

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 27, 2015

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. 2014AP350
STATE OF WISCONSIN**

Cir. Ct. No. 2013CV806

**IN COURT OF APPEALS
DISTRICT II**

MICHAEL J. ZWEIGER,

PLAINTIFF-APPELLANT,

V.

**J. PETER JUNGBACKER, KAROLA H. JUNGBACKER AND ALEXANDER &
BISHOP, LTD.,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Winnebago County:
KAREN L. SEIFERT, Judge. *Reversed and cause remanded.*

Before Brown, C.J., Neubauer, P.J., and Reilly, J.

¶1 PER CURIAM. Michael Zweiger appeals from an order granting summary judgment to and dismissing his claims against J. Peter Jungbacker, Karola Jungbacker, and Alexander & Bishop, Ltd. Because summary judgment was not appropriate on this record, we reverse and remand for further proceedings.

¶2 The dispute arises from Zweiger's claimed status as a shareholder in Alexander & Bishop (A&B), a real estate developer. In his July 2013 complaint seeking a declaratory judgment confirming his rights as an A&B shareholder, Zweiger alleged that in 1991, when A&B incorporated and authorized 9000 shares of common stock, he received 1000 shares of common stock. Zweiger alleged that he remained the owner of those shares, but A&B, now operated by the Jungbackers, had deprived him of his shareholder's rights. The Jungbackers and A&B disputed the material allegations of the complaint. In addition to other affirmative defenses, the Jungbackers and A&B alleged laches because Zweiger had unreasonably delayed in vindicating his shareholder rights.

¶3 The Jungbackers and A&B moved to dismiss Zweiger's complaint. The circuit court deemed the motion to be one seeking summary judgment. WIS. STAT. § 802.06(2)(b) (2013-14)¹. In support of summary judgment, the Jungbackers and A&B offered Peter Jungbacker's affidavit confirming that 2000 shares of A&B stock were issued at A&B's incorporation: 1000 each to Zweiger and the Jungbacker Childrens Present Interest Trust. Peter averred that his late father, John Jungbacker, and Zweiger agreed in 1993 that Zweiger would surrender his A&B shares if John assumed development of a troublesome real estate project. Peter averred that as a result of this agreement, Zweiger resigned as A&B's president, treasurer, and director and surrendered his shares. As proof, Peter offered a resignation statement dated January 1993 bearing Zweiger's name but no signature and 1993 corporate documents indicating that Zweiger resigned as a director and was no longer a shareholder as of the minutes of the 1993 annual

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

shareholders' meeting. Peter further averred that he is now the sole shareholder of A&B, John passed away in 2010, and that between January 1993 and July 2013, Zweiger had not made any claim in A&B consistent with stock ownership. The Jungbackers and A&B also submitted the affidavit of J. Thomas McDermott, A&B's counsel since 1998, in which counsel averred that he has never had any contact with Zweiger regarding A&B.

¶4 As a legal theory for summary judgment, the Jungbackers and A&B argued laches because Zweiger did not assert his shareholder's rights between 1993 and 2013. The Jungbackers and A&B alleged that Zweiger unreasonably delayed in bringing his claim, they had no knowledge that Zweiger would seek declaratory relief regarding his status as a shareholder, and they were prejudiced because John passed away in 2010 and his knowledge regarding Zweiger's status with A&B and Zweiger's claim for damages² died with him.

¶5 Zweiger opposed summary judgment.³ In his affidavit, Zweiger averred that he received 1000 shares of A&B stock in 1991. He further averred that the Jungbackers had deprived him of his shareholder's right to participate in annual shareholder meetings and to select members of the board of directors. Zweiger denied that he and John agreed that Zweiger would surrender his A&B shares and that Zweiger declined Peter's 1996 request that he resign as a director, president, and treasurer. Zweiger acknowledged that he had not taken an active

² Zweiger's complaint does not seek damages. Zweiger sought a declaration of his shareholder's rights and fees, costs, and disbursements.

³ We note that Zweiger moved to strike those portions of Peter's affidavit relating what Peter's father, John, did in relation to Zweiger's employment and stock ownership. Zweiger cited WIS. STAT. §§ 885.16 and 885.17 (rules of evidence relating to transactions with deceased persons). Because we reverse the grant of summary judgment, we do not address this issue.

role in A&B since 1996, but asserted that, as a shareholder, he was not required to do so. Zweiger denied that he surrendered his A&B shares, and asserted possession of the original, unaltered stock certificate. Zweiger averred that the 1993 corporate resolutions regarding his resignation and showing that he no longer owned any stock were made without his knowledge or consent. Zweiger also denied any connection with the real estate development Peter contended was the basis for Zweiger's resignation and stock surrender agreement with John. Zweiger conceded that he has never conferred with Attorney McDermott because he believed him to be counsel for Peter and Karola Jungbacker.

¶6 At the summary judgment hearing, the circuit court stated that it found the laches defense "very convincing." The court noted that Zweiger conceded on summary judgment that he had A&B's corporate documents in his possession since 1996, and he did not act. The court found no material facts in dispute regarding laches and granted summary judgment to the Jungbackers and A&B. Zweiger appeals.

¶7 We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis.2d 367, 372, 514 N.W.2d 48 (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." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

¶8 Our independent examination of the summary judgment record confirms what Zweiger argues on appeal: summary judgment based on laches was inappropriate due to the existence of disputed material facts. The movants contend

that Zweiger resigned from A&B and surrendered his shares. Zweiger contests this claim with the original, unaltered stock certificate in his possession, and he denies that he resigned. The document purporting to be Zweiger's 1993 resignation is unsigned. The claim that Zweiger resigned is not supported by first-hand knowledge regarding the alleged agreement to resign.⁴ These material disputed facts bar summary judgment.

¶9 In light of these disputed facts, the circuit court erred when it granted summary judgment after finding the laches defense “very convincing.” Laches is a fact-specific defense. *Riegleman v. Krieg*, 2004 WI App 85, ¶22, 271 Wis. 2d 798, 679 N.W.2d 857. Laches bars a claim if the delay was unreasonable, the claimant knew the facts but took no action, and the delay prejudiced the defendant. *Id.* While Zweiger acknowledges that he has had possession of the corporate record book since 1996, including the documents indicating that he was no longer a shareholder, Zweiger contends that he never surrendered his stock. Not only are there genuine issues of material fact regarding what happened, all reasonable inferences must be drawn in favor of Zweiger, the party opposing summary judgment. Assuming that Zweiger did not surrender his shares, equity may not bar his claim if he had no duty to act. The Jungbackers have failed to provide any authority that Zweiger was required to pursue a lawsuit to clarify his continued status as a shareholder, a role that is typically passive. *Cf.* 30A C.J.S. *Equity* § 145 (2007) (one in peaceable possession of personal property may rest in security until possession is attacked and

⁴ Peter's affidavit in support of summary judgment states that “an agreement was reached” between John and Zweiger, but offers no averments as to how Peter knows that this agreement was reached. The respondents' brief states, without citation to the record, that Peter was a witness to the agreement even though his affidavit does not make this assertion. Peter's claim that he witnessed the agreement is outside the summary judgment record.

failure to appeal to equity during that period is no defense to suit subsequently brought to establish, enforce, or protect right); *cf.*, *e.g.*, ***Tench v. Galaxy Appliance & Furniture Sales, Inc.***, 567 S.E.2d 53, 58 (Ga. Ct. App. 2002) (“One who is in possession of property under a claim of ownership will not be guilty of laches for delay in resorting to a court of equity to establish his rights.” (citation omitted)); ***Charleston Library Soc’y v. Citizens & S. Nat’l Bank***, 23 S.E.2d 362, 364 (S.C. 1942) (doctrine of laches ordinarily can be invoked only by one in possession against one out of possession and cannot be interposed against one who was under no obligation to act during delay). The record contains material factual disputes barring summary judgment on the grounds of laches. Any conclusion as a matter of law about the reasonableness of Zweiger’s delay is premature. *See Becker v. Becker*, 66 Wis. 2d 731, 734, 225 N.W.2d 884 (1975) (equitable defenses such as laches are entirely fact dependent and therefore rarely appropriate for summary judgment).

¶10 Summary judgment is not appropriate if the material facts are in dispute. ***Yahnke v. Carson***, 2000 WI 74, ¶10, 236 Wis. 2d 257, 613 N.W.2d 102. Such is the case here. The summary judgment court failed to view the facts and draw inferences in favor of the party opposing summary judgment. ***Kraemer Bros. v. United States Fire Ins. Co.***, 89 Wis. 2d 555, 567, 278 N.W.2d 857 (1979). We reverse and remand to the circuit court for further proceedings.

By the Court.—Order reversed and cause remanded.

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

