COURT OF APPEALS
DECISION
DATED AND FILED

July 29, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2013AP2466 **Cir. Ct. No. 2012CV461**

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

DONALD E. WATTON D/B/A EAU CLAIRE FLOOR SUPPLY-GODFREY FLOORING,

PLAINTIFF-APPELLANT,

V.

CITY OF EAU CLAIRE HOUSING AUTHORITY,

DEFENDANT-RESPONDENT,

AMERICAN FAMILY MUTUAL INSURANCE COMPANY,

INTERVENOR-RESPONDENT.

APPEAL from judgments of the circuit court for Eau Claire County: WILLIAM M. GABLER, SR., Judge. *Affirmed.*

Before Hoover, P.J., Mangerson and Stark, JJ.

¶1 PER CURIAM. Donald Watton d/b/a Eau Claire Floor Supply-Godfrey Flooring ("Watton") appeals a summary judgment declaring that American Family Mutual Insurance Company has no duty to defend or indemnify the City of Eau Claire Housing Authority ("housing authority"). Watton also appeals the summary judgment dismissing his breach of contract and discrimination suit against the housing authority. Watton appears to argue the circuit court erred by: (1) granting American Family's motion to intervene in the matter; (2) amending its scheduling order; and (3) dismissing his action against the housing authority. We reject these arguments and affirm the judgments.

BACKGROUND

¶2 In July 2012, Watton filed suit against the housing authority alleging breach of contract and employment discrimination. In November 2012, the court issued a scheduling order setting April 5, 2013, as the deadline for filing all dispositive motions, such as summary judgment motions.

¶3 In February 2013, American Family moved to intervene in order to determine its obligation to provide coverage to the housing authority under a business owner's insurance policy. The motion to intervene was granted on April 10, 2013. Because American Family's intervention post-dated the April 5 deadline for filing dispositive motions, the court issued an amended scheduling order setting September 20, 2013, as the deadline for filing dispositive motions. Both American Family and the housing authority timely filed motions for summary judgment under the amended scheduling order. The court granted the motions and entered judgments declaring American Family had no duty to defend or indemnify the housing authority in this matter, and dismissing Watton's claims against the housing authority. This appeal follows.

DISCUSSION

¶4 Watton does not raise any apparent challenge to the circuit court's declaration on coverage. Rather, he contends the court erred by allowing American Family to intervene and by amending its scheduling order. A party may intervene as of right when it has an interest in an action and it is "so situated that the disposition of the action may as a practical matter impair or impede the movant's ability to protect that interest, unless the movant's interest is adequately represented by existing parties." WIS. STAT. § 803.09(1).[1] Alternatively, a party may intervene with the permission of the court when "a movant's claim or defense and the main action have a question of law or fact in common" and the party's intervention will not "unduly delay or prejudice" the original parties' rights. WIS. STAT. § 803.09(2).

¶5 Application of the intervention statute to a given set of facts is a question of law that we review independently. ***Olivarez v. Unitrin Prop. & Cas. Ins. Co.***, 2006 WI App 189, ¶13, 296 Wis. 2d 337, 723 N.W.2d 131. As a housing authority insurer, American Family had an interest in the outcome of the case. Because Watton and the housing authority were aligned in opposing American Family on the coverage issues, American Family's interest was not adequately represented by an existing party. Further, the parties had common questions of law and fact, and there was no undue delay in granting intervention. Finally, Watton has failed to show how his rights were prejudiced by the intervention. Under either standard outlined above, the court properly granted intervention.

[1] All references to the Wisconsin Statutes are to the 2011-12 version.

¶6 The circuit court's decision to modify a scheduling order is reviewed for an erroneous exercise of discretion. ***Alexander v. Riegert***, 141 Wis. 2d 294, 298, 414 N.W.2d 636 (1987). Circuit courts have the inherent power to control their own dockets. *See* ***Parker v. Wisconsin Patients Comp. Fund***, 2009 WI App 42, ¶10, 317 Wis. 2d 460, 767 N.W.2d 272. That power necessarily includes broad discretion to amend scheduling orders, as such discretion "is essential to the court's ability to manage its calendar." ***Id.*** Because American Family's motion to intervene was not granted until after the original deadline for filing dispositive motions had expired, the circuit court reasonably amended the scheduling order to extend that deadline.

¶7 Watton nevertheless argues the extension is prohibited under WIS. STAT. § 802.08, which prescribes the time limits for filing summary judgment motions. Under the statute, a party may move for summary judgment at any time "within eight months of the filing of a summons and complaint or within the time set in a scheduling order." WIS. STAT. § 802.08(1). The statute further provides that "unless earlier times are specified in a scheduling order, the motions shall be served at least 20 days before the time fixed for the hearing." WIS. STAT. § 802.08(2).

¶8 In addition to asserting that the summary judgment motions were untimely under the statute, Watton contends the court erred by holding hearings on the motions less than twenty days after they were filed. The proceedings referenced by Watton, however, were not hearings on the summary judgment motions but, rather, scheduling conferences. In any event, the time limits outlined in WIS. STAT. § 802.08 apply only if the court does not set other deadlines. Here, the parties' deadlines were governed by the scheduling order.

¶9 Citing WIS. STAT. § 801.15(2)(a), Watton alternatively claims the court could not amend the scheduling order after the deadlines established therein had passed, unless excusable neglect was found. The provisions of § 801.15(2)(a), however, apply to statutory deadlines, not to deadlines set by court order. *See* ***Parker***, 317 Wis. 2d 460, ¶¶13, 19. Scheduling order amendments are governed by WIS. STAT. § 802.10—which outlines the standards and procedures governing pretrial calendar orders—and by the court's inherent authority to "efficiently and effectively administer its calendar." ***Parker***, 317 Wis. 2d 460, ¶19.

¶10 Finally, Watton challenges the summary judgment dismissing his claims against the housing authority. We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 314-15, 401 N.W.2d 816 (1987). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶11 Watton's complaint alleged breach of contract and employment discrimination. The circuit court properly determined that Watton failed to establish what, if any, contract was breached. Although Watton was awarded standing purchase order contracts with the housing authority, the language of those contracts did not give Watton the exclusive right to provide flooring. After the housing authority made requests for flooring product quotes, a standing purchase order was awarded to Watton's business and another flooring firm from five total quotes. Thus, as the court noted, the standing purchase order gave Watton the opportunity to bid on available jobs, but did not constitute a specific contract for

Watton to do a specific job at a specific price. The court correctly concluded there was no breach.[2]

¶12 Watton's allegation of employment discrimination under the Wisconsin Fair Employment Act (WFEA) also fails. Assuming arguendo the act applied to Watton, his discrimination claim was properly denied based on his failure to identify for the circuit court which of the prohibited bases of discrimination allegedly occurred.[3] For the first time on appeal, Watton alleges his age as the basis of discrimination. Watton, however, has forfeited this argument by failing to properly raise it in the circuit court. *See* ***Evjen v. Evjen***, 171 Wis. 2d 677, 688, 492 N.W.2d 361 (Ct. App. 1992).

By the Court.—Judgments affirmed.

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

[2] Watton cites WIS. STAT. § 66.1201(24), which provides, in part, that "[a] contract subject to bidding shall be awarded to the lowest qualified and competent bidder." Watton, however, fails to develop any cognizable argument relevant to that statute. We will not develop Watton's argument for him. *See* ***Barakat v. DHSS***, 191 Wis. 2d 769, 786, 530 N.W.2d 92 (Ct. App. 1995).

[3] The circuit court alternatively determined Watton was not entitled to any protections under the WFEA because he is not an employee of the housing authority but, rather, "he is in business for himself." The WFEA, however, defines "employee" only as excluding "any individual employed by his or her parents, spouse or child" and does not specifically exclude independent contractors. WIS. STAT. § 111.32(5). Courts must apply the "economic realities" test to determine whether one is an employee under the act. *See* ***Moore v. LIRC***, 175 Wis. 2d 561, 569, 499 N.W.2d 288 (Ct. App. 1993). Because Watton's discrimination claim fails on its merits, we need not decide whether Watton is an "employee" under the WFEA. *See* ***Patrick Fur Farm, Inc. v. United Vaccines, Inc.***, 2005 WI App 190, ¶8 n.1, 286 Wis. 2d 774, 703 N.W.2d 707 (we decide cases on narrowest possible grounds).