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DISTRICT II

December 11, 2013

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You are hereby notified that the Court has entered the following opinion and order:

2013AP376

Roger Pillsbury v. Christopher P. Bertrandt (L.C. # 2012CV1381)

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

Roger Pillsbury appeals from an order denying his claim to rescind a five-year-old real estate purchase contract on the ground that the property transfer was void because he never obtained a dam ownership permit. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2011-12).¹ Because we determine that the relevant statutes do not create a private right of action, we affirm.

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

In 2007, Pillsbury purchased approximately five acres of property from Christopher and Cathy Bertrandt. The land included a private dam which was contained in the property's legal description and had been maintained through donations of an informal homeowner's association since at least 1997. Three years later, the Wisconsin Department of Natural Resources notified Pillsbury that it would be inspecting the dam and would provide a report "noting any deficiencies that must be corrected or monitored."² The post-inspection report identified several deficiencies and established deadlines for their correction. The report also provided possible alternatives to Pillsbury, such as "an application ... to abandon and remove, or transfer the dam to a responsible party," and warned that the DNR "may pursue enforcement" for a failure to comply.

In 2012, Pillsbury filed an action in the circuit court to rescind the purchase contract and require the Bertrandts to buy back the property. As grounds, Pillsbury invoked WIS. STAT. § 31.14(4), which states that no person may assume ownership of a dam or piece of land on which a dam is physically present unless the purchaser complies with a permitting process. The statute further provides: "The transfer of the ownership of a dam or the ownership of a specific piece of land on which a dam is physically located made without complying with [the permit process] is void unless a permit to abandon the dam was granted ... or unless the transfer occurred by operation of law." Sec. 31.14(4). Pillsbury's complaint also cited WIS. STAT. § 710.11 which states that "[a] person may not accept the transfer of the ownership of a specific piece of land on which a dam is physically located unless the person complies with s. 31.14(4)."

² The DNR letter stated that no inspection had been performed since 1985.

Pillsbury moved for summary judgment, asserting that because he never obtained a dam permit, the conveyance was “void.” The circuit court determined that there were no disputed facts and granted summary judgment in the Bertrandts’ favor, concluding that the “transfer occurred by operation of law” under WIS. STAT. § 31.14(4).

On appeal, the parties agree that the circuit court misconstrued the statutory term “by operation of law.” The Bertrandts argue that the circuit court’s decision can be affirmed on alternative grounds. See *State v. Baudhuin*, 141 Wis. 2d 642, 648, 416 N.W.2d 60 (1987) (where the circuit court’s decision is correct, we may affirm on grounds not utilized by that court). Because we consider an alternative ground to be more straightforward, we will not address the circuit court’s reasoning further. We conclude that the Bertrandts were entitled to summary judgment because WIS. STAT. §§ 31.14(4) and 710.11 do not create a private right of action.³

A statute does not create a private right of action unless: (1) the language or the form of the statute clearly evinces the legislature’s intent to create a private right of action; and (2) “the statute establishes private civil liability rather than merely providing for protection of the public.” *Grube v. Daun*, 210 Wis. 2d 681, 687, 689, 563 N.W.2d 523 (1997) (citation omitted). Pillsbury has failed to demonstrate either prong.⁴ WISCONSIN STAT. § 31.14 (1) specifies that the statute’s purpose is to protect the public interest: “It is the policy of this section to preserve

³ Because this issue is dispositive, we need not address whether Pillsbury’s claim is barred by the doctrine of laches.

⁴ The summary judgment methodology is well established and need not be repeated here. See, e.g., *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶¶ 20-24, 241 Wis. 2d 804, 623 N.W.2d 751. We independently review the interpretation and application of WIS. STAT. §§ 31.14 and 710.11. See *State v. Jensen*, 2010 WI 38, ¶8, 324 Wis. 2d 586, 782 N.W.2d 415.

public rights in navigable waters, including those created by dams, and to provide a means of maintaining dams and the developments which have been made adjacent to the flowage of such dams.” To this end, the DNR is charged with implementing and enforcing the permit process. *See* §§ 31.14(2), (3), and (5). While perhaps the DNR could bring an action to void the purchase contract, Pillsbury cannot.

Furthermore, WIS. STAT. § 31.14 is devoid of any language creating a private right of action. This stands in contrast to WIS. STAT. § 31.25, where the legislature expressly provided that dams constituting a public nuisance are subject to “action at the suit of the state or any citizen thereof.” The legislature could have but did not include similar language in § 31.14.⁵ Additionally, WIS. STAT § 31.26 specifically enumerates the extent of a dam owner’s civil liability under WIS. STAT. ch. 31. It creates liability for property and personal injury damages occasioned by an owner’s failure to provide statutorily required “slides, booms and chutes,” not his or her failure to obtain a permit. WISCONSIN STAT. § 31.23 provides that a forfeiture is the appropriate enforcement mechanism for other violations.

In his reply brief, Pillsbury argues that he is not seeking to impose civil liability on the Bertrandts, but simply a declaration of the parties’ rights and responsibilities under the terms of the conveyance. Our conclusion that neither WIS. STAT. § 31.14 nor WIS. STAT § 710.11 creates a private right of action serves as a declaration that Pillsbury has no legal right under those statutes to rescind the real estate conveyance.

⁵ Similarly, WIS. STAT. § 710.11 does not evince a legislative intent to create a private right of action. The statute merely reinforces that a transferee of land containing a dam is expected to obtain a permit under WIS. STAT. § 31.14(4).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed pursuant to
WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals