STATE OF WISCONSIN CIRCUIT COURT KENOSHA COUNTY

Kristi Lacroix and
CarrieAnn Glembocki,

Plaintiffs,

v. Case No. 13-CV-1899

Kenosha Unified School District Board of Education,
Kenosha Unified School District, and
Kenosha Education Association Building Corporation,
d/b/a Kenosha Education Association,

Defendants.

PLAINTIFFS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

INTRODUCTION

The Kenosha Unified School District Board of Education (the "Board") and the Kenosha Unified School District (the "School District") have moved to dismiss the Complaint primarily on the ground that before filing this action the Plaintiffs were obligated to file a notice of claim with the District and wait 120 days before filing suit. According to the Board and the School District, the Plaintiffs are not entitled to seek an injunction preventing $1.65 million of unlawful spending or the unlawful forced deduction of union dues at a time when that illegal conduct can actually be prevented. Instead, they must wait months until after the illegal conduct has occurred and ask the court to put the toothpaste back into the tube. That is not the law in Wisconsin. This court has jurisdiction to enjoin their unlawful conduct before it occurs.

As the Court of Appeals recently noted, "the 'no action' command in § 893.80(1)(b) [the predecessor to § 893.80(1d)] does not apply to many actions." *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, ¶ 6, 304 Wis. 2d 702, 738 N.W.2d 168. The three part test for the inapplicability of those requirements is clearly met here. First, if not the

declaratory judgment statute, then § 813.02 – which gives persons in the position of the Plaintiffs the ability to seek a temporary injunction – constitutes, in the circumstances of this case, a "specific statutory scheme" for which exemption from the notice requirements of Wis. Stat. 893.80 may be sought.[1]

Second, application of those notice requirements here would frustrate the legislative policy in favor of providing prompt and effective judicial relief for irreparable harm. The legislature has determined that, if the requirements of § 813.02 are met, injured parties (such as the Plaintiffs here) are entitled to immediate relief.

Finally, the purpose of § 893.80 notice – to apprise governmental bodies of the pendency and particulars of a claim and to give them an opportunity to honor or comprise them – would not be served by requiring notice here. Although the Board and School District say they had "no idea" anyone would object to collective bargaining in violation of Act 10 and, therefore, had no actual notice of the claim, this cannot be taken seriously.

The School District and Board knew that Act 10 expressly prohibited what they were about to do. They knew that Act 10, like all state statutes, is presumed to be constitutional. They knew that the argument for Act 10's unconstitutionality was weak and had been rejected by all but one of the courts to have considered it. They knew that a contempt order issued by the Dane County Circuit Court in *Madison Teachers, Inc. v. Walker* – since vacated by the Wisconsin Supreme Court – could not apply to them or foreclose the rights of persons who, like the Plaintiffs, were not parties to that case.

Three days prior to approval of the agreement that is now being challenged, counsel for the Plaintiffs wrote to the Board and School District, putting them on notice that persons in the position of the Plaintiffs absolutely did object to the proposed course of action and that, if the District and School Board went ahead, they would be courting litigation.

[1] Plaintiffs also maintain that the declaratory judgment statute permits an exception to the notice requirements here. No case has expressly held that § 893.80 is applicable to all claims for declaratory relief. A court of appeals case, *Ecker Bros. v. Calumet County*, 2009 WI App 112, 321 Wis. 2d 51, 772 N.W.2d 240, holds only that "the statute applies to *this* declaratory judgment action," *i.e.*, the one before the court in that case. *Id.*, ¶5 (emphasis added). The plaintiff in *Ecker* did not argue that the *declaratory judgment* statute provided an exception to § 893.80, it argued that the "alternate energy statutes [were] an exception to the notice statute." *Id.*, ¶6. Here, the purpose of permitting a plaintiff to have a governmental action declared illegal would be frustrated if it were necessary to allow the illegal action to continue for over 120 days. But, given the exemption afforded by § 813.02, this court need not reach that broader issue.

We made clear what relief we demanded – no collective bargaining beyond that permitted by Act 10. Knowing that persons such as the Plaintiffs objected and the relief that they demanded, the Board and School District decided to go ahead anyway – effectively rejecting the claim we make here. That they would now claim to be surprised and invoke § 893.80 to frustrate the purposes of § 813.02 and be given four months to break the law is astonishing.

I. Section 893.80 Wis. Stats. Does Not Require a Party Seeking an Injunction to Wait 120 Days Prior to Filing Suit, Especially Where Doing So Would Defeat the Entire Point of Seeking the Injunction.

The Board and the School District rely on Wis. Stat. § 893.80(1d), which states that "no action may be brought or maintained" against a municipal corporation unless the plaintiff has submitted a claim within 120 days of the happening of the event giving rise to the claim. The Board and the School District concede that the "no action may be brought or maintained" language is not intended to be read as a blanket prohibition on all such actions, admitting that there are "limited exceptions" to this rule. (Defendants' Br. 5.) In fact, Wisconsin courts have recognized numerous exceptions to the notice requirements of § 893.80. *See generally Nesbitt Farms, LLC v. City of Madison*, 2003 WI App 122, ¶7, 265 Wis. 2d 422, 665 N.W.2d 379 (listing numerous claims not subject to § 893.80's requirements and finding that condemnation appeals are also exempt); *see also Dixson v. Wis. Health Org. Ins. Corp.*, 2000 WI 95, 237 Wis. 2d 149, 612 N.W.2d 721 (not applicable to 3rd party complaints for contribution); *Oak Creek Citizen's Action Comm. v. City of Oak Creek*, 2007 WI App 196, 304 Wis. 2d 702, 738 N.W.2d 168 (not applicable to a mandamus action to compel compliance with the direct legislation statute); *Kapischke v. County of Walworth*, 226 Wis. 2d 320 (Ct. App. 1999) (not applicable to certiorari actions of conditional use permit denials); *Hillcrest Golf & Country Club v. City of Altoona*, 135 Wis. 2d 431, 400 N.W.2d 493 (Ct. App. 1986) (not applicable to private nuisance claims).

An exception is particularly apt when a local government has engaged in unlawful behavior and created a looming injury for which there is no adequate remedy at law and which the parties facing injury would otherwise have the right to block. For example, in *Auchinleck v. Town of LaGrange*, 200 Wis. 2d 585, 547 N.W. 2d 587 (1996), the Wisconsin Supreme Court

held that § 893.80 did not apply to a claim under the Open Meetings Act. In that case the Supreme Court said:

> Likewise, requiring a citizen to wait up to 120 days before bringing an enforcement action for an open meetings violation frustrates the purpose of that law. During this delay, the municipality could take significant action without public input or scrutiny of the process. Further, the statutory remedy of voiding governmental action taken at an illegal meeting under Wis.Stat. § 19.97(3) may in many cases become moot.

Id. at 595.

This reasoning for this exception applies here in force, not because there was an Open Meetings violation by the Board (there was, but we have not yet made that claim, *see infra*, Section II.), but because the reasoning of the supreme court in *Auchinleck* also applies to the Plaintiffs' claim for a temporary injunction. The notice and waiting requirements of §893.80(1d) would frustrate the purpose of the temporary injunction law and render many injunction cases against municipal misconduct effectively moot. It cannot be the law, and it is not the law, that the Board and the School District can brazenly violate Act 10 with a four-month long period of impunity. *See Oliveira v. City of Milwaukee*, 2000 WI App 49, 233 Wis. 2d 532, 543, n. 3, 608 N.W.2d 419, 424 rev'd on other grounds, 2001 WI 27, 242 Wis. 2d 1, 624 N.W.2d 117 ("[I]nsofar as the City argues that this action is barred by Wis. Stat. § 893.80(1)(b) [the predecessor of (1d)(b)], which requires that a notice of claim be filed before the commencement of an action, that provision does not apply to injunction actions authorized by statute, which is the relief plaintiffs sought here.") (citing *Gillen v. City of Neenah*, 219 Wis.2d 806, 822, 580 N.W.2d 628, 633–634 (1998) (per curiam)).

In *Oak Creek Citizen's Action Committee, supra*, the court of appealswent through a litany of the exceptions to §893.80 and set forth the following test for determining if an exception should apply:

> (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of § 893.80(1), Stats., would hinder a legislative preference for a prompt resolution of the type of claim under consideration; and (3) whether the purposes for which § 893.80(1) was enacted would be furthered by requiring that a notice of claim be filed.

2007 WI App 196, ¶6

This case easily satisfies that test. First, the Plaintiffs do not seek damages, but permanent and temporary injunctive relief under the statutory temporary injunction scheme found in Wis. Stat. § 813.02. The Board and School District are about to implement an illegal contract. The costs it will impose upon the taxpayers and its impact upon the operation of Kenosha's schools while it is implemented cannot be undone. Nor will it be possible to remedy the injury visited upon teachers like Ms. Glembocki and other district staff who do not wish to be compelled to support a union or have the terms and conditions of their employment set by collective bargaining. In particular, the $ 1.65 million in lump sum payments about to be made to all district employees cannot readily be recovered.

Second, this is precisely the type of claim for which the legislature has expressed a preference for a prompt resolution – permitting an injunction to be granted quickly against a party who has not responded to the motion, not filed a responsive pleading, and not even been served with the complaint. *See* § 813.02(1). The statute provides that, when a plaintiff can establish a likelihood of success and irreparable harm, he or she may be entitled to immediate judicial relief. Application of § 893.80 here would make that impossible and frustrate the statute and the legislative policy preference it embodies.

Third and finally, the purposes of §893.80(1) would not be furthered by requiring that a notice of claim be filed before seeking an immediate injunction. *See Kettner v. Wausau Ins. Cos.*, 191 Wis. 2d 723, 735, 530 N.W.2d 399 (Ct. App. 1995) ("The purpose of this statute is to protect the government and taxpayers from excessive claims by limiting the government's exposure to potential liability. Thus, *unless the government is exposed to liability*, the protections of § 893.80 are inapplicable.") (emphasis added). This is particularly true in the circumstances here, where the defendants had actual notice of the Plaintiffs' claims before acting.

On November 12, 2013, three days before the Board ratified the collective bargaining agreement ("CBA"), counsel for Plaintiffs sent a letter to the Board notifying the Board that ratifying the proposed CBA would be illegal. A copy of that letter is attached hereto as Appendix A. In the letter, Plaintiffs' counsel stated:

> If the CBA that you are voting on tonight does not conform to state law, as set forth in Act 10, the Board will be exposing KUSD to litigation by taxpayers. Because collective bargaining can only occur over base wages, any CBA with a union is unlawful unless it deals exclusively with base wages. Also, wage increases in the contract cannot be higher than the cost of living unless you decide to seek a citizen referendum. In addition, state law currently prohibits a defined

> pension plan for general public employees unless the employees contribute half of all contributions. If an employer offers a healthcare plan, the employees must pay at least 12% of the average cost of premiums.
>
> Moreover, Act 10 has given teachers new rights that cannot be taken away by a CBA. Under state law, teachers have the freedom to opt out of union representation and the right to no longer be forced to pay union dues. Employers, such as KUSD, are prohibited from automatically deducting labor union dues from their earnings. Teachers who choose to not join a union cannot be compelled to pay union dues as a condition of employment, i.e. so-called "fair share" agreements.
>
> If the Kenosha School Board did in fact collectively bargain and, tonight, approves a CBA with terms that violate Act 10, then it would be subjecting itself to litigation by taxpayers who object to their money being spent illegally or by teachers who do not wish to be bound to an illegal contract. If such a lawsuit would be successful, the CBA may be declared null and void and taxpayers would be on the hook for substantial legal fees.

This notice, of course, completely undercuts the Board and School District's argument that these claims came out of the blue. (Defendants' Br. 8-9.) The Board was on actual notice that taking the action of ratifying the CBA would lead to litigation, and the Board proceeded anyway. The Board had a chance to avoid that litigation by refusing to ratify the illegal contract, but refused to accept that alternative.

This case is thus identical to *Little Sissabagama Lake Shore Owners Ass'n, Inc. v. Town of Edgewater*, 208 Wis. 2d 259, 265, 559 N.W.2d 914, 915 (Ct. App. 1997). In that case, the court held that there is no purpose in requiring a § 893.80 notice of claim when reviewing a county board's determination in a specific dispute. According to the court, "the purpose of requiring notice is to make the municipality aware of the claim and afford it an opportunity to compromise and settle the claim without litigation." *Id*. But because the County Board was aware of the dispute and proceeded anyway, it did not need to be put on notice of a claim it had already heard and denied. *Id.*

Indeed, that the purposes of § 893.80 do not require its application here is demonstrated by the fact that, even if those statutory notice requirements were applicable, they have been substantially complied with and therefore dismissal of this case would not be warranted.

As noted above, the Board and School District had actual notice of the claim and the relief demanded. By entering into a collective bargaining agreement that is not compliant with

Act 10, they effectively denied the claim. It is, in fact, difficult to see how they *could* now honor or compromise the claim. The Board and School District have made a contractual commitment to the union. While the Plaintiffs believe that contract is unlawful and void, we presume that the union does not. By entering into such an agreement, the Board and School District have effectively cast their lot and surrendered their ability to honor the Plaintiffs' claim without the acquiescence of the union. Only a court has the power to declare a contract unlawful and void and undo their unlawful action.

II. The Plaintiffs Have Not Yet Made an Open Meetings Claim that Could Be Dismissed.

The Plaintiffs are quite familiar with the procedural requirements for bringing an Open Meetings claim under Wis. Stat. § 19.97. On behalf of Plaintiff Lacroix, Plaintiffs' counsel sent a verified copy of a complaint to the Kenosha County District Attorney and the Wisconsin Attorney General on November 7, 2013. A copy is attached hereto as Appendix B. At the time they filed this Complaint in an emergency effort to halt looming unlawful expenditures of taxpayer money, 20 days had not passed since sending that verified complaint. Therefore, the Plaintiffs did not include an open meetings claim in their Complaint. While they made mention of certain facts relevant to an open meetings claim as background information, they only made three claims for relief: (1) a declaration that the union contracts violated Act 10; (2) a declaration that the union contracts violated Chapter 133; and (3) an injunction prohibiting the enforcement of those contracts for those two reasons. Neither does the Plaintiffs' Motion for a Temporary Injunction ask for a finding that the Board violated the Open Meetings Law. *See* Brief in Support of Motion for a Temporary Injunction 15, n. 6.

The Plaintiffs have not, as of yet, made an open meetings claim. Therefore, there is no open meetings claim for this Court to dismiss, either for failure to follow the proper procedure or on its merits. Now that 20 days have elapsed since sending the verified complaint and neither the DA nor the AG has taken action, the Plaintiffs will consider whether to file an open meetings claim in the future now that the procedural requirements have been met, but that is not before the Court at this time or the basis for the requested temporary injunction.[2]

[2] The Board and District argue that claims against the Board are superfluous and that it should be dismissed. If they in fact concede that complete relief could be awarded against the District, we have no objection to dismissing the

CONCLUSION

The Board and the School District have violated Act 10 and Chapter 133. For the reasons set forth above, the Plaintiffs request that the Court deny the Defendants' motion to dismiss and grant the Plaintiffs' Motion for a Temporary Injunction.

Dated this 9th day of December, 2013.

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Board although it – or certain of its members – may be brought back in if and when the Complaint is amended to assert an open meetings violation.