COURT OF APPEALS
DECISION
DATED AND FILED

September 17, 2014

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. 2013AP940 **Cir. Ct. No. 2009CV3540**

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

PARKLAND VENTURE LLC, ARTHUR D. DYER, NORMAN C. DYER, JR., WILLIAM FINK, DDS, VALERIE A. ESLER AND KIM E. ELLIS,

PLAINTIFFS-APPELLANTS,

V.

THE CITY OF MUSKEGO, THE CITY OF MUSKEGO COMMUNITY DEVELOPMENT AUTHORITY, DOMONIC R. D'ACQUISTO, MARK A. SLOCOMB, DAVID L. DE ANGELIS AND JOHN R. JOHNSON,

DEFENDANTS-RESPONDENTS,

INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA, GREAT AMERICAN INSURANCE COMPANY, FRANK F. WALTZ, LEAGUE OF WISCONSIN MUNICIPALITIES MUTUAL INSURANCE, EMPLOYERS INSURANCE OF WAUSAU, WAUSAU UNDERWRITERS INSURANCE COMPANY, COREGIS INSURANCE COMPANY, SPECIALITY MUTUAL INSURANCE COMPANY AND XYZ INSURANCE COMPANY,

DEFENDANTS.

APPEAL from an order of the circuit court for Waukesha County: LEE S. DREYFUS, JR., Judge. *Affirmed*.

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

¶1 PER CURIAM. Parkland Venture, LLC, its managing member Arthur Dyer, and members Norman Dyer, Jr., William Fink, D.D.S., Valerie Esler and Kim Ellis (jointly, Parkland) appeal from an order granting summary judgment in favor of the City of Muskego, the City's Community Development Authority (CDA), and former alderman and city council president Domonic D'Aquisto, and former mayors Mark Slocomb, David DeAngelis, and John Johnson. We affirm.

¶2 Certain facts are not disputed. In 1996, the City passed a "Resolution of Necessity" authorizing it to purchase a 10.8-acre piece of land on which sat a dilapidated strip mall. It was considering using the property as a site for a new public library. In 1997, Parkland outbid the City and purchased the land with the idea of renovating the mall and to lease part of it to a big-box retailer, such as Menard's. Parkland offered to lease a portion of the property to the City to build its library. The City declined.

¶3 Significant and costly environmental and structural problems dogged redevelopment of the blighted property. The State imposed deadlines for remediation and repairs. Parkland sought public subsidies from the City in the form of Tax Incremental Funding (TIF).

¶4 In 2000, Parkland presented its "Muskego City Center and Park" to the City Plan Commission. The Common Council approved a Tax Incremental District Project Plan (TID) granting a $2.8 million TIF that included $856,000 in

developer incentives. Matters unrelated to this case consumed managing member Dyer's time and attention for a while, and Parkland did not pursue the City Center development, return to the Common Council, or seek a Developer's Agreement.

¶5 In 2002, the City created the CDA to undertake blight elimination, urban renewal, and redevelopment programs. The CDA acted as the City's agent in planning and carrying out such development programs and activities as approved by the Common Council. It adopted a series of building restrictions and requirements, a redevelopment plan, and a ban on any new construction that did not comply with these new rules.

¶6 Parkland presented another development concept, "Beacon Square," to the CDA. The parties disagreed about how much new value the development would provide, however, and the amount available in TIF funding remained an issue. The City's TIF consultant cautioned that it was "very unlikely" the county review board would approve the atypically large public subsidy Parkland desired. Parkland switched development teams.

¶7 In 2004, the CDA gave conceptual approval for Beacon Square but the parties still could not agree on the amount of the subsidy. The CDA rejected Parkland's offer to sell the property to the City to develop the parcel itself.

¶8 To save on taxes, Parkland planted 3,000 evergreens and converted the property to agricultural use. Informed that reclassifying the site as an agricultural use negatively impacted the TID's financial status, the Common Council voted to approve the CDA's recommendation to amend the TID to remove Parkland. The City also denied the agricultural use exemption and continued to tax the property as real estate. Parkland did not pay the tax in 2006 and the county filed a tax lien.

¶9 While the above facts are not in dispute, Parkland's interpretation and the City's explanation of them dramatically diverged. Parkland asserted that all along it worked in good faith with the City, creating and submitting over fifty proposals, tweaking them to meet City demands, and otherwise jumping through whatever costly hoops the City or the CDA hoisted. It finally discovered, it contended, that the City never had any intention of allowing it to develop its property. Rather, due to a pervasive animosity toward Dyer, the hoops were but a stalling tactic to get it to spend millions in improvements after which the City eventually could foreclose on the property and purchase it for less than what Parkland originally had paid. Lobbing accusations that ranged from broken promises to misrepresentations to outright lies to illegal kickbacks to sabotage to conspiracy, Parkland contended that the City maliciously conspired with the Common Council, the CDA, and four mayoral administrations to sabotage the Menard's "deal," deter interested buyers, meddle with its lender, and generally thwart its development plans.

¶10 "Nonsense," said the City. It claimed that it, too, worked in good faith with Parkland but had to keep the tax-paying community's best interest at the forefront. It explained that it did not agree to the TIF early on because its public financing consultant was unconvinced that the TIF proposal was in taxpayers' best interests, because of uncertainty as to whether TIFs could include demolition and remediation expenses, and because the Common Council had concerns about using public monies for private development. Other delays were occasioned by development proposals that involved changes of a magnitude that might have impacted land use regulations or necessitated zoning code revisions and public hearings. Further, the City wanted a clear Developer's Agreement specifying which projects would be financed with TIF dollars, how much value Parkland

would guarantee, and what kind of security it would have to provide to secure those guarantees. The subsidy amount remained in contention when the CDA approved the physical plan for Beacon Square in October 2004 because Parkland sought significantly more than the City thought economically feasible. And while Menard's was interested to a degree, from the outset it wanted a larger site and there never was a final agreement in place. Finally, the reason the City declined to buy the property from Parkland was not to drive the price down but because it did not think the property's condition justified the $5.7 million asking price.

¶11 Parkland filed a Notice of Claim with the City of Muskego on January 7, 2009, "[a]s soon as the conspiratorial acts became known." *See* WIS. STAT. § 893.80 (2011-12).[1] One hundred twenty days passed with no response from the City. Parkland commenced this lawsuit, alleging inverse condemnation, regulatory and/or temporary taking, promissory estoppel, conspiracy to injure in trade or business contrary to WIS. STAT. § 134.01, civil conspiracy, slander of title (due to the tax lien), negligence, intentional/fraudulent and negligent misrepresentation, tortious interference with prospective contractual relations, violation of equal protection, and three federal claims: a taking in violation of the Fifth Amendment, an equal protection violation under the Fourteenth Amendment, and a violation of 42 U.S.C. 1983.

¶12 The City removed the action to federal court, which determined that it was without subject matter jurisdiction because the constitutional claims were not ripe. It remanded the case to state court. Parkland amended the complaint,

[1] All references to the Wisconsin Statutes are to the 2011-12 version unless noted.

adding a claim for defamation, alleging that then-mayor Johnson suggested at a public event that Dyer was trying to "blackmail" the City.

¶13 The City moved to dismiss the complaint. The circuit court properly dismissed five of the fourteen claims because they are intentional torts. *See* WIS. STAT. § 893.80(4); *see also* ***Maleki v. Fine-Lando Clinic Chartered, S.C.***, 162 Wis. 2d 73, 86, 469 N.W.2d 629 (1991) (conspiracy to injure trade or business, in violation of WIS. STAT. § 134.01); WIS JI—CIVIL 2802 (civil conspiracy); ***John Doe 1 v. Archdiocese of Milwaukee***, 2007 WI 95, ¶50, 303 Wis. 2d 34, 734 N.W.2d 827 (intentional/fraudulent misrepresentation); ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 282-83, 509 N.W.2d 323 (Ct. App. 1993) (tortious interference with prospective contractual relations); and WIS. STAT. § 893.57 (describing statute of limitations for libel and/or slander). The court also dismissed the slander-of-title claim because Waukesha county, not the City, filed the tax lien on the property when Parkland did not pay the disputed taxes, rather than paying them under protest.

¶14 Lastly, the court dismissed the defamation claim. Citizens queried Mayor Johnson at a public event about the slow progress of developing the blighted property. Johnson answered something to the effect that the City would not be blackmailed into paying more for the property than it was worth. We agree that, in this context and under these circumstances, a reasonable interpretation is that the choice of words was not defamatory. *See* ***D. R. W. Corp. v. Cordes***, 65 Wis. 2d 303, 313, 222 N.W.2d 671 (1974).

¶15 The City then moved for and was granted summary judgment on the remaining claims. Parkland appeals.

¶16 We review a grant of summary judgment independently, using the same methodology as the circuit court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315-17, 401 N.W.2d 816 (1987). Summary judgment is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. WIS. STAT. § 802.08(2). We conclude the City is entitled to a judgment as a matter of law because WIS. STAT. § 893.80(1d)(a) bars Parkland's claims and it has shown no federal constitutional violations.

¶17 Prior to bringing an action against a governmental subdivision, such as a municipality, a party must serve upon it a written notice of the circumstances of the claim, including an itemized statement of the relief sought. WIS. STAT. § 893.80(1d)(a), (b). The burden is on the claimant to prove that the notice requirements were met. ***Moran v. Milwaukee Cnty.***, 2005 WI App 30, ¶3, 278 Wis. 2d 747, 693 N.W.2d 121. Whether notice of the circumstances of the claim was timely is a question of law that we review de novo. *See* ***American Family Mut. Ins. Co. v. Outagamie Cnty.***, 2012 WI App 60, ¶8, 341 Wis. 2d 413, 816 N.W.2d 340.

¶18 Parkland served its notice of claim on the City on January 7, 2009. One hundred twenty days prior to that was September 9, 2008. Parkland identifies no acts that occurred on or after that date. Accordingly, it was not timely.

¶19 But Parkland asserts that it did not *discover* the decade-plus history of the conspiracy to thwart its efforts to develop the property until November 2008. That is when several current or former alderpersons, Donna Woodard among them, provided supporting affidavits describing the City's allegedly unwavering plan to prevent Parkland from ever developing the property, regardless of how many plans it submitted.

¶20 That cannot be so. Parkland also filed a notice of claim ten years earlier, in March 1999, alleging, among other things, conspiracies, regulatory takings, tortious interference, defamation, and efforts to thwart development. Not only did the same law firm draft both notices, but Woodard's 2008 affidavit incorporated and reaffirmed the sworn statement she provided for the 1999 notice. The allegations were not news to Parkland.

¶21 Parkland claims the lack of timely written notice is of no consequence, however, because it substantially complied with the statute—*i.e.*, the City had actual notice and was not prejudiced. *See* WIS. STAT. § 893.80(1d)(a); *see also* ***Bostco LLC v. Milwaukee Metro. Sewerage Dist.***, 2013 WI 78, ¶88, 350 Wis. 2d 554, 835 N.W.2d 160. Parkland asserts that the City knew for years of the conspiracy to deprive it of the use and development of the property and that its multiple efforts to secure TIF subsidies were sufficient contacts to comply with the notice of claim statute.

¶22 It is true that substantial compliance can suffice but Parkland's conclusion is flawed. The purpose of the statute is to give the municipality the opportunity to investigate and possibly settle the claim before entering into costly litigation. ***City of Racine v. Waste Facility Siting Bd.***, 216 Wis. 2d 616, 622, 575 N.W.2d 712 (1998). Thus, it is not the City's knowledge of the underlying allegations or Parkland's financing endeavors that constitute notice; it is notice—*actual* notice—that a claim may be filed. Parkland has not met its burden of proof. *See* ***Moran***, 278 Wis. 2d 747, ¶3.

¶23 All that is left are the federal claims. A party does not have to comply with WIS. STAT. § 893.80(1) to bring federal constitutional claims. ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶21, 235 Wis. 2d 610, 612 N.W.2d 59. We

agree with the circuit court, however, that Parkland has not demonstrated that there has been a taking or a denial of equal protection. Parkland still owns the property. Its Beacon Hill proposal was as close as it came to presenting a final development plan for the City to act on, but it presented the proposal to the CDA, an advisory body, not to the Common Council, the approving body. The CDA gave Beacon Hill conceptual approval, but funding remained unsettled, as Parkland wanted or believed necessary TIF subsidies greater than what the CDA proposed. The proposal effectively died there. With no federal constitutional violation, the 42 U.S.C. § 1983 also falls away.

By the Court.—Order affirmed.

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