COURT OF APPEALS
DECISION
DATED AND FILED

March 13, 2013

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. 2012AP20 **Cir. Ct. No. 2010CV918**

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

URBAN PLANNING AND DEVELOPMENT, LLC AND GRAFTON RIVERSITE PARTNERS, LLC,

PLAINTIFFS,

THE DILLON GROUP, LLC,

PLAINTIFF-APPELLANT,

V.

VILLAGE OF GRAFTON,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Ozaukee County: SANDY A. WILLIAMS, Judge. *Affirmed*.

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

¶1 NEUBAUER, P.J. The Dillon Group, LLC sued the Village of Grafton for breach of contract. Dillon was involved in the development of a Tax Incremental Financing (TIF) district in downtown Grafton. According to Dillon, the Village did not meet its obligations under the development agreements. The circuit court held, and we agree, that Dillon did not serve the Village with a timely notice of claim under WIS. STAT. § 893.80 (2011-12)[1] and therefore Dillon's suit is barred.

¶2 Dillon, Urban Planning and Development, LLC and Grafton Riversite Partners, LLC entered into agreements with the Village's Community Development Authority (CDA) to build: 1) condominiums, 2) an office building with a brew pub, and 3) a professional building, all on 13th Avenue, which runs parallel to the Milwaukee River in downtown Grafton. The development was part of an improvement plan for the TIF district. As an incentive to develop this area, the CDA paid the developers $1,316,000. The developers agreed that if the improved properties were not assessed at a certain minimum value, they would pay the Village the difference between the assessed tax and the projected tax. To secure this guarantee to make up the shortfall, if any, the developers, in two of the agreements, agreed to provide a letter of credit to the CDA. In two of the agreements the CDA agreed to make certain improvements to the area, or agreed

[1] 2011 Wis. Act 162, § 1g renumbered WIS. STAT. § 893.80(1) to § 893.80(1d). We will refer to the subsection with the new numbering.

WISCONSIN STAT. § 893.80 is titled "Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits." In paragraph (1d)(a), the notice is referred to as "notice of the circumstances of the claim." Both "notice of injury" and "notice of the circumstances of the claim" are used in the case law to refer to the notice, and we use them interchangeably in this opinion.

All references to the Wisconsin statues are to the 2011-12 version unless noted otherwise.

that the Village would make the improvements, including the construction of a Riverwalk.

¶3 In March 2010, Dillon filed a notice of the circumstances of the claim and claim against the Village and then filed suit in November 2010. Dillon's claims against the Village fall into three groups. First, Dillon alleges that the Village breached the agreements through acts and omissions regarding the improvements to and maintenance of 13th Avenue and the Riverwalk. Second, Dillon alleges that the Village substituted pages into one of the agreements before the developers signed it. Third, Dillon alleges that the Village's deliberations about the Bridge Street Dam hindered, obstructed, and frustrated the purpose of the agreements. Ultimately, Dillon claims the Village's acts and omissions caused various damages, including causing the properties' assessed values to fall short of what the parties anticipated, triggering Dillon's contractual obligation to pay the Village the tax difference and subsequent draws on the letters of credit.

¶4 After Dillon filed suit, the Village filed a motion for a more definite statement, which the circuit court granted. Dillon filed a more definite statement, to which the Village answered, including affirmative defenses and a counterclaim against the two other developers. The Village later moved to dismiss Dillon's complaint, arguing that it failed to state a claim upon which relief could be granted because Dillon did not give the Village the required statutory notice. The Village also moved for summary judgment on Dillon's claims regarding property tax assessment and zoning changes. The circuit court granted the Village's motions, effectively dismissing Dillon's complaint. The only part of the case that survived was the Village's counterclaim against the other two developers; the order was final as to Dillon, and Dillon appeals.

Standard of Review

¶5 We review a grant of summary judgment de novo, using the same methodology as the circuit court. ***Old Tuckaway Assocs. Ltd. P'ship v. City of Greenfield***, 180 Wis. 2d 254, 278, 509 N.W.2d 323 (Ct. App. 1993). Summary judgment "shall be rendered 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). Our review of the circuit court's grant of a motion to dismiss for a complaint's failure to state a claim is also de novo. ***Rainbow Springs Golf Co. v. Town of Mukwonago***, 2005 WI App 163, ¶8, 284 Wis. 2d 519, 702 N.W.2d 40. "[W]e accept the truth of all alleged facts and all inferences one might reasonably draw from those facts." ***Id.*** We independently review all legal conclusions, including whether the facts alleged state a claim upon which relief can be granted. ***Id.*** When a motion to dismiss for failure to state a claim upon which relief can be granted includes matters outside the pleadings, it is treated as a motion for summary judgment. WIS. STAT. § 802.06(2).

Timeliness of Claim Under WIS. STAT. § 893.80

¶6 WISCONSIN STAT. § 893.80(1d) requires a party to serve written notice of the circumstances of the claim (or notice of injury) and a claim containing an itemized statement of the relief sought on a municipality prior to bringing an action against the municipality. 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). The notice is a prerequisite to "all

causes of action, not just those in tort and not just those for money damages." ***Id.*** (citation omitted). Notice of injury must be served on the municipality "[w]ithin 120 days after the happening of the event giving rise to the claim." Sec. 893.80(1d)(a). The government entity must have enough information about the potential claim "so that it can budget accordingly for either a settlement or litigation." ***Waste Facility***, 216 Wis. 2d at 622. The burden is on the plaintiff 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 the 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 ("The application of the governmental immunity statute and its exceptions to a set of facts presents a question of law, which we review independently.").

¶7 Dillon's notice of the circumstances of the claim was served on the Village on March 18, 2010. One hundred twenty days prior to that was November 18, 2009. The notice itself does not include any date of any event giving rise to the claim. Similarly, the complaint does not include any date of any event giving rise to the claim. It is only because of the court-ordered more definite statement that we know the timeframe of Dillon's allegations at all.

¶8 Likewise, in the more definite statement, which elaborated on the allegations in the complaint, there is no event alleged that would give rise to a

claim.[2] Instead, the only items listed that occurred on or after November 18, 2009, have to do with the construction of a fish ladder and the removal of a dam. There is no indication that the fish ladder was built, and the dam is still there. These are both the outcomes that the developers wanted. Neither of these nonevents gives rise to a claim.

¶9 Similarly, Dillon's monetary damages argument based on drawing on letters of credit fails to describe an event that gives rise to a claim. Dillon asserts that "the Village's actions caused the Lots to be assessed at a value less than anticipated, and, as such, any shortfall in the real property tax monies that [Dillon] owes to the Village pursuant to the Agreements should not be paid by [Dillon]." Dillon appears to argue that even though there was no actual event giving rise to a claim within the notice period, the fact that the Village accessed credit that had been established for just such a shortfall somehow generated an event within the notice period. This fact was not included as a circumstance giving rise to a claim in Dillon's notice, in its complaint, or in its more definite statement. There is no allegation that the Village was a party to the letters of credit, which are separate contracts issued by two banks, or that there was any breach of the terms of the letters of credit. Furthermore, accessing the letters of credit is not an event giving rise to a claim in and of itself; the draws on the letters of credit are at best evidence of Dillon's alleged damages—the shortfall in

[2] Indeed, the statement details multiple events and dates all of which range from March of 2005 through the summer of 2009. As examples, Dillon alleges that the Village failed to attach certain documents to one agreement executed in March 2005. Dillon alleges in April 2007 it was unable to finish certain improvements due to ongoing Riverwalk construction. Dillon alleges the Village denied it the ability to challenge the assessment of the properties in July 2009.

property value. Dillon does not, or cannot, allege that the draw is the event giving rise to its claim.

Waiver

¶10 Dillon argues that the Village waived the statutory notice requirements by providing alternate notice and waiver provisions in the agreements. Waiver is the intentional relinquishment of a known right. ***Anderson v. City of Milwaukee***, 208 Wis. 2d 18, 33-34, 559 N.W.2d 563 (1997). The notice provisions in the agreements provide that required notices under the agreements are effective "if dispatched by registered or certified mail." This boilerplate contract language serves to standardize communications between the parties to the agreement; it in no way excepts the agreement from statutory notice requirements. The notice requirements of WIS. STAT. § 893.80 can only be "expressly waived under circumstances that satisfy the purposes of this statute—protecting the public treasury and allowing for fiscal planning." ***Anderson***, 208 Wis. 2d at 33-34. The waiver provisions in the agreements provide that "[n]o failure … to exercise, and no delay in exercising, any right, power, or remedy under this agreement shall operate as a waiver thereof." The provision limits itself to addressing waiver under the agreement; there is no express waiver of statutory requirements. The contract provisions have nothing to do with the requirements of the Wisconsin statutes that a party must give a municipality notice of an event giving rise to a claim within the time frame set forth by the statute, prior to filing suit. The Village did not waive the § 893.80 notice provision.[3]

[3] We further note that this provision, which Dillon acknowledges simply allows a party who waives assertion of a breach to take action on a subsequent breach, in no way contradicts the time requirements of WIS. STAT. § 893.80.

Actual Notice

¶11 Dillon argues that the Village had actual notice of its claim because the Village "knew what was transpiring." Under WIS. STAT. § 893.80(1d)(a), "[f]ailure to give the requisite notice shall not bar action on the claim if [the governmental entity] had actual notice of the claim and the claimant shows … that the delay or failure to give the requisite notice has not been prejudicial to the [governmental entity]." Dillon has not provided any citations to facts in the record supporting its assertion that the Village had actual notice. The best Dillon does is to cite to its own more definite statement to show that the Village and Dillon "communicated from the execution of the Agreements to the construction of the improvements and beyond." Dillon seems to argue that a municipality, by engaging in communication about ongoing problems, is on notice of potential claims. But even if the governmental entity knows that there are concerns, or knows it has done something to aggrieve another, that is not the same as knowing that a party intends to pursue a claim. Dillon did not set forth any affidavits to show that the Village knew that its actions constituted an "event giving rise to [a] claim." Sec. § 893.80(1d)(a). Absent actual notice we do not reach prejudice. *See* ***id.*** (both notice and prejudice are required to overcome written notice requirement); ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (we only need address dispositive issues).

Continuing Violation

¶12 Dillon urges that "the continuing violation doctrine" makes its notice to the Village timely, because all the events were part of a continuing series of breaches that had a cumulative effect, namely lower property values. Dillon argues that the statute does not require a claimant to file a new notice of the

circumstances of the claim every time there is an event that could be part of a series of breaches that gives rise to a claim, otherwise anyone in a long-term contract with a municipality would have to be continually filing notices of claim every time there was a potential breach. Dillon also argues that it is inequitable for the Village's breaches to "be cured with the passage of each 120-day time period but apply a six year statute of limitations to [Dillon's] actions." Additionally, Dillon tells us that this statute was not meant to apply to someone in an ongoing relationship with a municipality, such as developers who are cooperating with the municipality in improving a TIF district.

¶13 Dillon's arguments miss the mark. First, Dillon did not even include a viable tail end of a continuing violation in its notice of the circumstances of the claim—there is no allegation of any event giving rise to injury within the 120-day period. Second, Dillon did not file a notice of the circumstances of the claim for *even one event* in the 120-day period, so its concerns about continuous refiling are unfounded. Third, there is no exception to WIS. STAT. § 893.80 for developers of TIF districts. The municipality needs to have notice of their claims, arising out of a TIF district improvement project, just like any other claim. Dillon's public policy questions are for the legislature to decide, and the legislature has not set forth any separate statutory schemes for claims pursuant to TIF agreements.

Assessment and Zoning Challenges

¶14 With regard to Dillon's challenges to the assessment and zoning decisions regarding the property, Dillon failed to exercise its statutory remedies. Objections to the assessment of real property are governed by WIS. STAT. § 70.47. While Dillon did challenge the assessment, it did not appeal the board of review's decision. *See* ***Hermann v. Town of Delavan***, 215 Wis. 2d 370, 382, 572 N.W.2d

855 (1998) (statutory appeals procedures are exclusive remedy for challenging valuation of real property). Regarding zoning, Dillon appeared before the plan commission to object to changes in parking availability, but did not appeal the commission's decision to the zoning board of appeals. WIS. STAT. § 62.23(7)(e) (setting forth procedure for zoning board of appeals).[4]

Conclusion

¶15 The notice of injury and notice of claim are not procedural formalities to be brushed aside before initiation of litigation. The legislature has instituted these notice requirements to allow local governments to be better stewards of limited public resources through the proper investigation of claims and proper budgeting of taxpayer dollars for settling or litigating claims. Where, as here, the claimant does not give the municipality notice of the circumstances giving rise to its claim within 120 days, an action cannot be maintained against the municipality.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

[4] Among other things, the Village asserted an affirmative defense that the CDA was a necessary party to this action. The parties dispute the CDA's status vis-à-vis the Village and this lawsuit, due to the fact that the CDA is a party to all three agreements. We need not address that issue, as the claim before us is against only the Village, and the statutory notice to the Village was untimely. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (we only need address dispositive issues).