December 31, 2000, and that such a construction is not contrary to the parties' intent or other provisions of the contract. Kohler appeals this ruling.

[4] At the contract's inception, the maximum term of TIDs was twenty years. *See* § 66.46(6)(a)1 and (7)(a), STATS., 1979-80. However, 1995 Wis. Act 27, § 3337, amended § 66.46(7)(am) to provide that TIDs created before October 1, 1995 may remain open twenty years after the last expenditure identified in the project plan. It is undisputed that under the new statute, TID No. 2 would expire no later than December 22, 2006.

[5] Other claims were at issue between the parties. However, they are not pursued on appeal and are not relevant to this appeal.

On appeal from a grant of summary judgment, we apply the same standards employed by the trial court. *See* ***Brownelli v. McCaughtry***, 182 Wis.2d 367, 372, 514 N.W.2d 48, 49 (Ct. App. 1994). We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law. *See* ***Streff v. Town of Delafield***, 190 Wis.2d 348, 353, 526 N.W.2d 822, 824 (Ct. App. 1994). Because both parties moved for summary judgment, the parties waived their right to a trial and permitted the trial court to decide the legal issue, i.e., the construction of the contract. *See* ***Schunk v. Brown***, 156 Wis.2d 793, 796, 457 N.W.2d 571, 572 (Ct. App. 1990).

If a contract is plain and unambiguous, it must be enforced as it is written. *See* ***Goossen v. Estate of Standaert,*** 189 Wis.2d 237, 247, 525 N.W.2d 314, 318 (Ct. App. 1994). Whether a contract is unambiguous is a question of law we decide independently on appeal. *See* ***Lamb v. Manning,*** 145 Wis.2d 619, 627, 427 N.W.2d 437, 441 (Ct. App. 1988). A contract is unambiguous when it is susceptible to more than one reasonable interpretation. *See* ***Wilke v. First Fed. Sav. & Loan Ass'n,*** 108 Wis.2d 650, 654, 323 N.W.2d 179, 181 (Ct. App. 1982).

On appeal, Kohler concedes that § 7.02 of the contract is unambiguous. We agree. The language of § 7.02—"[i]n all events it is understood that the Village's obligations hereunder terminate upon distribution of the final increment allocations into the Special Funds as herein above specified or, in any event, as of December 31, 2000"—is not susceptible to more than one reasonable interpretation. Unambiguous contract terms are given their ordinary dictionary meaning. *See* ***Coutts v. Wisconsin Retirement Bd.***, 201 Wis.2d 178, 190, 547 N.W.2d 821, 826 (Ct. App. 1996). "Any" generally means "every." *See* ***id***. "Event" is defined as "something that happens" or an "occurrence." *See*

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, 788 (1976). We conclude that the agreement terminates on December 31, 2000, unless there has been a distribution of the final increment allocations into the Special Funds prior to that date.

Kohler argues that § 7.02 cannot be read in isolation and that other contract provisions indicate that the parties intended to ensure that Kohler would be reimbursed as fully as possible for its TID expenditures. We need not discuss these other provisions at length because: (1) the unambiguous language of § 7.02 does not invite reference to other contract provisions to determine when the contract terminates; and (2) the other provisions do not, by their terms, preclude termination of the contract under § 7.02. All of Kohler's arguments about the other contract provisions are premised upon its contention that § 7.02 does not mean what it says. Having held that the language of § 7.02 is plain and unambiguous, we reject these arguments. Finally, construing § 7.02 with reference to other provisions of the contract which do not speak to termination of the agreement would render § 7.02 surplusage, a result which is to be avoided in contract construction. *See* ***Heritage Mut. Ins. Co. v. Truck Ins. Exch.,*** 184 Wis.2d 247, 258, 516 N.W.2d 8, 12 (Ct. App. 1994).

We also reject Kohler's claim that the Village breached a good faith duty of fair dealing when it refused to extend the contract term and relied upon the unambiguous termination provision of § 7.02. A party who acts as specifically authorized in the agreement does not commit a bad faith breach of the agreement. *See* ***Wausau Med. Ctr. v. Asplund,*** 182 Wis.2d 274, 293-94, 514 N.W.2d 34, 42-43 (Ct. App. 1994).

There is no indication that the December 31, 2000, termination date was not the subject of bargaining by the parties. That the termination date has become a disadvantageous term is not grounds for rewriting the unambiguous contract to relieve Kohler of this provision. *See* ***Gardner v. Gardner***, 190 Wis.2d 216, 240, 527 N.W.2d 701, 709 (Ct. App. 1994).

We also reject Kohler's claim that it has a right to reimbursement of its expenditures independent of the contract. Our review of the record does not reveal that Kohler made this argument in the trial court. Therefore, we will not consider it for the first time on appeal. *See* ***Seagull v. Hurwitz,*** 114 Wis.2d 471, 489, 339 N.W.2d 333, 342 (Ct. App. 1983).

By the Court.—Judgment affirmed.

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