COURT OF APPEALS
DECISION
DATED AND FILED

February 6. 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP720 **Cir. Ct. No. 2010CV2061**

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

TOWN OF NEENAH,

PLAINTIFF-RESPONDENT,

V.

STEPHEN A. BATES,

DEFENDANT-APPELLANT,

WISCONSIN DEPT. OF REVENUE AND UNITED STATES OF AMERICA,

DEFENDANTS.

APPEAL from a judgment of the circuit court for Winnebago County: BARBARA H. KEY, Judge. *Affirmed.*

Before Brown, C.J., Reilly and Gundrum, JJ.

¶1 PER CURIAM. This is Stephen A. Bates's second appearance in this court regarding a raze order the Town of Neenah obtained against a property Bates owns in the Town. Bates appeals the judgment granting the Town's request on grounds that service of process was defective. We disagree and affirm.

¶2 Bates's properties are located at 1745 and 1964 Oakridge Place. In August 2010 the Town's building inspector determined that the building at the 1745 address was unfit for human habitation and unreasonable to repair and issued an order giving Bates a month to raze the building. Bates did not comply. The Town sought a court order by filing a summons and complaint under WIS. STAT. § 66.0413(1)(g) (2011-12).[1] Bates disputed service but the court granted the Town judgment on the pleadings. On appeal, this court agreed that material factual issues remained, and reversed and remanded for further proceedings.

¶3 On remand, after an evidentiary hearing, the circuit court found that the Town exercised reasonable diligence in its efforts to serve Bates personally, *see* WIS. STAT. §§ 66.0413(1)(d) and 801.10(4)(a); that the Town completed service by publication under § 66.0413(1)(d); that the APPLETON POST-CRESCENT was a proper publication forum; and that Bates was barred from challenging the reasonableness of the raze order because he did not file for a restraining order within thirty days of service. *See* WIS. STAT. § 893.76. The court granted the Town's oral motion for summary judgment and granted an order under § 66.0413(1)(g) requiring Bates to raze the structure and authorizing the Town to raze it at Bates's expense upon his failure or refusal to do so. Bates appeals.

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

¶4 As a threshold matter, we disagree with Bates's contention that the circuit court erred in allowing testimony on the issue of service. He contends WIS. STAT. § 801.10(4) sets forth the exclusive procedure where proof of service of process is challenged. That statute applies, however, when personal or substituted personal service is challenged. Bates was served by publication. Even if publication were a form of "substituted personal service," testimony is not prohibited. *See* ***Heaston v. Austin***, 47 Wis. 2d 67, 73, 176 N.W.2d 309 (1970).

¶5 A raze order must be served in the same manner as a summons. *See* WIS. STAT. § 66.0413(1)(d). "Reasonable diligence" to effect personal service is required. *See* WIS. STAT. § 801.10(4)(a). Whether the Town exercised reasonable diligence in its efforts to serve Bates is a mixed question of fact and law. The attempts made at service present a question of fact to be affirmed unless clearly erroneous. ***Welty v. Heggy***, 124 Wis. 2d 318, 324, 369 N.W.2d 763 (Ct. App. 1985). The legal significance of those attempts is a question of law. *See* ***id.***

¶6 Bates claims the Town was not reasonably diligent in its attempts at personal service. The Town's efforts were established through documentary evidence and witness testimony. On August 30, 2010, the Town's building inspector posted a noncompliance notice/raze order ("raze order") to the front door of the "totally dilapidated" structure at 1745 Oakridge. The top of the raze order reads "Noncompliance Notice" in large bold letters on a bright yellow field. On September 3, the town clerk sent the legal notice regarding the raze order for publishing in the APPLETON POST-CRESCENT, the newspaper the Town uses for all legal notices, and sent a copy of the raze order to both Oakridge addresses. The notice was published on September 8, 9 and 10. On September 18, Bates responded to the clerk's letter, indicating that the text of the ordinance referenced

in the raze order did not match that in his "archives" of the cited ordinance, and requesting that all further correspondence be sent to the 1745 address.

¶7 Process server Steven Krueger made two unsuccessful attempts to serve Bates at 1964 Oakridge. Krueger did not attempt service at 1745 Oakridge. He "took it for granted" that Bates lived at 1964 because he saw no vehicles or people at 1745; the car a neighbor identified as Bates' was in the driveway at 1964 on both days; and "nobody could live" at 1745, as the house lacked an exterior wall and "a good portion" of the roof. On the first attempt, a woman Krueger later learned was Bates's wife was outside at 1964 but, although he "hollered to her who I was," she ran inside and refused to open the door. The next day, Krueger could hear activity in the house and saw a television playing but again no one came to the door. He left a card indicating that the sheriff's department had attempted to serve legal papers.

¶8 Bates testified that his primary residence is 1745 Oakridge, that 1964 Oakridge is his wife's, and that he spends thirty to fifty percent of his time at 1745 and sleeps there "from time to time." He also testified that he neither received a copy of the raze order nor was served with the summons and complaint, and first learned of the lawsuit and raze order in December 2010 by reading back issues of the POST-CRESCENT at the library. In rebuttal, however, the Town introduced several POST-CRESCENT articles from September 2010 indicating the Town's intent to seek a raze order from the court. Bates was interviewed for and quoted in those articles.

¶9 The circuit court found the testimony of the Town's inspector, clerk and process server most credible and termed Bates "coy" in regard to acknowledging his true address. We accept the circuit court's determinations as to

witness credibility, and the reasonable inferences it draws where the credible evidence allows for more than one inference. ***Gehr v. City of Sheboygan***, 81 Wis. 2d 117, 122, 260 N.W.2d 30 (1977). We conclude the Town was reasonably diligent in attempting to serve Bates personally and thus properly turned to service by publication. On the facts here, we reject Bates's claim that the Town's use of the APPLETON POST-CRESCENT, an Outagamie county newspaper, was error.

¶10 Legal notices must be "published in a newspaper likely to give notice in the area or to the person affected." WIS. STAT. § 985.02; *see also* WIS. STAT. § 985.05(1) (municipality without an official newspaper may designate newspaper of general circulation to be used for notices). The town clerk testified that the Town has used the APPLETON POST-CRESCENT for its legal notices for at least ten years. The Town lies in northeastern Winnebago county, geographically closer to Appleton than to Oshkosh, the Winnebago county seat. The circuit court found that in Winnebago county's "northern ends … [m]ore people are going to read the POST-CRESCENT than [are] going to read the [OSHKOSH] NORTHWESTERN." The court's finding is not clearly erroneous nor is its conclusion legally flawed.

¶11 Bates next contends that the published notice itself was defective because it did not cite WIS. STAT. § 66.0413 or advise him of his right to seek a restraining order. Bates points to no authority stating that the notice must do either of those things. In any event, the boldly lettered raze-or-be-razed order referenced the statute, and the clerk's September 3 letter and attached raze order both advised Bates that his failure to comply with the order could result in the Town proceeding with the razing. Bates reasonably might have contacted the Town's inspector or clerk. Simply asserting that he did not know he had any options is not enough. *See* ***Putnam v. Time Warner Cable of Se. Wis., Ltd.***

P'ship, 2002 WI 108, ¶13 n.4, 255 Wis. 2d 447, 649 N.W.2d 626 (every person is presumed to know the law and cannot claim ignorance as an excuse).

¶12 Bates also argues that the record is devoid of evidence that the summons and complaint were served on him, thus depriving him of his due process rights to notice and an opportunity to be heard. This argument also fails. Even if true, the properly served raze order gave Bates notice and provided him with the *opportunity* to be heard, regardless of whether he recognized it or chose to take it. Commencing a lawsuit simply was an avenue for the Town to seek court assistance to proceed with razing. *See* WIS. STAT. § 66.0413(1)(g).

¶13 Once the court determined that service was proper, no factual disputes remained. Summary judgment is properly granted where no material issue of fact exists and only a question of law is at issue. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). While this court generally disapproves of oral motions for summary judgment, ***Homa v. East Towne Ford, Inc.***, 125 Wis. 2d 73, 77 n.6, 370 N.W.2d 592 (Ct. App. 1985), here the parties anticipated it would follow the court's ruling, even if not immediately. Further, WIS. STAT. § 66.0413(1)(h) was designed to allow municipalities to act swiftly to prevent the public from "any long exposures to the risks of an unsafe or unsanitary building." *See* ***Siskoy v. Walsh***, 22 Wis. 2d 127, 130, 125 N.W.2d 574 (1963) (addressing predecessor statute).

¶14 In addition, WIS. STAT. § Section 66.0413(1)(h) is the exclusive means by which an owner may contest the reasonableness of a raze order and has only thirty days to pursue it. ***Matlin v. City of Sheboygan***, 2001 WI App 179, ¶7, 247 Wis. 2d 270, 634 N.W.2d 115. The failure to commence a timely action in the circuit court bars the owner's right to a judicial hearing to challenge the raze

order's reasonableness. *See* ***Gehr***, 81 Wis. 2d at 122-25. Bates's time to seek a restraining order had long since expired. The Town thus had the authority to carry out the raze order without a judicial determination. *See* ***Siskoy***, 22 Wis. 2d at 130. There was nothing left to try or brief. In view of this posture, the case's lengthy history, and the statute's purpose, piggy-backing the evidentiary hearing and summary judgment motion made sense.

By the Court.—Judgment affirmed.

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