

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

SEPTEMBER 10, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-0984-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAVID KOSMO,

Plaintiff-Appellant,

v.

**STATE OF WISCONSIN,
DEPARTMENT OF TRANSPORTATION,**

Defendant-Respondent,

**CITY OF EAU CLAIRE, a municipal
corporation of the State of
Wisconsin, and EAU CLAIRE AREA
SCHOOL DISTRICT, a quasi-municipal
corporation of the State of
Wisconsin,**

Defendants.

APPEAL from a judgment of the circuit court for Eau Claire County: GREGORY A. PETERSON, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. David Kosmo appeals a judgment dismissing his inverse condemnation complaint against the Department of Transportation for failure to state a claim upon which relief may be granted, and awarding costs for filing a frivolous action.¹ See § 814.025, STATS.² He argues that his complaint states a claim and that the trial court erroneously concluded that his claim was frivolous. We affirm the judgment.

Kosmo's complaint against the department states the Chicago, Milwaukee, St. Paul and Pacific Railroad Company owned record title to certain property that it leased to various individuals pursuant to a written indefinite term lease. It alleges that the written lease gave the individual ownership of the building on the property and the right to occupy the property in perpetuity, as long as rent was paid. He also alleged that these rights were transferable, and he purchased these rights from one of the tenants.

Kosmo alleges that he conducted a business on the property until the department exercised its power of eminent domain and acquired ownership of the property from the trustee for the railroad. By quitclaim deed, the department deeded the property to the City of Eau Claire. Kosmo claims that he vacated the property upon the department's demand and is entitled therefore to relocation benefits, and compensation for the taking of his property rights.

Kosmo argues that because his complaint states a claim against the department, the trial court erroneously dismissed it. Whether a complaint states a claim upon which relief may be granted is a question of law that we review de novo. *Heinritz v. Lawrence Univ.*, 194 Wis.2d 606, 610, 535 N.W.2d 81, 83 (Ct. App. 1995). We must liberally construe the complaint and accept its allegations as true, drawing inferences in favor of the party against whom the motion is brought. *Id.* Under this analysis, we are confined to the facts alleged in the complaint. *Id.* at 611, 535 N.W.2d at 83. To succeed in this initial stage of an inverse condemnation claim, the plaintiff "must allege facts that, prima facie at least, show there has been either an occupation of its property under sec. 32.10, STATS., or a taking, which must be compensated under the terms of the

¹ This is an expedited appeal under RULE 809.17, STATS.

² Kosmo does not challenge the trial court's dismissal of his claims against the City of Eau Claire and the Eau Claire Area School District.

Wisconsin Constitution." *Howell Plaza, Inc. v. State Highway Comm'n*, 66 Wis.2d 720, 723, 226 N.W.2d 185, 187 (1975).

At the outset, we note that the complaint alleges Kosmo is entitled to compensation under ch. 32, STATS., "assuming that plaintiff complies with the procedural requirements" set forth. The complaint however fails to state that Kosmo complied with procedural requirements.

Also, the complaint fails to set forth facts alleging a compensable property interest. Kosmo claims that his complaint states a property interest because he has "the right to occupy the property in perpetuity, in accordance with a written indefinite term lease with the Railroad, as long as the tenant paid the required rent." The complaint fails to allege a property interest compensable in eminent domain proceedings.

We agree that a lessee has a property interest and, when such interest is completely taken by a condemning authority, the lessee is entitled to compensation. *Maxey v. Redevelopment Auth.*, 94 Wis.2d 375, 400, 288 N.W.2d 794, 806 (1980). "To entitle a person having a right of occupancy of real estate to recover compensation when the land is taken, he must have an actual estate or interest in the soil." See 2 NICHOLS, LAW OF EMINENT DOMAIN, § 5.06[7] at 5-131 (1982). Chapter 706, STATS., governs every transaction by which an interest in land is created or assigned. Section 706.01(1), STATS. Excluded, however, are leases for a term limited to one year or less. Section 706.01(2)(c), STATS.

Kosmo claims that his interest arises out of a lease for an indefinite term. A lease for an indefinite term is not a lease for more than a year, creating an interest in the land under ch. 706, STATS. It is also not a lease for less than a year, valid under § 704.01(1) STATS., which provides:

"Lease" means an agreement, whether oral or written, for transfer of possession of real property, or both real and personal property, for a definite period of time. A lease is for a definite period of time if it has a fixed commencement date and a fixed expiration date or if the commencement and expiration can be

ascertained by reference to some event, such as completion of a building.³

On the other hand, a tenant who holds possession without a valid lease and pays rent on a periodic basis is a periodic tenant. Section 704.01(2), STATS. A tenant at will holds possession with permission of the landlord without a valid lease and under circumstances not involving periodic payment of rent. Section 704.01(5), STATS.

Here, the complaint claims tenancy according to a written indefinite term lease. Because a lease, by definition, must be for a definite period of time, Kosmo's tenancy is not a leasehold under Wisconsin law but rather a tenancy at will or a periodic tenancy. The complaint fails to allege any facts regarding the rental payment periods. Consequently, it is impossible to determine from the complaint which tenancy applies.

Nonetheless, either a periodic or an at-will tenancy may be terminated according to § 704.19, STATS., absent express written agreement upon another termination method. The complaint alleges no other expressly agreed termination method. With exceptions not suggested here, upon twenty-eight-day written notice, a tenancy may be terminated at the end of the rental period. Sections 704.19(2) and (3), STATS. An inaccurate termination date in a notice does not invalidate the notice but merely makes it effective as of the first date which could have been properly specified. Section 704.19(5), STATS.

A periodic tenant from month to month, for example, has no such interest as would entitle him to compensation. 2 NICHOLS, *supra*, § 5.06[4] at 5-129. The State, having succeeded to the title of the landlord, would have the right to terminate the tenancy on a month's notice. *Id.* at 5-130. The right of a tenant at will is afforded even less dignity. "A mere expectation of continued possession based upon the previous conduct of the parties cannot be

³ A lease is included within ch. 704, STATS., even though it may also be treated as a conveyance under § 706, STATS. Section 704.01(1), STATS.

considered" by the court. *Id.* Kosmo's complaint fails to allege any facts to show a valid lease for a definite term.⁴

We also conclude Kosmo fails to allege facts to show a taking. Without citation to authority, Kosmo argues: "It is difficult to imagine a clearer 'taking' of Appellant's property than was alleged in this case: the Department simply exercised its power of condemnation and took fee title ownership to the property. There could not be a clearer assertion of a taking than that!" We are unpersuaded. In any event, "the fact that title vested in the state at a particular time has no bearing on the question of whether the lease was breached." *Kilps v. Pawinski*, 27 Wis.2d 467, 473, 134 N.W.2d 470, 473 (1965). A transfer of title does not necessarily imply a transfer of possession. *See id.*

In the event the facts could be interpreted to imply a constructive eviction, Kosmo must show in any event a reduced value of his leasehold interest.⁵ *Cf. Kilps*, 27 Wis.2d at 474, 134 N.W.2d at 473 (The tenant must look to the landlord for "an apportionment of the damages assessed against the condemning authority based on the reduced value of his lease."). As previously discussed, the complaint fails to allege facts to support an inference Kosmo held a valid leasehold interest.

Therefore, we agree with the trial court that the complaint fails to state a claim upon which relief may be granted. Because Kosmo fails to cite legal authority to support the proposition that an indefinite term lease is a compensable property interest, or that a transfer of title amounts to a taking of possession, we also affirm the trial court's discretion to tax costs for a frivolous action under § 814.025, STATS.

By the Court. – Judgment affirmed.

⁴ Kosmo cites no legal authority for the proposition that an indefinite term lease creates a property interest. There is authority that it does not. *See Ratcliff v. Aspros*, 254 Wis. 126, 129, 35 N.W.2d 217, 218 (1948); *Leider v. Schmidt*, 260 Wis. 273, 275, 50 N.W.2d 233, 234 (1951); *Batavian Nat'l Bank v. S & H, Inc.*, 3 Wis.2d 565, 569-70, 89 N.W.2d 309, 312 (1958); *cf., Capital Inv., Inc. v. Whitehall Packing Co.*, 91 Wis.2d 178, 193, 280 N.W.2d 254, 260-61 (1979).

⁵ On appeal, Kosmo does not argue that the complaint alleges a taking in that it states he vacated upon demand of the department.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.