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DISTRICT III

August 31 , 2015

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You are hereby notified that the Court has entered the following opinion and order:

2015AP135 BC II Properties LLC v. City of Wausau
(L. C. #2014CV533)

Before Stark, P.J., Hruz, J., and Thomas Cane, Reserve Judge.

The appellants are the Wausau Area Apartment Association and various landlords (collectively "the landlords") who sought declaratory and injunctive relief to invalidate a City of Wausau rental inspection and licensing ordinance. The circuit court granted summary judgment in favor of the City. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition, and we summarily reverse and remand the cause for further proceedings. *See* WIS. STAT. RULE 809.21.[1]

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

Under the terms of WAUSAU, WIS. MUNICIPAL CODE § 16.04.039 (2013), entitled "Residential Rental Licensing," landlords must obtain annual licenses. To do so, they must accomplish three things: (1) complete and submit an application; (2) obtain a "certificate of compliance," after an inspection, indicating the conditions at the dwelling unit comply with the municipal code; and (3) pay a fee. The inspection requirement is designed for the landlord to demonstrate the rental units meet the requirements for the rental license.

When a landlord applies for a rental license, the City will schedule an appointment and send notice of the inspection date to the landlord. The landlord must then arrange for access and notify all tenants of the inspection. WAUSAU, WIS. MUNICIPAL CODE § 16.04.039(e)(3) (2013) provides, in relevant part: "The owner shall arrange for access to the dwelling unit and all portions [of] the property affected by the rental of the dwelling unit and shall notify all tenants of the inspection in accordance with Wisconsin law and the lease agreement between the owner and the tenant."

In the circuit court, the parties filed cross-motions for summary judgment. The landlords contended the ordinance was preempted by recently enacted WIS. STAT. § 66.0104(2)(d)1.a. The statute provides: "No city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law." The landlords argued the ordinance's requirement that landlords notify tenants of inspections was a communication not required under federal or state law.

The City contended the notice responsibility under the ordinance was an already existing requirement imposed by WIS. STAT. § 704.05 and WIS. ADMIN. CODE § ATCP 134.09(2)(a), to notify a tenant in advance of a landlord's entry into the premises for inspection purposes. The

City insisted its ordinance was consistent with, and not preempted by, WIS. STAT. § 66.0104(2)(d).

On December 1, 2014, the circuit court issued a written decision concluding the City's rental licensing ordinance was a valid exercise of its home rule powers and WIS. STAT. § 66.0104.(2)(d) contained no express withdrawal of the City's power. The court stated:

> [T]he City's rental licensing ordinance is not preempted by the statute limiting what information landlords can be compelled to convey to tenants or to the municipality. The statute contains no express withdrawal of the City's power to enact a rental licensing ordinance. Nothing about the ordinance logically conflicts with the statute, nor does the ordinance interfere with the statute's purpose or its spirit; in fact, the ordinance requires only what the statute allows it to require, suggesting that the ordinance was written with the statute in mind.

Accordingly, the circuit court held the City was entitled to dismissal of the landlords' complaint. The court granted the City's summary judgment motion and denied summary judgment to the landlords. The landlords appealed.

After appellate briefing was completed in the present case, this court issued a published opinion in a similar case involving La Crosse's rental registration and licensing program. *See* ***Olson v. City of La Crosse***, 2015 WI App 67, ___ Wis. 2d ___, ___ N.W.2d ___ (No. 2015AP127). In that case, we concluded La Crosse's ordinance was preempted by WIS. STAT. § 66.0104(2)(d)1.a., because the legislature had expressly withdrawn the power of the municipality to act. In ***Olson***, ¶7, we stated:

> WISCONSIN STAT. § 66.0104(2)(d)1.a. provides: "No city, village, town, or county may enact an ordinance that requires a landlord to communicate to tenants any information that is not required to be communicated to tenants under federal or state law." Thus, as the landlords argue, the statute expressly withdraws the power of a

> municipality to require landlords to communicate information to tenants that is not required to be communicated under federal or state law. Further, we discern no reason why requiring landlords to provide tenants with notice of a City inspection would not be a requirement that landlords communicate information to tenants.

Thus, we determined the ordinance was preempted "if there is not some federal or state law that requires landlords to communicate this information." ***Id.*** We rejected La Crosse's argument that WIS. STAT. § 704.05(2) and WIS. ADMIN. CODE § ATCP 134.09(2) worked together to require a landlord to notify a tenant about city inspections. In ***Olson***, ¶9, we stated:

> As to WIS. STAT. § 704.05(2) and WIS. ADMIN. CODE § ATCP 134.09(2), our analysis is simple. Those state laws pertain to *landlord* inspections, not *City* inspections. Section 704.05(2) provides: "The *landlord* may upon advance notice and at reasonable times inspect the premises …." (Emphasis added.) Similarly, § ATCP 134.09(2) provides that a "landlord" may enter a dwelling to inspect the premises if the landlord provides advance notice and enters at a reasonable time.

We further concluded in ***Olson***, ¶14:

> As far as we can tell, nothing in our interpretation stops local governments from implementing rental housing inspection and registration programs as part of a housing code, let alone precludes other substantive housing code regulations. We simply conclude that the responsibility for communicating to tenants about housing code programs like the City's program must, under WIS. STAT. § 66.0104(2)(d)1.a., fall on the government instead of on landlords.

However, we agreed with La Crosse's argument that even if the notice provision was preempted, the circuit court's decision upholding the remainder of the inspection and registration program should stand because the notice provision was severable.

The City submitted a supplemental response to the ***Olson*** decision and takes umbrage with the result regarding preemption, but we are bound by that precedent. *See* ***Cook v. Cook***, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). The City acknowledges that La Crosse's

rental registration and inspection program is "nearly identical" to Wausau's ordinance. However, the City insists this court's review of the La Crosse ordinance overlooks the requirement of the inspection within the context of the entire ordinance. The City argues:

> Nothing in the [Olson] decision found that La Crosse was without the authority under its home rule powers to maintain a rental license or inspection program. Therefore, if a municipality may lawfully enact and enforce a rental licensing and inspection program, the inspection requirement of a rental premises would be similar to that which might be mandated for example, by an insurer in order to provide a policy of insurance for the same rental premises.

However, the notice a landlord would give a tenant of an insurance inspection pursuant to an insurance policy is not equivalent to the notice requirement in the City's program. Quite simply, responsibility for communicating to tenants about an insurance inspection falls on the landlord. As we emphasized in ***Olson***, the responsibility for communicating to tenants about the City's program falls on the government under WIS. STAT. § 66.0104(2)(d)1.a. ***Olson***, ¶14. Accordingly, we reverse the circuit court's judgment and remand the cause for further proceedings.

Therefore,

IT IS ORDERED that the judgment is summarily reversed and cause remanded for further proceedings. *See* WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals