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DISTRICT II

July 20, 2016

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

2015AP2331-FT Wexford Heights, LP v. Town of Lisbon Plan Commission
(L.C. # 2015CV996)

Before Neubauer, C.J., Gundrum and Hagedorn, JJ.

Bark River Brigade, U.A. (BRB) appeals from a circuit court order denying its Wis. STAT. § 806.07 (2013-14)¹ motion for relief from an order dismissing a circuit court certiorari proceeding while its motion to intervene in the certiorari action was pending. Pursuant to a presubmission conference and this court's order of December 1, 2015, the parties submitted memorandum briefs. Upon review of those memoranda and the record, we affirm.

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

We refer to the procedural history of this case only as necessary to illuminate the appellate issues. Wexford Heights sought a conditional use permit (CUP) from the Town of Lisbon to construct a fueling station, convenience store, car wash, and restaurant. After Lisbon denied the CUP, Wexford sought certiorari review of the denial. Thereafter, further proceedings were had on the CUP in an administrative appeal before Lisbon officials. The administrative appeal yielded approval for the CUP. The September 2, 2015 CUP approval was submitted to the circuit court in the pending certiorari action.²

On October 2, 2015, BRB filed a motion to intervene in the pending circuit court certiorari action because as nearby property owners, they were aggrieved by Lisbon's approval of the CUP. On October 7, the certiorari parties, Wexford Heights and Lisbon, filed a WIS. STAT. § 805.04(1) stipulation to dismiss the certiorari action. After the circuit court dismissed the certiorari action with prejudice, BRB sought WIS. STAT. § 806.07 relief from the dismissal. The circuit court denied BRB's motion because Wexford Heights and Lisbon had the right under § 805.04(1) to dismiss the action without an order of the court. Implicit in the circuit court's ruling was that BRB was not a party at the time Wexford Heights and Lisbon stipulated to dismiss the certiorari action. BRB appeals.

WISCONSIN STAT. § 806.07 relief is discretionary with the circuit court. *Schauer v. DeNeveu Homeowners Ass'n*, 194 Wis. 2d 62, 70, 533 N.W.2d 470 (1995). "A discretionary determination must be the product of a rational mental process by which the facts of record and law

² Wexford Heights, which commenced the certiorari action, was no longer aggrieved once Lisbon approved the CUP. No party sought certiorari review of the September 2, 2015 decision approving the CUP. Even though BRB filed an objection to the September 2, 2015 decision, BRB's status as an intervenor was yet to be determined by the circuit court.

relied upon are stated and considered together for the purpose of achieving a reasoned and reasonable determination.” *Breuer v. Town of Addison*, 194 Wis. 2d 616, 625, 534 N.W.2d 634 (Ct. App. 1995).

A pending motion to intervene does not preclude dismissal by the parties under WIS. STAT. § 805.04(1). See *Fox v. DHSS*, 112 Wis. 2d 514, 536, 334 N.W.2d 532 (1983). Under WIS. STAT. § 803.09, the circuit court had to act on BRB’s intervention motion before BRB could become a party.³ The provisions of § 805.04(1) apply only to parties: “[A]n action may be dismissed ... by the filing of a stipulation of dismissal signed by all parties who have appeared in the action.” Sec. 805.04(1). In relation to the § 805.04(1) stipulation to dismiss, BRB was a movant, not a party whose consent to dismiss was required.

BRB argues that the stipulation to dismiss was defective because it was not signed by all of the parties who appeared in the circuit court action. Specifically, BRB argues that Attorney Bruce’s signature on behalf of Lisbon was invalid because Bruce represented the Lisbon administrative review board that ultimately granted the CUP.

We will not delve into the specifics of Bruce’s representation of Lisbon and related entities in the CUP dispute with Wexford Heights. During the course of the dispute, Bruce represented Lisbon and the Lisbon Plan Commission. The pleading filed by Wexford Heights to commence the certiorari action named Town of Lisbon as the opposing party, and Bruce filed

³ A movant whose motion to intervene is denied has the right to appeal from that decision. *Wengerd v. Rinehart*, 114 Wis. 2d 575, 582, 338 N.W.2d 861 (Ct. App. 1983). However, the right to appeal does not convert the movant into a party in the circuit court.

Lisbon's answer. There is no indication that any party objected to Bruce's various roles in the case.

The circuit court did not misuse its discretion when it denied BRB's WIS. STAT. § 806.07 motion seeking relief from the order dismissing the circuit court certiorari action. The facts and the law support the circuit court's reasonable decision.

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is affirmed.

Diane M. Fremgen
Clerk of Court of Appeals