COURT OF APPEALS
DECISION
DATED AND FILED

November 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2015AP1906 **Cir. Ct. No. 2013CV850**

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

G&D PROPERTIES, LLC, KARDON, INC., SYSTEMS ENGINEERING COMPANY, INC., CECIL EDIRISINGHE, VELICON, LTD., KENNETH DRAGOTTA, DAVID GARMS AND SYSTEMS ENGINEERING & AUTOMATION CORP.,

PLAINTIFFS-APPELLANTS,

V.

MILWAUKEE METROPOLITAN SEWERAGE DISTRICT AND CITY OF MILWAUKEE,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Milwaukee County: JEFFREY A. CONEN, Judge. *Affirmed*.

Before Curley, P.J., Kessler and Brash, JJ.

¶1 KESSLER, J. G&D Properties, LLC, Systems Engineering Company, Inc., Cecil Edirisinghe, Velicon, Ltd., Kenneth Dragotta, David Garms, and Systems Engineering & Automation Corp. (collectively, "G&D") appeal a

judgment of the circuit court granting summary judgment to the Milwaukee Metropolitan Sewerage District (MMSD) and the City of Milwaukee (the City). G&D contends that it filed proper notice of flood damage with MMSD and the City, that the governmental entities had actual knowledge of the circumstances giving rise to G&D's claim, and that the entities were not prejudiced by any lack of notice. We affirm the circuit court.

BACKGROUND

¶2 The material facts underlying this appeal are not in dispute. On July 22, 2010, the City of Milwaukee experienced substantial rainfall. The property located at 4044 North 31st Street, owned by G&D, experienced excessive flooding. On September 30, 2010, Kenneth Dragotta, one of the members of G&D, met with MMSD representatives to discuss the flooding and the damages to each business operating at the property. It is undisputed that between September 30, 2010, and the end of October 2010, Dragotta, MMSD representatives, and City representatives met multiple times to discuss the cause of the flooding, the resulting damage, and strategies for mitigating future flood damage. Also in October 2010, an MMSD representative informed Dragotta that MMSD planned to conduct a flow study to determine whether system design and operation contributed to the flooding in the vicinity of the property at issue. Within 120 days of the flooding, eighty-two claimants affected by the flooding filed Notices of Claim with MMSD, in accordance with WIS. STAT. § 893.80(1d) (2013-14),[1] for flood-related damages. G&D was not among those claimants.

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

¶3 MMSD completed and released the flow study on or about December 2, 2011. G&D determined, based on the report, that MMSD was responsible for the flooding. On March 30, 2012, 119 days after MMSD issued its report, G&D filed a "Demand for Indemnity Pursuant to Recorded Easement, and Notice of Claim." (Some capitalization omitted.) The notice, as relevant to this appeal, stated:

> This claim relates to damages caused to the Claimants by you in the area of North 31st Street and Capitol Drive. The circumstances of the claim are generally described in the attached HNTB Technical Memorandum, dated as of December 1, 2011.
>
> ….
>
> The Milwaukee Metropolitan Sewerage District, and the City of Milwaukee, owe Claimants $2,333,438.84.
>
> ….
>
> Claimants reserve the right to supplement and amend this Notice of Circumstances of Claim and itemization of Relief Sought. Furthermore, as the Milwaukee Metropolitan Sewerage District and the City of Milwaukee had actual notice of the circumstances surrounding this claim, this Notice of Circumstances of Claim and Claim is unnecessary….

MMSD denied the claim, prompting G&D to file the lawsuit underlying this appeal.

¶4 MMSD and the City then filed motions for summary judgment, arguing that G&D failed to follow the notice requirements described in WIS. STAT. § 893.80(1d), which provides:

> **(1d)** Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any … political corporation, governmental subdivision or agency thereof … for acts done in their official capacity or in the course of their agency … upon a claim or cause of action unless:

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the … political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the … corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant … corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant … corporation, subdivision or agency and the claim is disallowed.

¶5 MMSD and the City argued that G&D's claim contained "no date of injury; no date of loss; no date of harm; [and] no description of the events giving rise to the claim." They argued that G&D failed to provide any details which could have allowed them to ascertain the nature and date of G&D's losses and that G&D's reference to MMSD's flow study did not provide MMSD or the City with actual notice of G&D's injuries because the report "does not refer to … any of the … named plaintiffs; does not provide the relevant address[es], does not describe any loss suffered, and does not supply any specific date of loss." MMSD and the City also argued that G&D's failure to comply with the statutory requirements was prejudicial to MMSD's abilities to evaluate G&D's claims.

¶6 The circuit court found that G&D's notice did not comport with the requirements of WIS. STAT. § 893.80(1d) but did not dismiss G&D's claim. Rather, the court allowed the parties to conduct discovery on the issues of whether MMSD and the City had actual notice of G&D's claim and whether MMSD was prejudiced by G&D's failure to comply with the statute.

¶7 Following discovery, the parties filed competing summary judgment motions on the issues of whether MMSD and the City had actual notice of G&D's claim and whether the governmental entities were prejudiced by G&D's delay in seeking relief.

¶8 Ultimately, the circuit court granted MMSD's motion and denied G&D's motion. The court found that G&D did not meet its burden of proving that MMSD and the City had actual notice of its claim. The court found that even though G&D contacted MMSD following the flooding to inquire about responsibility and to discuss the prevention of future flooding, the inquiry did "not rise to the level necessary to create actual knowledge that G&D intended to pursue a legal claim against the defendants." The court stated that the statutory language required G&D to provide "notice of the legal variety, and notice of damage or injury." The court also found that G&D's lack of formal notice was prejudicial to MMSD because MMSD lost the ability to properly budget for G&D's claims.

¶9 This appeal follows. Additional facts are included as necessary to the discussion.

DISCUSSION

¶10 On appeal, G&D contends that its claim against MMSD and the City accrued on December 1, 2011, the date of the flow study report, making its notice of claim timely. G&D also contends that MMSD and the City had actual notice of its claim and that neither has shown prejudice by any delay or failure of G&D to provide earlier written notice of its claim.

Standard of Review.

¶11 This court reviews summary judgment decisions *de novo*, applying the same methodology and legal standard the circuit court employs. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." WIS. STAT. § 802.08(2).

¶12 This case also involves the interpretation of the notice of claim statute, found in WIS. STAT. § 893.80(1d). The interpretation of a statute is a question of law that we review *de novo*. *See* ***Hocking v. City of Dodgeville***, 2010 WI 59, ¶17, 326 Wis. 2d 155, 785 N.W.2d 398.

G&D failed to comply with WIS. STAT. § 893.80.

¶13 Under WIS. STAT. § 893.80(1d), no action may be brought against a governmental subdivision unless paragraphs (a) and (b) are satisfied:

> (a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the … political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the … corporation, subdivision or agency had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant … corporation, subdivision or agency or to the defendant officer, official, agent or employee; and
>
> (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a

> clerk or secretary for the defendant … corporation, subdivision or agency and the claim is disallowed.

¶14 In short, WIS. STAT. § 893.80(1d)(a) is the notice of injury provision. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶23, 235 Wis. 2d 610, 612 N.W.2d 59. "The notice of injury provision allows governmental entities to 'investigate and evaluate' potential claims." ***Id.*** (citations omitted). "It states that an action cannot be brought against a governmental entity unless a signed 'written notice of the circumstances of the claim' is served on the governmental entity within 120 days of the initial event." ***Id.*** (citation omitted). "Even if a claimant fails to comply with the 120-day deadline, however, the claimant may still comply with [the statute] by showing that the governmental entity had actual notice of the claim and was not prejudiced by the claimant's failure to give the requisite notice." ***Id.***

¶15 It is undisputed that G&D discovered the loss on July 22, 2010—the date of the flood—and did not file a notice of injury within 120 days of the flooding; however, G&D asserts that even if it did not provide the requisite notice, its action is not barred because MMSD and the City had actual notice such that neither was prejudiced by the lack of formal notice. We disagree.

¶16 Whether a governmental entity had actual notice of a plaintiff's claim presents a mixed question of fact and law. ***Olsen v. Township of Spooner***, 133 Wis. 2d 371, 377, 395 N.W.2d 808 (Ct. App. 1986). What the governmental entity knew about the plaintiff's claim is a factual finding and may not be overturned unless clearly erroneous. ***Id.*** Whether the governmental entity's knowledge constituted actual notice under the law is a legal conclusion we review *de novo*. *See* ***id.*** The plaintiff bears the burden of proving actual notice. ***Weiss v. City of Milwaukee***, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977). It is the plaintiff's burden to prove actual notice or that the governmental entity was not

prejudiced by the failure to comply with the formal notice requirements of WIS. STAT. § 893.80(1d). ***E-Z Roll Off, LLC v. County of Oneida***, 2011 WI 71, ¶¶17-18, 335 Wis. 2d 720, 800 N.W.2d 421. Whether he or she has done so is a question of law. ***Olsen***, 133 Wis. 2d at 379.

¶17 WISCONSIN STAT. § 893.80(1d) is designed to ensure that the governmental entity will have enough information about the plaintiff's injury, either formally by a notice within 120 days or by actual notice sufficient to avoid prejudice from the lack of formal notice, so as to be able to fully investigate "the circumstances giving rise to a claim." ***Elkhorn Area Sch. Dist. v. East Troy Cmty. Sch. Dist.***, 110 Wis. 2d 1, 5, 327 N.W.2d 206 (Ct. App. 1982). "An irreducible minimum of this enough-information requirement is that the governmental entity know the 'type of damage alleged to have been suffered by a potential claimant.'" ***Moran v. Milwaukee Cty.***, 2005 WI App 30, ¶7, 278 Wis. 2d 747, 693 N.W.2d 121 (citation omitted).

¶18 The heart of G&D's argument is that because the flood was obvious, G&D communicated its concerns to MMSD shortly after the flooding, and G&D had multiple subsequent meetings with MMSD and City representatives to discuss the flooding, MMSD and the City had actual knowledge of G&D's losses. John Jankowski, an employee of MMSD, and multiple City employees all stated in deposition testimony that they met with Dragotta multiple times, but that their meetings consisted of discussions primarily about the cause of the flooding and ways to prevent future flooding. The testimony indicates that while both entities were aware that G&D suffered flood damage, they were not aware that G&D intended to file a claim alleging that MMSD and the City were the parties responsible for the damage. Accordingly, MMSD and the City had no way of

knowing whether they faced a claim based in tort, contract, negligence, or a statutory violation. Indeed the circuit court noted that:

> [e]ven Mr. Dragotta did not expressly discuss liability or a lawsuit. For example, while waiting for the results of the flow study, … Dragotta … told Mr. Jankowski that the floods were nearly fatal to his business and that it's imperative that we know how the storm/sanitary sewer infrastructure is operating with the multiple cross connections in our area during heavy periods of rain. But this does not indicate that a lawsuit was forthcoming or that G&D believed the defendants were liable; rather, it appeared that Mr. Dragotta was concerned with correcting the problem before the flooding happened again.

¶19 We have previously held that a governmental entity's awareness of a party's concerns is not the equivalent of the governmental entity's awareness that a party intends to pursue a claim. *See* ***Urban Planning and Dev., LLC v. Village of Grafton***, No. 2012AP20, unpublished slip op. ¶9 (WI App Mar. 13, 2013). Accordingly, we conclude that G&D did not meet its burden of proving that MMSD and the City had actual notice of its losses.

¶20 We also conclude that G&D failed to meet its burden of showing that MMSD was not prejudiced by the delay in filing its notice. "Prejudice" is the inability to adequately defend a claim. ***Olsen***, 133 Wis. 2d at 379-80. One purpose of WIS. STAT. § 893.80 is to ensure that the governmental unit has sufficient opportunity to escape prejudice by promptly investigating claims. ***Olsen***, 133 Wis. 2d at 380. Another is to afford the governmental body the opportunity to compromise and to budget for potential settlement or litigation. ***E-Z Roll Off, LLC***, 335 Wis. 2d 720, ¶46. Whether a governmental entity suffered prejudice is also a mixed question of fact and law. ***Olsen***, 133 Wis. 2d at 378. We uphold the circuit court's factual findings unless clearly erroneous. *See* ***id.*** at 378-79. How these facts fit the statutory concept of prejudice is a question of law we

review *de novo*. *See* ***id.*** at 379. The plaintiff bears the burden of proving lack of prejudice. ***Weiss***, 79 Wis. 2d at 227.

¶21 The circuit court recognized that MMSD budgets for its annual operations and management costs, including expenses related to personal injuries or property damage, on a yearly basis. Budget surpluses are returned within two years of collection so as to minimize user costs. Thus, any budget surplus from 2010—the year G&D sustained flood damage—was returned in 2012—the year G&D filed its notice. Accordingly, MMSD did not have the opportunity to budget for G&D's multi-million dollar claim. It is undisputed that eighty-two other claimants filed notices with MMSD in the 120 days following the flood. MMSD evaluated and denied all of those claims. Had G&D acted more promptly, MMSD may have been able to work out a settlement or properly budget for a damage claim. G&D has not proved that its failure to timely provide formal notice was not prejudicial to MMSD.

¶22 For the foregoing reasons, we affirm the circuit court.

By the Court.—Judgment affirmed.

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