COURT OF APPEALS
DECISION
DATED AND FILED

September 1, 2015

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2014AP1089 **Cir. Ct. No. 2013CV9761**

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

PERRAULT JEAN-PAUL,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Milwaukee County: KAREN E. CHRISTENSON, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Bradley, JJ.

¶1 PER CURIAM. Perrault Jean-Paul, *pro se*, appeals from a trial court order that granted summary judgment to the City of Milwaukee on both its

claims and Perrault's counterclaims.[1] Perrault claims that the circuit court erred in refusing to adjourn or stay proceedings when he so requested and that it erred in its application of the exhaustion of remedies doctrine to grant summary judgment to the City. We affirm.

BACKGROUND

¶2 Perrault owns multiple properties in Milwaukee. For the levy year 2011, the City assessed property taxes. On some properties, special assessments were levied, reflecting the cost to the City to clear the properties of debris and trash after warnings to Perrault went unheeded. Payment of the taxes and assessments was due by January 31, 2012, but the bills for six of Perrault's properties went unpaid. The City thus commenced this action in October 2013.

¶3 Perrault answered, raising "defenses" of unconscionability, vagueness, and overbreadth. He also filed counterclaims seeking declaratory or injunctive relief and alleging a due process violation. Specifically, Perrault complained that he had inadequate notice of the special assessments and claimed that the amounts billed bore no relation to the tasks the City performed on his properties.

¶4 The City initially moved for summary judgment on its claims and moved to dismiss Perrault's counterclaims. It later withdrew its motion to dismiss and amended the summary judgment motion to also seek judgment on the

[1] The caption in the circuit court indicated that the defendant-appellant is also known as Jean-Paul Perrault. This, coupled with the process server's documentation, suggests that Jean-Paul is the defendant-appellant's given name and Perrault is his family name. We therefore refer to him as Perrault in this opinion.

counterclaims. The circuit court set a hearing on the summary judgment motion for May 5, 2014; this was at least the second date scheduled for the hearing.

¶5 On April 25, 2014, Perrault sent a letter to the circuit court, stating that he could not attend the May 5 hearing and requesting a sixty-day adjournment so he could retain counsel. On May 1, 2014, the circuit court's clerk called Perrault, who lives in New Jersey, to inform him that the circuit court would not reschedule the hearing.

¶6 Perrault appeared for the May 5 hearing and again sought an adjournment. He said that he had been in a severe car accident in which he lost consciousness and suffered a brain injury, so he did not feel fit to represent himself. The circuit court asked why Perrault had not informed the court of the accident earlier; Perrault responded that that he did not have a chance to tell the court's clerk when she called. Ultimately, the circuit court concluded that Perrault's adjournment requests were a delay tactic and denied the adjournment. In his response to the City's summary judgment motion, Perrault had also requested a stay of the state proceedings pending resolution of a federal lawsuit he had filed. The circuit court denied that request as well.

¶7 Turning to the City's motion for summary judgment, the circuit court noted that Perrault had failed to follow the administrative appeal process for challenging either the property tax levy or the special assessments. While Perrault insisted he had made challenges—by writing to the tax assessor and attempting to appeal the special assessments without response from the City—the circuit court noted that he had presented no evidence to show he had followed the processes as prescribed by ordinance or statute: random correspondence did not satisfy the requirements for either, particularly the correspondence that related to properties

not listed in the City's complaint. As Perrault did not dispute that the taxes remained unpaid, the circuit court concluded the City was entitled to summary judgment on its claims because Perrault had failed to exercise and exhaust his administrative remedies.

¶8 With respect to the City's motion for summary judgment on Perrault's counterclaims, the circuit court separated the counterclaim for declaratory or injunctive relief from the due process claim. The counterclaim for injunctive relief sought an order directing the City to "produce a transparent account and assess his qualifying special charges and levies that have been added to his tax bill, including proof of the work and service alleged to have been performed[.]" The circuit court noted that Perrault had failed to provide notice of his counterclaim as required by WIS. STAT. § 893.80(1d) (2013-14).[2] Thus, for the counterclaim to survive, the question was whether Perrault had given actual notice to the City and whether the City suffered any prejudice. However, the circuit court noted that just sending letters to the City was not enough to give actual notice of any counterclaim, nor was filing an answer or counterclaim in a different circuit court case actual notice for this case. Further, despite having the statutorily prescribed burden to do so, Perrault presented no evidence regarding whether the City had been prejudiced.

¶9 The circuit court stated that under Wisconsin's liberal pleading rules, the due process counterclaim survived the lack of statutory notice to the City. However, the circuit court determined that the issues underlying that counterclaim

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

could have been resolved through the administrative appellate process, so the City was also entitled to summary judgment on the due process counterclaim because Perrault failed to exhaust his remedies. Perrault appeals.

DISCUSSION

I. Motion to Delay Proceedings

¶10 Perrault sought an adjournment of the May 5 hearing, first to retain counsel and then because he felt he could not adequately represent himself due to injuries purportedly sustained in a car accident. He also thought his case should be stayed pending resolution of his federal lawsuit. The circuit court rejected both requests.

¶11 "'It is well established in Wisconsin that a continuance is not a matter of right.'" ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶92, 313 Wis. 2d 542, 753 N.W.2d 496 (citation omitted). Whether to grant or deny an adjournment is left to the discretion of the circuit court. *See* ***Marquez v. Mercedes-Benz USA, LLC***, 2012 WI 57, ¶105, 341 Wis. 2d 119, 815 N.W.2d 314. We review the circuit court's denial of an adjournment only for an erroneous exercise of discretion, which occurs if the circuit court fails to exercise discretion at all or if there was no reasonable basis for its decision. *See* ***id.*** There are several factors for the circuit court to balance in its exercise of discretion, including the length of the requested delay; whether other continuances had been requested and received; the convenience or inconvenience to the parties, witnesses, and court; and whether the delay seems to be for legitimate reasons. *See* ***Rechsteiner***, 312 Wis. 2d 542, ¶93.

¶12 Here, the circuit court noted that the case had been pending for several months, during which Perrault could have sought representation.

Additionally, the circuit court noted that Perrault never informed the court of his traffic accident prior to the hearing date. Though Perrault claimed that he simply did not have the chance to tell the court's clerk about the accident when she called him on May 1, this does not explain why he did not call or write to the court at any other point between the day of the accident, estimated to be April 25, and the May 5 hearing. Further, despite his claimed ability to document the accident, it does not appear that Perrault ever provided such proof to the circuit court. Thus, we discern no erroneous exercise of discretion in the circuit court's decision to deny the adjournment requests because they appeared to be a delay tactic.[3]

¶13 With respect to the motion to stay the state proceedings because of pending federal proceedings, Perrault complains without citation to legal authority that "the Circuit Court superseded the supremacy of federal jurisdiction and proceeded nonetheless, constituting reversible error." The State responds that in the circuit court, Perrault incorrectly relied on WIS. STAT. § 801.63, and that Perrault's issues in the federal case do not involve the same issues as this case. In particular, the federal case challenges the City's raze ordinance, which plays no role in this attempt to collect on delinquent tax bills. Perrault did not file a reply brief, so we deem the City's points conceded. *See* ***Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.***, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶14 Further, WIS. STAT. § 801.63 "is the *forum non conveniens* provision generally applicable in civil actions." ***Mayer v. Mayer***, 91 Wis. 2d 342, 350, 283

[3] In addition, Perrault had an opportunity to fully brief the summary judgment issue prior to the hearing, so the circuit court decided to resolve the motion on the written submissions. "It was logical for the circuit court to [decide] the summary judgment motion as scheduled because if there were no triable issues of fact the request for a continuance would be moot." *See* ***Rechsteiner v. Hazelden***, 2008 WI 97, ¶98, 313 Wis. 2d 542, 753 N.W.2d 496.

N.W.2d 591 (Ct. App. 1979). The only relief available to a moving party under that section is a stay of pending Wisconsin proceedings to permit commencement of an action in a more convenient forum. *See* ***Littman v. Littman***, 57 Wis. 2d 238, 248, 203 N.W.2d 901 (1973) (discussing the statute as previously numbered, WIS. STAT. § 262.19 (1960)).

¶15 Even if WIS. STAT. § 801.63 applied here, it does not *require* a stay of state proceedings but, rather, permits a circuit court, in an exercise of discretion, to stay proceedings in this state if it finds that "substantial justice" so requires. *See* WIS. STAT. § 801.63(1), (3). In addition, a stay of state proceedings may be appropriate where state and federal actions are "substantially identical" and the federal action is commenced first. *See* ***North Central Dairymen's Coop. v. Temkin***, 86 Wis. 2d 122, 127-28, 271 N.W.2d 890 (1978). However, Perrault has not established that substantial justice requires staying the state court action or that the state and federal proceedings are substantially identical; thus we conclude the circuit court did not err in refusing to stay the state proceedings.

II. Motions for Summary Judgment

¶16 "We review a grant of summary judgment de novo, using the same methodology as the circuit court." ***Blasing v. Zurich Am. Ins. Co.***, 2014 WI 73, ¶21, 356 Wis. 2d 63, 850 N.W.2d 138. The first step in the methodology is to examine the pleadings and determine whether a claim for relief has been stated. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). This is a low bar: the complaint is insufficient only if, taking all pleadings as true and giving the plaintiff the benefit of all inferences, there are no conditions under which the plaintiff could prevail. *See* ***Bank One, NA v. Ofojebe***, 2005 WI App 151, ¶7, 284 Wis. 2d 510, 702 N.W.2d 456.

¶17 If the complaint states a claim and there are factual issues involved, the court reviews the moving party's affidavits and other proof to determine whether the movant has made a *prima facie* case for summary judgment. *See* ***id.*** If the movant has made such a case in its favor, the court then examines the opposition's affidavits and proof to determine whether there is any genuine issue of material fact. *See* ***id.*** Summary judgment is appropriately granted if "there is no genuine issue as to any material fact and … the moving party is entitled to judgment as a matter of law." WIS. STAT. § 802.08(2).

A. The City's Complaint

¶18 The City's complaint alleged that "real estate taxes, special taxes, special charges and/or special assessments" were levied against Perrault for 2011 and remained unpaid. The City supported this claim in its summary judgment motion with affidavits and documentation from the Assessment Commissioner. Clearly, the complaint states a claim for relief. In the summary judgment motion, the City further asserted that Perrault had never administratively appealed or challenged the assessments at issue in this case, making them final. The City supported this allegation with an affidavit from the City Clerk, who checked records and averred there was no record of any such administrative proceedings for the properties and time periods at issue in this case.[4]

¶19 Perrault does not dispute that the City assessed him as represented, nor does he deny that the amounts remain unpaid. Perrault did, however, assert

[4] There was an appeal for a property on Fond du Lac Avenue, which is one of the properties for which the City seeks to collect past-due amounts, but that appeal challenged an assessment incurred in 2013, outside the scope of the City's action. There was also an appeal involving a property not listed in the City's complaint.

that he had challenged the property tax assessments by asking the assessor to lower some of the properties' values and by attempting to challenge the special assessments by writing in to complain. This is where the exhaustion of remedies doctrine comes into play.

¶20 "[W]here a statute sets forth a procedure for review of administrative action and court review of the administrative decision, such remedy is exclusive and must be employed before other remedies are used." ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 422, 254 N.W.2d 310 (1977). "The law is well established that 'judicial relief will be denied until the parties have exhausted their administrative remedies; the parties must complete the administrative proceedings before they come to court.'" ***State ex rel. Mentek v. Schwarz***, 2001 WI 32, ¶8, 242 Wis. 2d 94, 624 N.W.2d 150 (citation omitted).

¶21 In a city the size of Milwaukee,[5] WIS. STAT. § 70.47(16)(a) requires that

> all objections to the amount or valuation of real or personal property shall be first made in writing and filed with the commissioner of assessments on or before the 3rd Monday in May. No person may, in any action or proceeding, question the amount or valuation of real or personal property in the assessment rolls of the city unless objections have been so filed. The board may not waive the requirement that objections be in writing.

The City asserted that Perrault never so challenged his tax assessments at issue in this case, and Perrault offered no evidence to the contrary. Though Perrault noted he contacted the assessor on some occasions, resulting in a lower assessment,

[5] *See* WIS. STAT. § 62.05(1)(a).

Perrault does not offer any authority to suggest that such informal contact satisfies the statutory requirements.

¶22 Two ordinances, MILWAUKEE, WIS., CODE OF ORDINANCES 200-04(3) & 309-72(1), set forth procedures for challenging special charges or assessments. Both require the owner "to appeal the amount or necessity of the special charge" within thirty days of mailed notice from the City. WISCONSIN STAT. § 68.13(1) then provides for judicial review by *certiorari* of final determinations of municipal administrative bodies. The City established that it mailed notice for the special charges to Perrault, and that Perrault had not pursued the formally prescribed relief. While Perrault asserts that he challenged the special assessments, he does not show that he did so in conformity with the specified procedures.

¶23 Accordingly, the circuit court properly granted summary judgment on the City's complaint. Perrault failed to exhaust his administrative remedies.

B. Perrault's Counterclaims

¶24 The City initially asserted that all of Perrault's counterclaims were barred because he had failed to give the requisite notice of claim under WIS. STAT. § 893.80(1d). The circuit court determined that the counterclaim for a due process violation would survive even the lack of notice, so it considered the two counterclaims separately.

1. The Demand for Declaratory or Injunctive Relief

¶25 Perrault sought an order requiring the City to provide a better accounting of the assessments and to prove it did the remedial work on his properties as claimed. However, no action may be brought against any

governmental subdivision unless, "[w]ithin 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party … is served on" the governmental subdivision. *See* WIS. STAT. § 893.80(1d)(a). This notice requirement applies to claims for declaratory or injunctive relief, *see* ***Johnson v. City of Edgerton***, 207 Wis. 2d 343, 352, 558 N.W.2d 653 (Ct. App. 1996), as well as to counterclaims, *see* ***City of Racine v. Waste Facility Siting Bd.***, 216 Wis. 2d 616, 630, 575 N.W.2d 712 (1998). The City asserted that Perrault had failed to provide proper notice, and he offered no evidence to the contrary.

¶26 However, the circuit court recognized that "[f]ailure to give the requisite notice shall not bar action on the claim if the … [governmental subdivision] had actual notice of the claim and the claimant shows to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the defendant [subdivision.]" *See* WIS. STAT. § 893.80(1d)(a). Perrault claimed he had given the City actual notice, but the circuit court rejected this assertion, finding that the "notice"—activity in other circuit court cases and general correspondence—did not rise to the level of actual notice. In any event, the circuit court also found that Perrault had utterly failed to offer any evidence regarding prejudice or the lack thereof, so his counterclaim for declaratory or injunctive relief did not survive the lack of statutory notice. Accordingly, we agree that the circuit court properly granted summary judgment to the City on this counterclaim.

2. The Claim of a Due Process Violation

¶27 The circuit court perceived Perrault's second counterclaim to be alleging a due process violation based on the manner in which the City levies

special charges and assessments, as Perrault thought he was entitled to proof of the City's actual work and an accounting of the charges. The circuit court concluded, however, that this counterclaim was also precluded by Perrault's failure to exhaust his administrative remedies.

¶28 Perrault takes issue with this conclusion because an administrative board cannot declare unconstitutional those ordinances enacted by a legislative body from which the board derives its existence. *See* ***Nodell***, 78 Wis. 2d at 426. Further, Perrault points out that the exhaustion doctrine need not be applied where the reasons supporting the doctrine are lacking.[6] *See* ***id.*** at 425-26.

¶29 However, if Perrault thought the special assessments were invalid because they were not worth the amount charged to him, or because they were unnecessary, then his available avenue for challenging the amount or necessity of the charges was through administrative review. *See* MILWAUKEE, WIS., CODE OF ORDINANCES 200-04(3) & 309-72(1). This review could be had without the administrative board having to consider a constitutional challenge, so it was not improper to apply the exhaustion of remedies doctrine. *See* ***Nodell***, 78 Wis. 2d at 426 (approving use of exhaustion doctrine where board could have invalidated challenged actions without having to invalidate an ordinance on constitutional grounds). Summary judgment was, therefore, properly granted to the City on this counterclaim as well.

[6] Some reasons for excusing the exhaustion of remedies include circumstances where the administrative agency lacks jurisdiction or a substantial constitutional question is involved. *See* ***Nodell Investment Corp. v. City of Glendale***, 78 Wis. 2d 416, 425 n.12, 254 N.W.2d 310 (1977).

By the Court.—Order affirmed.

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