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DISTRICT II

June 29, 2022

To:

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Circuit Court Judge
Electronic Notice

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Rebecca Matoska-Mentink
Clerk of Circuit Court
Kenosha County Courthouse
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You are hereby notified that the Court has entered the following opinion and order:

2021AP1212 Opal J. Jensen v. County of Kenosha (L.C. #2020CV823)

Before Gundrum, P.J., Neubauer and Grogan, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Opal J. Jensen appeals from an order of the circuit court granting summary judgment to the County of Kenosha and its treasurer, Teri A. Jacobson (collectively, the County). 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 (2019-20)[1]. For the following reasons, we affirm.

[1] All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

The County acquired Jensen's nonhomestead business property assessed at $250,000 in order to satisfy delinquent taxes she owed on it. Jensen filed this lawsuit seeking to "vacate" or "cancel" the tax deed issued to and recorded by the County for the property. She initially challenged the adequacy of the notice that was provided in relation to the acquisition of the property, but she subsequently conceded the notice was sufficient and dropped that challenge. She then sought equitable relief, and in an effort to strengthen her position, she paid $60,174.59 to satisfy all outstanding taxes and penalties due on the property. The County moved for summary judgment, which the circuit court granted stating:

> [Jensen] was taxed as the law allows for every Kenosha County property owner similarly situated. Notice was provided and procedures were adhered to. Ultimately, the analysis is simple: [she] failed to pay a tax and suffers the consequences of that act of omission, or commission, and this is beyond dispute.
>
> As there are no genuine issues of material fact and no basis upon which the Court will grant equitable relief, the [County's] motion is granted.

On appeal, Jensen claims the County has violated the Takings Clause of the Fifth Amendment to the United States Constitution and article 1, section 13 of the Wisconsin Constitution. She places much reliance upon decisions from other jurisdictions; however, we need not address them because we are guided by relevant Wisconsin precedent.

Our review of a circuit court's decision on summary judgment is de novo. ***Behrendt v. Gulf Underwriters Ins. Co.***, 2009 WI 71, ¶11, 318 Wis. 2d 622, 768 N.W.2d 568. "Whether government conduct constitutes a taking of private property without just compensation is [also] a question of law that [we] review[] de novo." ***Somers USA, LLC v. DOT***, 2015 WI App 33, ¶9, 361 Wis. 2d 807, 864 N.W.2d 114 (second and third alterations in original; citation omitted).

In ***Oosterwyk v. County of Milwaukee***, 31 Wis. 2d 513, 143 N.W.2d 497 (1966), the county secured a tax deed and ultimately fee simple ownership of Oosterwyk's property following his failure to pay a lien. ***Id.*** at 515. Following sale of the property, Oosterwyk brought a claim against the county seeking $20,000, which was the amount of profit he claimed the county realized on the sale. ***Id.*** at 515-16. Oosterwyk asserted that, as the court stated it, "property received by the county pursuant to a tax deed and subsequently sold at a profit by the county gives a right to the former owner on the theory of unjust enrichment." ***Id.*** at 515. At the time, Wisconsin statutes provided that the proceeds from the sale of property procured through a tax deed, if any remained after the statutory deductions were made, would be "prorated between the remaining nonoutlawed municipally owned taxes outstanding on the date the tax deed was taken, including the tax certificate on which the tax was taken, and paid to the [government] owners of such tax certificates and taxes." WIS. STAT. § 75.36(8) (1965). The circuit court granted the county's request for summary judgment. ***Oosterwyk***, 31 Wis. 2d at 516.

In its ruling on appeal, the Wisconsin Supreme Court stated that WIS. STAT. "[ch. 75] appears to make no provision whatsoever for distribution of a surplus upon sale of land as to which a county had obtained a tax deed." ***Oosteryk***, 31 Wis. 2d at 516. It noted that the relevant statutory provision, WIS. STAT. § 75.36(8) (1965) "provides for the proration of the proceeds of sale 'between the remaining nonoutlawed municipally owned taxes outstanding on the date the tax deed was taken,' but it does not direct payment of any surplus remaining after the payment of the taxes." ***Oosterwyk***, 31 Wis. 2d at 516 (citation omitted).

The court queried, "Since the statute does not provide for the distribution of any surplus, does it follow that the former owner is entitled to it?" ***Id.*** The court answered by concluding that simply because the county benefits from excess funds it retains following a sale and that it is

probably fully aware of this benefit, "it cannot be said that the county's retention of such benefits is inequitable." ***Id.*** at 517. The court went on to hold that "a former owner such as Mr. Oosterwyk is not entitled to any surplus unless the legislature chooses to provide therefor." ***Id.*** The court further cited favorably a decision out of Massachusetts that concluded that "[i]f there should be a remedy for someone in the plaintiff's position, the matter rests in the legislative domain." ***Id.*** (citing ***Kelly v. City of Boston***, 204 N.E.2d 123, 126 (1965)). The ***Oosterwyk*** court concluded that

> [a]s a result of having taken a tax deed under the statutory process of [WIS. STAT. ch. 75], the county became the owner of the property in fee.… As a result, the county was free to sell the property at its pleasure. We perceive no basis in equity to hold that if the property is subsequently sold at a profit it is the former owner who is entitled to enjoy such excess.

Oosterwyk, 31 Wis. 2d at 518. The court also cited favorably to a Texas decision which concluded that, in a similar circumstance where the state received the excess from the sale of land it acquired from the complainant, "the state simply sold its own land and was entitled to the entire proceeds of the sale." ***Id.*** at 518 (citing ***Booty v. State***, 149 S.W.2d 216, 217 (Tex. Civ. App. 1941)). The ***Oosterwyk*** court concluded, "[w]e are convinced that in the absence of a legislative direction Mr. Oosterwyk is not entitled to the surplus." ***Oosterwyk***, 31 Wis. 2d at 518.

In 1987, the legislature revised WIS. STAT. ch. 75 so as to specifically—and only—provide that an owner of *homestead* property is entitled to the excess from sale proceeds when a county has acquired his/her property by tax deed and then sold the property. *See* 1987 Wis. Act 378, §§ 120, 122; WIS. STAT. § 75.36(4) (1987-88). The legislature enacted no similar provision for nonhomestead property such as Jensen's business property at issue in this case.

Following this statutory change, we decided ***Ritter v. Ross***, 207 Wis. 2d 476, 558 N.W.2d 909 (Ct. App. 1996). After obtaining a foreclosure judgment on the Ritters' nonhomestead property, giving the county a tax deed and vesting it with title to the property—all due to a tax arrearage of $84.43 going unpaid for several years—Rock County sold the property for $17,345 and retained all of the sale proceeds. ***Id.*** at 478, 484 n.5. Seeking to void the foreclosure and sale, the Ritters sued the county, alleging inter alia that the county's retention of the sale proceeds violated Due Process and the Takings Clause of the Fifth Amendment of the United States Constitution.[2] ***Id.*** at 478-79. On appeal, we determined there was no constitutional

[2] As indicated, Jensen also claims a violation of the takings provision of article 1, section 13 of the Wisconsin Constitution. She develops no argument to show a violation of this specific provision, and thus, on that basis alone, we need not address it. *See* ***ABKA Ltd. P'ship v. Board of Rev.***, 231 Wis. 2d 328, 349 n.9, 603 N.W.2d 217 (1999) ("[We] will not address undeveloped arguments."). That said, we note that in ***Lakeland Area Property Owners Ass'n, U.A. v. Oneida County***, 2021 WI App 19, ¶62, 396 Wis. 2d 622, 957 N.W.2d 605, we stated:

> Although Wisconsin courts may conclude that the Wisconsin Constitution provides greater protection than the federal constitution, we do so "only in cases where either the state constitution or 'the laws of this state require that greater protection of the citizens' liberties ... be afforded.'" "Where ... the language of the provision in the state constitution is 'virtually identical' to that of the federal provision or where no difference in intent is discernible, Wisconsin courts have normally construed the state constitution consistent with the United States Supreme Court's construction of the federal constitution." Here, Lakeland has not developed any argument that the relevant provisions in the state and federal constitutions are materially different, or that there is any discernable difference in their intent. We therefore decline to interpret the Wisconsin Constitution as providing greater protection for Lakeland than the United States Constitution.

(Citations omitted.)

(continued)

violation and Ritter had no valid constitutional (or statutory) claim to the surplus proceeds. We held that

> when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements. We have not been referred to any applicable provision of the Wisconsin Constitution, and we see nothing in [WIS. STAT. ch. 75] either directing or relating in any way to distribution of surplus funds after a tax sale.

Ritter, 207 Wis. 2d at 486 (footnotes omitted). We then noted that in ***Oosterwyk*** our supreme court

> upheld Milwaukee County's retention of a … tax-sale surplus against various state-law challenges, stating that, even though a municipality may benefit by retaining the surplus, when it acquires fee-simple title to property via a tax deed and sells it, "[the] owner … is not entitled to any surplus unless the legislature chooses to provide therefor."

Ritter, 207 Wis. 2d at 486-87 (citing ***Oosterwyk***, 31 Wis. 2d at 517). We further observed in ***Ritter*** that the 1987 legislative amendment of WIS. STAT. § 75.36 (1987-88) "required distribution of tax-sale surplus to the owner if the property had been used as a homestead," and

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Similarly, here too Jensen has failed to develop any argument that the federal and state takings provisions "are materially different, or that there is any discernable difference in their intent." *See* ***id.*** Furthermore, our supreme court noted in ***City of Milwaukee Post No. 2874 Veterans of Foreign Wars v. Redevelopment Authority***, 2009 WI 84, ¶35, 319 Wis. 2d 553, 768 N.W.2d 749, that the federal and state provisions are "substantially similar." Indeed, that is an understatement as article I, section 13 of the Wisconsin Constitution provides: "[t]he property of no person shall be taken for public use without just compensation therefor" and the Takings Clause of the Fifth Amendment to the United States Constitution provides that private property shall not "be taken for public use, without just compensation." The ***Post No. 2874*** court further stated that "when interpreting and applying Article I, Section 13 of the Wisconsin Constitution, this court long has sought guidance in decisions based on the federal Takings Clause or on analogues in the constitutions of other states." ***Post No. 2874***, 319 Wis. 2d 553, ¶35. Thus, we view ***Ritter v. Ross***, 207 Wis. 2d 476, 558 N.W.2d 909 (Ct. App. 1996), as providing just as much "guidance" for our rejection of Jensen's undeveloped state constitutional claim as it does for our rejection of her federal constitutional claim.

we concluded that the legislature did not intend to require distribution of excess proceeds for nonhomestead property foreclosures. ***Ritter***, 207 Wis. 2d at 486 n.9.

Again, in concluding there was no Takings Clause violation, we held in ***Ritter*** that "when a state's constitution and tax codes are silent as to the distribution of excess proceeds received in a tax sale, the municipality may constitutionally retain them as long as notice of the action meets due process requirements." ***Id.*** at 486. In the case now before us, there is no remaining challenge to the adequacy of the notice Jensen was provided. And unquestionably, the statute is "silent as to the distribution of excess proceeds received in a tax sale" of nonhomestead property like Jensen's. Indeed, Jensen acknowledges in her briefing that "[a]s the owner of non-homestead property taken to satisfy delinquent taxes, [she] is absolutely precluded from any surplus under the statute" because "the state statute at issue 'absolutely precludes an owner from obtaining the surplus proceeds of a judicial sale'" and "does not protect her." Based upon the facts of record, the language enacted by the legislature making the public policy choice to distribute excess funds to a former property owner only in the case of homestead property, and the case law identified above, we can only conclude that Jensen has no vested interest in this nonhomestead property, no grounds exist for setting aside the tax deed, and she is not entitled to excess proceeds from any sale of the property.

IT IS ORDERED that the judgment of the circuit court is summarily affirmed. *See* WIS. STAT. RULE 809.21.

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals