

**COURT OF APPEALS
DECISION
DATED AND FILED**

September 24, 2003

Cornelia G. Clark
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. 03-1281-FT
STATE OF WISCONSIN**

Cir. Ct. No. 02CV000227

**IN COURT OF APPEALS
DISTRICT II**

TERENCE J. BILGO,

PLAINTIFF-APPELLANT,

v.

DON REINEKING AND DON REINEKING BUILDERS, LLC.,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Sheboygan County: JOHN B. MURPHY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Terence J. Bilgo appeals from the grant of summary judgment to Don Reineking and Don Reineking Builders, LLC (hereafter Reineking). The issues on appeal are whether the circuit court erred when it refused to consider the appellant's brief in response to the summary

judgment motion, and whether the court appropriately granted summary judgment. We conclude that the court properly exercised its discretion when it refused to consider the appellant's untimely brief, and that summary judgment was appropriately granted. Consequently, we affirm.

¶2 Bilgo brought suit against Reineking for defects in a house which had been built by Reineking and which he purchased from Reineking. He alleged causes of action for breach of warranty and misrepresentation, asserting that Reineking knew or should have known of certain defects in the house. In his deposition testimony, Bilgo asserted that there was damage to the north basement wall. He further asserted that there was a weep hole in the east basement wall which he pointed out to Reineking during the "walk through" before he purchased the home. He asserts that Reineking told him that the hole was merely "an inadvertent drill hole."

¶3 Reineking moved for summary judgment. Bilgo filed a brief in response to the summary judgment motion three days after the deadline for doing so had passed. Because the brief was not timely, and counsel had not requested an extension of time before the brief was due, the circuit court refused to consider it. The court granted summary judgment to Reineking. Bilgo appeals.

¶4 The first issue Bilgo raises is whether the circuit court appropriately granted summary judgment to Reineking. Bilgo asserts that Reineking's own submissions created genuine issues of material fact, and that the circuit court erred because it did not consider all of the factual submissions before it.

¶5 Our review of the circuit court's grant of summary judgment is de novo, and we use 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).

We first examine the complaint to determine whether it states a claim, and then we review the answer to determine whether it joins an issue of material fact or law. If we determine that the complaint and answer are sufficient to join issue, we examine the moving party's affidavits to determine whether they establish a *prima facie* case for summary judgment. If the movant has carried his [or her] initial burden, we then look to the opposing party's affidavits to determine whether any material facts are in dispute that entitle the opposing party to a trial.

Schurmann v. Neau, 2001 WI App 4, ¶6, 240 Wis. 2d 719, 624 N.W.2d 157 (citations omitted). In our review, we are limited to consideration of the pleadings and evidentiary facts submitted in support and opposition to the motion. See ***Super Valu Stores, Inc. v. D-Mart Food Stores, Inc.***, 146 Wis. 2d 568, 573, 431 N.W.2d 721 (Ct. App. 1988).

¶6 Bilgo argues that the circuit court did not consider all of the submissions before it. Because our standard of review is *de novo*, and we consider the same documents presented to the circuit court, the question of which documents the circuit court considered does not affect our determination. After reviewing those documents, we conclude that there are no genuine issues of material fact, and the circuit court appropriately granted Reineking's motion for summary judgment.

¶7 The affidavits submitted by the respondents in support of their motion were undisputed. The affidavits submitted were from Don Reineking, a person from the company which installed the concrete in Bilgo's basement, Jerry Davies, and Reineking's engineering expert, David A. Rudig. The affidavits of Reineking and Davies establish that they had no knowledge of any defects in

the house prior to closing. Further, Rudig's affidavit states that the damage to the north wall of the basement was caused by improper grading of the backyard and poor rear yard drainage. The weep hole, which Bilgo asserts Reineking misrepresented to be an inadvertent drill hole, was on the east wall of the house. There is simply nothing in the record, other than Bilgo's conclusory allegations, to support the assertion that any misrepresentation occurred or, for that matter, to link the hole in the east wall to the damage to the north wall. We conclude that on the record before us that there are no genuine issues of material fact and that Reineking is entitled to judgment as a matter of law.

¶8 Bilgo also argues that the circuit court erred when it refused to accept his brief. The circuit court refused to consider the brief Bilgo filed in opposition to the summary judgment motion because it was filed three days past the deadline. At the hearing on the motion, Bilgo's counsel moved to extend the time to file the brief and the circuit court denied the motion. Bilgo argues that claim dismissal is not an appropriate sanction in this case. Bilgo misstates the sanction. The circuit court did not dismiss the claim but rather decided the motion for summary judgment without Bilgo's brief.

¶9 The circuit court has the authority to sanction a party for failing to comply with the statutes governing procedure or an order of a court. WIS. STAT. § 805.03 (2001-02).¹ The decision of whether to sanction a party under this rule is a discretionary determination by the circuit court. *Anderson v. Circuit Court for*

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

Milwaukee County, 219 Wis. 2d 1, 9, 578 N.W.2d 633 (1998). Sheboygan County Local Rule 602 provides:

Motion of summary judgment/dismissal. A party may, within eight months of filing of a summons and complaint or within the time set in the court's scheduling order, move for summary judgment on any claim asserted by or against the party. Unless otherwise specified in the scheduling order, the motion along with a brief and other supporting documents shall be served and filed at least 20 days before the time fixed for the hearing, and the adverse party shall serve and file opposing affidavits, brief, and other supporting documents at least five days before the time fixed for hearing.

In the event the moving party does not wish to file a brief or other documents, a statement waiving this right shall be filed with the motion. If the respondent fails to file a brief or other supporting documents at least five days prior to the hearing, it shall be deemed waiver of this right and the court shall accept no further supporting written materials. The court's decision shall be based upon the record as timely filed.

It is undisputed that Bilgo's brief was not timely under this rule, and that the court followed the rule by not allowing Bilgo to file the brief beyond the stated deadline. We cannot conclude that the circuit court erred when it refused to accept Bilgo's brief after the deadline had passed. For the reasons stated, we affirm the judgment of the circuit court.

By the Court.—Judgment affirmed.

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

