

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

November 19, 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. 96-1174-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

DAVID KOSMO,

Plaintiff-Appellant,

v.

**STATE OF WISCONSIN DEPARTMENT OF
TRANSPORTATION AND CITY OF EAU CLAIRE,
A MUNICIPAL CORPORATION OF THE STATE
OF WISCONSIN,**

Defendants,

**EAU CLAIRE AREA SCHOOL DISTRICT,
A QUASI-MUNICIPAL CORPORATION OF
THE STATE OF WISCONSIN,**

Defendant-Respondent.

APPEAL from an order 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 an order dismissing his complaint against the Eau Claire Area School District.¹ Kosmo argues that the trial court erroneously concluded the complaint failed to state a claim upon which relief could be granted. We affirm.

Whether a complaint states a claim upon which relief may be granted is a question of law we review de novo. *Dziewa v. Vossler*, 149 Wis.2d 74, 77, 438 N.W.2d 565, 566 (1989). A motion to dismiss shall be granted only if, based upon the complaint and all reasonable inferences to be drawn from the complaint, there are no conditions under which the plaintiff could recover. *Quesenbery v. Milwaukee Co.*, 106 Wis.2d 685, 690, 317 N.W.2d 468, 471 (1982). In considering a motion to dismiss, the allegations of the complaint are accepted as true. *Id.* To succeed at 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., to a taking, which must be compensated under the terms of the Wisconsin Constitution." *Howell Plaza, Inc. v. State Hwy. Comm'n*, 66 Wis.2d 720, 723, 226 N.W.2d 185, 187 (1975).

Kosmo's complaint seeks a declaratory judgment that he is entitled to relocation benefits under § 32.19 and § 32.195, STATS., and claims inverse condemnation. Kosmo alleged that starting in 1977, his business occupied certain real estate in the City of Eau Claire according to an indefinite term lease and that he had the right to occupy the property in perpetuity. He alleged that "by virtue of a series of actions taken by the defendants," his business was displaced from the property. He alleged that in 1984, the "State of Wisconsin, Department of Transportation lawfully exercised its power of eminent domain and issued an award of damages under § 32.05(7), Wisconsin Statutes, and thereby acquired fee title ownership of the property" from the trustee of the railroad. In 1985, under § 85.09(4), STATS., the department deeded the property to the City of Eau Claire. In 1994, Kosmo was required to vacate the property. Further:

That defendant City of Eau Claire has, or will within the foreseeable future, deed the property to defendant Eau Claire Area School District and defendant Eau

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

Claire Area School District will then, or is now in the process of, building a new school facility on the property;

....

Eau Claire Area School District ... [is] obligated to pay plaintiff those so-called relocation benefits accorded to displaced persons and other condemnees by sections 32.19 and 32.195, Wisconsin Statutes, to which plaintiff is or may become may be eligible, assuming that plaintiff complies with the procedural requirements which are set forth in section 32.20, Wis. Stats., and in Chapter ILHR 202, Wisconsin Administrative Code, for obtaining such benefits.

Kosmo argues that his complaint alleges that he was forced to vacate his business due to the fact that the City of Eau Claire was deeding the property to the school district. Because the school district falls within the definition of a "condemnor" under § 32.185, STATS.,² he claims relocation benefits under ch. 32, STATS., and inverse condemnation against the school district.

We conclude that Kosmo's complaint fails to state a claim against the school district. The complaint alleges that the State, not the school district, exercised the power of eminent domain. In his brief, Kosmo invites us to interpret his complaint as follows:

That the School District, as part of its long range planning process, entered into a contract with the City of Eau Claire under section 66.30, Wisconsin Statutes, where by the City would utilize the process set forth in section 85.09, Wisconsin Statutes, to obtain title to the subject property, which was abandoned railroad property. The School District itself would not be eligible to proceed under section 85.09, Wis. Stats., as it is not a

² Section 32.185, STATS., provides in part that a condemnor also means a displacing agency. "In this section 'displacing agency' means any state agency, political subdivision of the state or person carrying out a program or project with public financial assistance that causes a person to be a displaced person, as defined in s. 32.19(2)(e)."

"municipality" as that term is defined for section 85.09 purposes.

The complaint, however, does not contain this paragraph, and Kosmo cites no record reference to where this allegation may be found. We construe the complaint liberally, but to conclude that the complaint contains these allegations exceeds even the most liberal construction. The complaint states merely that the City has, or will, deed the property to the school district. Because the complaint does not allege facts to support an inference that the school district exercised its condemning authority, we conclude that the complaint fails to state a claim against the school district.

Further, Kosmo has not alleged a property interest pursuant to a definite term lease but, rather, an indeterminate lease term. A lessee has a property interest, and when such interest is taken, the lessee is entitled to compensation. *Maxey v. Redevelopment Authority*, 94 Wis.2d 375, 400, 288 N.W.2d 794, 806 (1980). An indeterminate term lease, however, is not a "lease" within the meaning of § 704.01(1), STATS., which requires that a valid lease contain an identifiable commencement and expiration date.

The complaint fails to allege any facts from which to determine the rental period. A periodic tenant or tenant at will generally has no interest that entitles him to compensation. 2 NICHOLS, LAW OF EMINENT DOMAIN, § 5.06[4] at 5-129 to 5-130. The State, having succeeded to the title of landlord, would have the right to terminate the tenancy at a month's notice. *Id.* "[A] mere expectation of continued possession based upon the previous conduct of the parties cannot be considered[]" by the court. *Id.* at 5-130. Kosmo cites no authority for the proposition that an indeterminate term lease creates a property interest or right to occupy the property in perpetuity. *Cf., Capital Invests., Inc. v. Whitehall Pkg. Co.*, 91 Wis.2d 178, 193-94, 280 N.W.2d 254, 261 (1979) ("There is, therefore, an apparent judicial reluctance to interpret any contract to require performance in perpetuity"). Therefore, Kosmo has not alleged a leasehold interest sufficient to entitle him to compensation.

Next, Kosmo argues that the trial court erroneously ruled that his action was frivolous under § 814.025, STATS. In light of the complaint's failure to allege facts showing that the school district exercised its condemning authority,

and the lack of legal citation supporting the finding of a compensable leasehold interest, we affirm the ruling.

By the Court. — Order affirmed.

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