COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2001

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

No. 00-3094-FT

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

VILLAGE OF HAWKINS, A MUNICIPAL CORPORATION OF THE STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

P. THOMAS WYMORE,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Rusk County: FREDERICK A. HENDERSON, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. P. Thomas Wymore appeals a summary judgment declaring that he owns no interest in real estate belonging to the Village of Hawkins and requiring him to remove a pole building and its contents from

Village land.[1] Wymore claims that the trial court erroneously failed to apply the laws of eminent domain. Because the Village was not seeking to take Wymore's shed, but rather to have Wymore remove his shed, the court properly granted relief to the Village. We affirm the judgment.

STANDARD OF REVIEW

¶2 When reviewing a summary judgment, we perform the same function as the trial court and our review is de novo. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate when no material facts are in dispute and the moving party is entitled to judgment as a matter of law. *See* WIS. STAT. § 802.08. If the pleadings state a claim for relief and present an issue of material fact, the inquiry shifts to the moving party's affidavits. ***Green Spring Farms***, 136 Wis. 2d at 317. A prima facie case for summary judgment is established when evidentiary facts are stated that, if they would remain uncontradicted by the opposing party's affidavits, resolve all factual issues in the moving party's favor. ***Kassuba v. Bauch***, 38 Wis. 2d 648, 655, 158 N.W.2d 387 (1968).

BACKGROUND

¶3 In May 2000, the Village filed a complaint seeking an order requiring Wymore to remove a storage building from Village land.[2] The complaint alleges that in 1991, Wymore purchased a steel shed from Guenther

[1] This is an expedited appeal under WIS. STAT. RULE 809.17. All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

[2] Wymore describes the building as a 60 ft. x 176 ft. steel pole building that had been constructed in the 1940s or 1950s.

Siegel, the Village's predecessor in interest, for $1,500 and agreed to remove it no later than the summer of 1995. The Village subsequently purchased Siegel's land and notified Wymore to remove the pole building. Wymore refused and filed an "Affidavit of Ownership" in the register of deeds office, claiming ownership of the building and rights of ingress and egress.[3] The Village sought removal of the building from its land and nullification of Wymore's affidavit from the registry.

¶4 Wymore's answer admitted that the Village purchased the land in question and owns fee simple title. He also admitted that he purchased the steel building from Siegel for $1,500. He further admitted that he agreed to remove it no later than the summer of 1995, but alleged that Siegel took no action to have it removed and later agreed that it could remain. He admitted that he refused to remove the building and continues to use and occupy it for storage. Wymore denied that the Village was Siegel's "successor in interest" because the Village's deed from Siegel is subject to Wymore's claims, interests, or right.[4]

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[3] The affidavit provides in part:

> 7. This affidavit is being executed so as to allow it to be recorded in the office of the Rusk County Register of Deeds; and to provide formal record notice of the interests of this affiant. While the real estate itself is not owned by this affiant, this affiant does have a continuing interest in the steel structure on the premises, its use, and the right of ingress and egress over the land, so as to facilitate the customary use of the building.

In this appeal, Wymore does not raise any issue claiming an easement in the land.

[4] The deed provides:

> Exception to warranties: Restrictions, reservations and easements of record, and specifically excepting any claim to right, title or, interest made by P. Thomas Wymore as set forth in that certain affidavit as to ownership bearing date of June 18, 1999 and recorded June 18, 1999 in the office of the Register of

(continued)

¶5 Wymore raised numerous affirmative defenses, including estoppel, and that the Village took the land subject to Wymore's rights, as evidenced in the affidavit of ownership. Finally, Wymore filed a counterclaim incorporating his previous allegations and seeking a declaration of "his rights in and to continued occupancy and use of his steel shed, unless and until the requirements of eminent domain law are properly followed."

¶6 Wymore filed a motion for summary judgment, supported by his counsel's affidavit and brief. He asserted that the Village must proceed according to "the requirements of [WIS. STAT.] Chapter 32 regarding eminent domain." He asserted that he was not compensated in any way for the proposed effect on his ownership interest and use of the shed.

¶7 The Village filed a counter motion, supporting it with excerpts of Wymore's deposition testimony. Wymore testified that in 1995, he began dismantling the building and that he had nothing in writing indicating that he had Seigel's permission to keep it on the land. He stated that Siegel granted him permission to keep the building on the land as long as Siegel owned the land. He further testified that he had no lease, never paid rent, real estate taxes or insurance on the building or real estate. He agreed that all he paid was $1,500 for the building that sits on real estate that he admittedly does not own.

¶8 Also attached to the Village's motion were copies of letters between Wymore and Seigel detailing their agreement and a later one explaining the Village's purchase, dated July 23, 1999. There, Siegel pointed out: "If the Village insists that the shed is to be removed it is your obligation to do so."

Deeds in and for Rusk County, Wisconsin, appearing in Volume 357 of Records at Page 73 as Document No. 263340.

¶9 Based upon the record, the circuit court determined that there were no issues of material fact and that the Village was entitled to judgment as a matter of law. This appeal follows.

DISCUSSION

¶10 Wymore contends that because the building was a fixture on the land purchased from Siegel the Village must proceed under WIS. STAT. ch. 32. He relies on WIS. STAT. § 32.01(2)'s definition of property: "property includes estates in lands, fixtures and personal property directly connected with lands." Wymore claims: "[B]y operation of Chapter 32, when the Village bought Siegel's real estate, it was deemed as a matter of law to have bought Wymore's building." We disagree.

¶11 Fixtures are generally considered realty that "pass by transfer of title to the land unless specifically reserved in the writing." ***Premonstratensian Fathers v. Badger Mut. Ins. Co***., 46 Wis. 2d 362, 366 n.1, 175 N.W.2d 237 (quoting ***Hannon v. Kelly***, 156 Wis. 509, 514, 146 N.W. 512 (1914)). Although determination of whether an article of property is a fixture is "normally a question of fact, it becomes [a] question of law when only one reasonable conclusion may be drawn from the evidence." ***DOR v. A. O. Smith Harvestore Prods.***, 72 Wis. 2d 60, 68, 240 N.W.2d 357 (1976).

¶12 The only reasonable conclusion that may be drawn from the undisputed facts is that the deed specifically reserved the pole building from the conveyance. Wymore himself asserts that the pole building was excepted from the deed conveying the land from Siegel to the Village. At the time of the conveyance, Siegel had no rights in the pole building to transfer to the Village.

Because Wymore's argument makes assumptions contrary to the undisputed facts, it must be rejected.

¶13 Wymore next argues that his position is supported by ***Green Bay Broadcasting v. Redevelopment Auth.***, 116 Wis. 2d 1, 12-13, 342 N.W.2d 27 (1983), *modified by per curiam*, 119 Wis. 2d 251, 349 N.W. 2d 478 (1984), that states that fixtures are to be treated as personal property to be credited to the tenants in condemnation proceedings. We are unpersuaded. ***Green Bay Broadcasting*** involved an appeal of a condemnation award. It did not address the issue whether WIS. STAT. ch. 32 applied. Here, the Village purchased Siegel's property, not Wymore's. Additionally, it did not seek to condemn Wymore's property. Accordingly, ***Green Bay Broadcasting*** does not apply.

¶14 Finally, Wymore argues that "there can be no doubt that the Village sought to take (extinguish) Wymore's record property interest in the real estate that it purchased from Siegel … without tendering any compensation to Wymore." This argument suffers a glaring defect. It neglects Wymore's concession that he had no interest in the real estate. Because of its faulty premise, the argument fails.[5]

[5] In his reply brief, Wymore argues for the first time that as a "lawful farm occupant" of government-acquired land, he has a "statutory right to be paid so-called relocation benefits" as a "tenant displaced person" under WIS. STAT. §§ 32.19(2)(i), 32.19(4m)(b) and 32.19(3). We do not address issues raised for the first time in a reply brief.

There is no reason that this court should take a rare departure from this rule. It is self-evident that the trial court could not err by failing to address an issue that was not advanced. A party must raise an issue with some prominence to allow the court to address the issue and make a ruling. *See* ***State v. Salter***, 118 Wis. 2d 67, 79, 346 N.W.2d 318 (Ct. App. 1984). Wymore's failure to do so constitutes abandonment of the issue in the trial court. *See* ***Zeller v. Northrup King Co.***, 125 Wis. 2d 31, 35, 370 N.W.2d 809 (Ct. App. 1985).

By the Court.—Judgment affirmed.

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