COURT OF APPEALS
DECISION
DATED AND FILED

February 3, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP700 **Cir. Ct. No. 2013CV585**

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

WILSON LAND HOLDINGS, LLC,

PLAINTIFF-RESPONDENT,

V.

TOWN OF WILSON,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Sheboygan County: L. EDWARD STENGEL, Judge. *Affirmed*.

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

¶1 GUNDRUM, J. The Town of Wilson appeals from a circuit court order granting Plaintiff Wilson Land Holdings, LLC's (WLH) motion for partial summary judgment, denying the Town's motion for partial summary judgment, and entering declaratory judgment in favor of WLH. The Town claims the circuit

court erred in finding that the Town had actual notice sufficient to satisfy WLH's WIS. STAT. § 893.80 (2013-14)[1] notice of claim requirement, in holding that laches did not bar WLH's claim related to the nonannexation provision at issue, and in concluding that all necessary parties had been joined in the action. The Town further contends the court erred in determining the nonannexation provision in its contract with WLH is unenforceable because it was not noted as an exception in the deeds to the property at issue. For the following reasons, we affirm.

Background

¶2 In 1998, the Town sold property to WLH.[2] After negotiations, the parties executed an offer to purchase that included a nonannexation provision stating the Town would have the right of reversion of the property if WLH petitioned for and secured annexation to the city of Sheboygan following the purchase. The warranty deeds conveying the property from the Town to WLH in 1998 were drafted by the Town and executed in May and July of 1998. Both deeds conveyed the property to WLH in fee simple without reference to any nonannexation provision.

¶3 At the time of the July 1998 conveyance, the parties also entered into a land contract for the Town to sell WLH additional property. The land contract made no mention of any nonannexation provision. In 2000, the contract's

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

[2] The name of the buyer entity has changed through the years; but pursuant to the terms of the offer to purchase and amendments thereto, and the land contract and extensions thereto, the buyer entity or its assigns is the proper party and that appears, on the latest documents, to be WLH. As the parties do not dispute that WLH is at least one of the legal entities with standing to seek this declaratory judgment, we do not discuss this further.

maturity date was extended via a "Land Contract Extension Agreement and Agreement Not to Annex" (Agreement). This Agreement contained a nonannexation provision stating that in the event WLH petitioned for and secured annexation by the city of Sheboygan, the Town would have the right of reversion of the property to the Town or alternatively the right to the payment of $135,000 from WLH and/or WLH members. The Agreement required WLH to begin construction of a building on one of the parcels "as soon as practicable and legally possible" and required the Town to take the necessary steps to form and construct a water district. In 2003, WLH paid in full the sums due under the Agreement and the Town conveyed to WLH by warranty deed the land covered by the Agreement. This warranty deed also made no mention of any nonannexation provision.

¶4 In August 2012, WLH communicated with the Town regarding WLH's concern that the Town had failed to construct a water district and such failure had caused WLH economic harm. The letter stated that WLH had received interest from a potential buyer of the parcels but sale would require annexation by the city of Sheboygan and the Agreement "may complicate annexation." The letter further stated that the Town's failure "to form and construct a water district within a reasonable time from now" would constitute nonperformance resulting in potential financial damage and provided that WLH was willing to pay the Town $135,000 "in exchange for termination of the [A]greement and the parties giving each other mutual releases." Communications between the parties continued, without successful resolution, until August 2013, when WLH filed this declaratory judgment action.

¶5 WLH sought a declaration that the Town breached the Agreement by failing to create the water district and that the nonannexation provision contained therein is void and of no effect "because it constitutes an unlawful restrictive

covenant" and/or because enforcement would be contrary to public policy. The Town's answer asserted, among other defenses, that WLH "failed to submit a notice of claim as required by WIS. STAT. § 893.80 as a prerequisite for filing this action," and that WLH's claim was barred by the doctrine of laches and the failure to name necessary parties to the action.

¶6 WLH sought partial summary judgment confirming that "it hold[s] title to the Property in fee simple absolute and that annexation of the Property to the City of Sheboygan will not give the Town the option to revest title in itself." The Town also moved for partial summary judgment, arguing that WLH's breach of contract claim failed as a matter of law based upon statute of limitations, failure to provide statutory notice, laches, and failure to join necessary parties theories. The circuit court held a hearing and ultimately issued a written decision and order granting WLH's motion and declaring the nonannexation provision of the Agreement unenforceable as a matter of law because the warranty deeds conveying the property to WLH contained no mention of it. It further denied the Town's motion in its entirety. The Town appeals. Additional facts are set forth as necessary.

Discussion

¶7 Our review of a decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. Summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. ***Id.***

Notice of claim, laches and joinder

¶8 The Town asserts it did not have actual notice of WLH's challenge to the nonannexation provisions in the offer to purchase and Agreement. We disagree.

¶9 WISCONSIN STAT. § 893.80 generally precludes a party from bringing an action against a government entity such as the Town unless within 120 days "after the happening of the event giving rise to the claim" written notice "of the circumstances of the claim" is served on the entity. Sec. 893.80(1d). The lack of such formalized notice "shall not bar action on the claim," however, if the entity had actual notice and was not prejudiced by the lack of formalized notice. *See* ***id.***

¶10 Here, the Town had actual notice of WLH's challenge to the effect of the nonannexation provision. In August 2012, WLH corresponded with the Town regarding WLH's concern over the Town's failure to create a water district as required by the Agreement and the economic harm WLH was incurring as a result of this failure. The correspondence addressed the fact that WLH had an interested buyer "but the sale would require that we allow the City of Sheboygan to annex the parcels"; further pointed out that the Agreement could "complicate annexation"; and offered to settle the matter with a $135,000 payment from WLH to the Town. In its September 21, 2012 response letter, the Town rejected WLH's settlement offer and indicated that "private wells" should be utilized for development of the property at issue. Less than two weeks later, WLH corresponded again with the Town, clearly expressing its position that the Town had breached the Agreement by failing to form and construct a water district, and also challenging the effect of the nonannexation provision, characterizing the provision "[a]s a restrictive covenant, which, under Wisconsin law, is to be

construed narrowly and, where possible, in favor of facilitating free alienation of the property." While WLH's correspondence may not have specified all the reasons for its concern regarding the nonannexation provision or all legal theories related to its belief as to the limited effect of the provision, it put the Town on notice that WLH was challenging the enforceability and effect of that provision.

¶11 The Town contends WLH needed to notify the Town as to its challenge to provisions in the Agreement shortly after adoption of the Agreement a decade earlier.[3] We agree, however, with the circuit court's ultimate conclusion that WLH did not need to provide the Town with notice until "the Town's decision not to provide water to the WLH parcels became clear." Based upon the correspondence between WLH and the Town in late 2012, this became clear with the Town's September 21, 2012 correspondence to WLH rejecting WLH's settlement offer and indicating that WLH should pursue development of the property with "private wells." This correspondence indicated to WLH that the Town did not intend to comply with the Agreement's requirement that it form and construct a water district. As the circuit court correctly noted in ruling on WLH's summary judgment motion: "To file suit any earlier would have been without merit, because there was still a possibility the Town would create the water district called for in the agreement and that no request for annexation would have been needed."

[3] The Town asserts that the "event giving rise" to WLH's claim in this case "was the Town's failure to include the non-annexation provision in the deeds," and that "[t]he last such failure happened on December 30, 2003." We reject this contention. The nonannexation provision was an integral part of the Agreement and there would be no reason for a party who just recently entered into the Agreement to challenge it shortly thereafter absent some other "event giving rise" to a claim, such as the Town's alleged breach of the Agreement through its failure to form and construct a water district.

¶12 We agree with the conclusion of the circuit court that the 120-day notification period of WIS. STAT. § 893.80 did not begin to run until September 2012 when the Town corresponded with WLH in a manner indicating the Town's unwillingness to create the water district required by the Agreement. Following that indication, WLH timely corresponded back to the Town WLH's position that the Town had breached the requirement in the Agreement that the Town form and construct a water district and further informed the Town of its challenge to the effect of the nonannexation provision. The Town received timely actual notice of WLH's claim.

¶13 The circuit court also considered whether the notice the Town received caused it to be prejudiced, *see* WIS. STAT. § 893.80(1d)(a), and concluded the Town was in no way prejudiced by WLH's failure to provide more formalized notice to the Town. On appeal, the Town fails to sufficiently develop any argument on the prejudice consideration, relying entirely on its contention that it never received timely actual notice. Here, the actual notice the Town received as to WLH's challenge to the effect of the nonannexation provision was timely, coming less than two weeks after the Town's rejection of WLH's settlement offer and its assertion that WLH develop the property with "private wells." We see no prejudice to the Town.

¶14 The Town next asserts that WLH's action is barred by the doctrine of laches. Under the equitable doctrine of laches, a party who delays in making a claim may lose the right to assert that claim. ***Dickau v. Dickau***, 2012 WI App 111, ¶9, 344 Wis. 2d 308, 824 N.W.2d 142. The elements of laches are: "(1) unreasonable delay by the party seeking relief, (2) lack of knowledge or acquiescence by the party asserting laches that a claim for relief was forthcoming, and (3) prejudice to the party asserting laches caused by the delay." ***Id.*** (citation

omitted). "The reasonableness of the delay, and whether prejudice resulted from the delay, are questions of law based upon factual findings." ***Id.*** Once a court has determined that the elements of laches have been established, whether or not it will apply the doctrine remains within its discretion. ***Id.***

¶15 The Town's laches assertion fails for the same reason its notice argument fails. The Town again contends WLH had a claim upon which it should have acted in 2003. As above, we disagree with this contention and agree with the observations of the circuit court:

> The dispute in this matter did not arise when the agreements were entered into. The dispute arose when the parties failed to perform the obligations entered into under the agreement. When it became clear [in 2012] that the Town would not or could not create the water authority, WLH attempted to negotiate a solution. When these negotiations failed, WLH's claim arose as it became clear that the Town would not construct the water district.

The Town argues that the circuit court erred because it made this determination based on the wrong claim—the breach of contract claim against the Town as opposed to the claim that the nonannexation provision was void. We agree with the circuit court as the breach of contract and nonannexation provision claims were inextricably intertwined, and there simply was no conflict or basis for WLH to bring an action against the Town until it was clear the Town had no intention of establishing a water district as required by the Agreement. Simply put, there is no indication in the record that WLH would have sought to void the nonannexation provision if the Town had simply fulfilled its obligation to establish the water district.

¶16 The doctrine of laches is driven by an unreasonable delay by a party seeking relief that unduly prejudices the party against whom the relief is being

sought. Here WLH acted in a timely manner as soon as it became clear the Town would not form and construct a water district. As discussed above, there was no unreasonable delay on the part of WLH, the Town had knowledge of WLH's concerns, and the Town has not shown how it was prejudiced by the actual notice it received. The Town's laches argument fails.

¶17 The Town also argued before the circuit court that WLH failed to join necessary parties to the action, namely the two individual members of WLH who the Town states "were parties to the … Agreement." The circuit court found that WLH was the only owner of the property with respect to the sale and since the declaratory judgment related to a determination of the current rights regarding the ownership of the land, the individual members of WLH were not necessary parties. The court further noted that it was to the Agreement that the two individual members were signatories in their individual capacities, but WLH was "not pursuing its claims under a contract action and has affirmatively stated that it has no intent to pursue such a claim," and therefore if the Town believed that the two individuals "were necessary to its contract action claim, the burden was on [the Town] to bring those parties in as necessary to the contract action."

¶18 The Town again raises this joinder issue in its brief-in-chief on appeal. In response, WLH notes that it filed its declaratory judgment as the sole owner of the property and "[n]either of its individual members have a personal interest in the properties." It adds that when it "filed this lawsuit, without its members as co-plaintiffs, it did so in part to establish the quality of title in its own property," agreeing with the circuit court that "no other party had standing to establish WLH's title vis-à-vis the purported non-annexation provision." WLH further asserts that the Town's appeal of the joinder issue is "procedurally improper." Specifically, WLH argues that the issue was raised by the Town in its

motion for partial summary judgment related to WLH's *breach of contract* claim and "**not** the claim related to the non-annexation provision," and WLH "expressly abandoned" its breach of contract claim after the circuit court granted WLH's motion for partial summary judgment as to the nonannexation provision, and, thus, because "the Town never made any other effort to pursue this argument as it related to the non-annexation provision," the Town is essentially raising "this issue for the first time on appeal." The Town fails to respond in its reply brief to any of WLH's arguments regarding the joinder of parties issue. Consequently, we deem the Town to have conceded this issue. ***Fischer v. Wisconsin Patients Comp. Fund***, 2002 WI App 192, ¶1 n.1, 256 Wis. 2d 848, 650 N.W.2d 75 ("An argument asserted by a respondent on appeal and not disputed by the appellant in the reply brief is taken as admitted."). That said, we nonetheless agree with WLH and the circuit court that the matter before the court related to the quality of WLH's title in the property and, as to that matter, the individual members are not necessary parties.

¶19 With WLH's action to have the nonannexation provision declared unenforceable sufficiently founded, we next turn to the substantive question regarding the enforceability of the provision.

Nonannexation provision

¶20 The circuit court granted WLH's requested declaration that the nonannexation provision in the Agreement was unenforceable. The Town challenges that ruling.

¶21 Whether a grantor such as the Town can reserve to itself the right to re-enter the land where the grantor conveys fee simple title via warranty deed is a question of law we review de novo. *See* ***Lucareli v. Lucareli***, 2000 WI App 133,

¶5, 237 Wis. 2d 487, 614 N.W.2d 60. The "first step in construction of a deed is to examine what is written within the four corners of the deed, for this is the primary source of the intent of the parties." ***Grygiel v. Monches Fish & Game Club, Inc.***, 2010 WI 93, ¶20, 328 Wis. 2d 436, 787 N.W.2d 6 (citation omitted). "If the language within the four corners of the deed is unambiguous, the court will not look further." ***Id.*** It is undisputed the nonannexation provision is not within the four corners of the deeds.

¶22 In ***Lucareli***, a property owner ("grantor") executed, through her attorney-in-fact, a warranty deed that conveyed to each of her three sons a one-third interest in her property but also reserved to the grantor "power to appoint the property to her issue," which language "purport[ed] to give [grantor] the right to take the land away from [the sons] and give it to any of her descendents." ***Lucareli***, 237 Wis. 2d 487, ¶¶2, 6. Grantor subsequently exercised her appointment power in a document purporting to remove two of her three sons from ownership of the home and grant ownership solely to her third son. ***Id.***, ¶2. Despite the purported reservation of the power to appoint in the deed itself and the subsequent document purporting to exercise that power, we held that "[b]ecause the reserved special power of appointment was repugnant to the grant of the property, it was void." ***Id.***, ¶4. In so holding, we stated:

> Ordinarily, where a deed contains both a grant of an interest and a reservation of a right over the conveyed property, the two provisions are read together and reconciled … [but] "*where the attempted reservation is of some right inconsistent with the nature of the estate conveyed*" *the grant controls*.

Id., ¶7 (emphasis added; citation omitted). "For instance," we added, "where the fee title to real estate is conveyed, a reservation of a right in the grantor for subsequent control of the property is repugnant to the grant and is therefore a

nullity." ***Id.*** (citation omitted). We further stated, "The situation described above is precisely what we have here. The reserved power of appointment is inconsistent with the rest of the terms of the warranty deed and is thus void." ***Id.***, ¶8.

¶23 The situation in this case is similar to that in ***Lucareli***, only here the purported right of reversion was not even mentioned in any of the deeds. Wisconsin law is clear—deeds are to be construed against the grantor. *See* ***Lintner v. Office Supply Co.***, 196 Wis. 36, 42, 219 N.W. 420 (1928) ("The rule is well entrenched in our jurisprudence that doubtful language contained in an instrument of conveyance will be most strictly construed against the grantor."). Thus, even if there was ambiguity related to the deeds, we would have to construe them against the Town. That said, here the deeds all clearly state that the Town was conveying each parcel of property to WLH in fee simple and thus "a reservation of a right in the grantor for subsequent control of the property is repugnant to the grant and is therefore a nullity." ***Lucareli***, 237 Wis. 2d 487, ¶7 (citation omitted). Based upon the deeds, the Town retained no future interest in the property and the property was all conveyed to WLH in fee simple. The nonannexation provisions in the Agreement and other documents could not have the effect of retaining in the Town a future right of reversion.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.