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Clerk of Circuit Court
Brown County, WI
2018CV000013

STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

BROWN COUNTY TAXPAYERS ASSOCIATION, et al.,
Plaintiffs,

vs.

Declaratory Judgment
Case No. : 18-CV-13
Case Code: 30701

BROWN COUNTY, et al.,
Defendants.

DEFENDANT BROWN COUNTY’S BRIEF IN SUPPORT OF MOTION TO DISMISS

Pursuant to Wis. Stat. § 802.06(2)(a)(6), Defendant Brown County, (“Brown County”) by its attorneys von Briesen & Roper, s.c., files this brief in support of its motion to dismiss the Complaint of the Plaintiffs, Brown County Taxpayers Association (“BCTA”) and Frank Bennett (“Bennett”) (collectively “the Plaintiffs”) for their failure to satisfy the statutory conditions precedent to maintain a claim against a Wisconsin county.

INTRODUCTION

Long ago, the Legislature determined that municipal entities such as counties were entitled to notice of potential legal claims prior to those legal claims being filed in court. Section 893.80 of the Wisconsin Statutes is clear – a Wisconsin county cannot be sued, and a court should not proceed with adjudicating a case involving a Wisconsin county, unless and until a plaintiff first provides notice to the county of his/her/its intent to sue. The statutory notice of claim process is a threshold issue that must be addressed before the merits of any lawsuit are addressed or the fundamental purpose of the statute is lost.

In this case, and contrary to Wis. Stat. § 893.80, Plaintiffs ignored their obligation to advise Brown County of their intent to sue prior to commencing this action. If the Court excuses Plaintiffs' disregard for appropriate statutory process, this case could produce broad and devastating ramifications for Brown County and each of its citizens. There can be no honest debate that Brown County has been significantly prejudiced as a result of the Plaintiffs' failure to comply with the Wis. Stat. § 893.80 notice of claim procedure and is entitled to dismissal.

FACTS¹

A. The Brown County Taxpayers Association and Bennett

In its Complaint, the Plaintiff BCTA describes itself as an “unincorporated non-partisan association” whose mission is to promote “individual freedom and citizen responsibility...economic policy that encourages free markets...respects property rights...and expands opportunity for the people of Brown County to prosper and live free, productive lives.” (Complaint, ¶¶ 2-3.) BCTA has over “100 dues-paying members, including individuals, businesses, and organizations...” (Complaint, ¶ 4). In its Bylaws, the BCTA explicitly states that one of its “Purposes” is to promote “limited government which is fiscally responsible, transparent and accountable to the people.” (Complaint, Ex. A).

The second Plaintiff, Frank Bennett, is a resident of Brown County who alleges will be adversely impacted after the Sales Tax is first levied. (Complaint, ¶ 5).

B. Brown County

Brown County is the fourth largest County in Wisconsin with an estimated population of 245,000.² The County's total 2018 Annual Budget is set at \$90,285,893.³ It is estimated that

¹ All facts set forth herein are taken from Plaintiffs' Complaint or the affidavits of Brown County officials.

² https://www.co.brown.wi.us/about_us/

non-resident visitors to Brown County (*i.e.*, those persons that are not property taxpayers, but nonetheless utilize the infrastructure and facilities that Brown County has built and maintains) will generate approximately 30% of the sales tax revenues derived from the sales categories in which they participate, including accommodations, food and beverage, retail, recreation/arts/entertainment, and transportation. Additionally, it has been estimated that non-resident visitors to Brown County overall make up 61% of the attendance at facility events where tickets are sold, (Affidavit of Jeff Flynt, ¶ 3).

C. The Enactment of the Sales and Use Tax

On May 17, 2017, Brown County, consistent with its authority under state statutes, enacted the Sales and Use Tax Ordinance, creating a .5% sales and use tax (“The Ordinance”). (Complaint, ¶ 12).

The Minutes from the May 17, 2017 Board of Supervisors Meeting explicitly listed the nine “specific capital projects” sought to be funded by the Ordinance. They are:

- 1) Expo Hall Project - \$15M
- 2) Infrastructure, Roads and Facilities Projects - \$60M
- 3) Jail and Mental Health Projects - \$20M
- 4) Library Project - \$20M
- 5) Maintenance at Resch Expo Center Project - \$10M
- 6) Medical Examiner and Public Safety Projects - \$10M
- 7) Museum Project - \$1M
- 8) Parks and Fairgrounds Project - \$6M
- 9) Stem Research Center Project - \$5M

(Complaint, ¶ 13).

³ http://www.co.brown.wi.us/i/f/county_executive/2018%20Proposed%20Budget/Full%20Document.pdf

Prior to the May 17, 2017 Board of Supervisors Meeting, a Public Notice of Meeting was issued which provided the public opportunity with a time, place, and opportunity at which to provide comment on the sales and use tax. (Affidavit of Sandy Juno, ¶ 3). As set forth in the Ordinance, the revenues from the sales and use tax are to be used to fund various planned Brown County capital projects. (Complaint, ¶15). Several of these planned projects will now be impacted if Plaintiffs prevail⁴:

1. PSC 911 and Technology Services SDC UPS Replacement: Brown County is relying solely upon forthcoming sales and use tax revenues to fund this mission critical project.
2. Highway Projects: Stopping the sales tax would jeopardize these critical projects moving forward due to contractual obligations, seasonality of construction, loss of state and federal funding, and potential layoffs of highway crews.
3. Expo Hall: Brown County is contractually committed to \$15 million in sales tax dollars for the construction of the new Expo Hall to replace the 60-year-old Veterans Memorial Arena.
4. Jail & Medical Examiner's office: Brown County has issued an RFP for an Owner's Representative to provide comprehensive services in the organization, coordination, management and administration required for all aspects of these two essential County developments.
5. STEM Innovation Center Building: Brown County has committed \$5 million for the architecture, design and construction of the building in partnership with the University of Wisconsin-Green Bay to be the location for the university's new Engineering School. Based on that pledge, the State of Wisconsin in its 2017-19 Capital Budget included a matching \$5 million pledge to the project once Brown County has committed its money. The other \$5 million is through private donations, and halting the sales tax would negatively affect fundraising efforts to generate the remaining \$5 million of the \$15 million dollar project.
6. Neville Public Museum's Core Gallery Renovation: Brown County has issued an RFP for the Construction, Fabrication and Installation of the Neville Museum's renovation. An injunction on the sales tax would have an immediate negative impact on fundraising for the museum.

⁴ Other planned projects are in the conceptual phase.

(Flynt Aff., ¶ 4).

In 2017, the Ordinance was passed with 23 board supervisors voting in favor and only 3 board supervisors casting negative votes. (Complaint, Ex. B). The tax began to be collected on January 1, 2018. *Id.* As Plaintiffs allege in the Complaint, the Ordinance was signed by the County Clerk on May 19, 2017, by the County Executive on May 23, 2017, and by the Brown County Board Chair on May 24, 2017. (Complaint, ¶ 13).

On October 13, 2017 Brown County published its proposed Notice of the 2018 Annual Budget summary to the general public. (Complaint, Ex. D; Ehlinger Aff., Ex. A). That proposed Annual Budget contained the County Sales Tax revenues and provided it was to “account for the collection and use of the 0.5% County sales tax imposed for capital improvements” and listed nine County projects which are to be funded by forthcoming sales tax revenues. (Complaint, Ex. D, p. 17).

Proposed: (b)							
Highway Projects	-	9,264,687	1,367,053	1,007,331	11,639,071	-	-
Facility Building Upgrades	-	250,000	-	-	250,000	-	-
Jail Projects: Sheriff Jail Pods	-	1,071,258	-	-	1,071,258	-	-
Library Improvements:							
Library Branch Expansion/Relocation	-	1,000,000	-	-	1,000,000	-	-
Medical Examiner Facility	-	528,120	-	-	528,120	-	-
Museum Permanent Exhibit	-	500,000	-	-	500,000	-	-
Parks Improvements	-	500,000	-	270,000	770,000	-	-
Brown County Research and Business							
Park: STEM Innovation Center	249,250	4,200,000	-	10,000,000	7,500,000	-	6,949,250
Public Safety Communications							
Upgrades: 9-1-1 & TS SDC UPS							
Replacement	-	581,000	-	-	581,000	-	-
Veteran's Memorial Complex:							
Stadium Sales Tax Refund	4,519,159	-	-	9,066	4,505,474	-	22,751
Subtotal - Proposed	4,768,409	17,895,065	1,367,053	11,286,397	28,344,923	-	6,972,001

(Complaint, Ex. D, p. 279). These projects are the identical nine “specific capital projects” identified in the May 17, 2017 Ordinance. Thus, Plaintiffs knew about these capital projects on May 17, 2017 but took no action to file any notice of claim.

On or about November 1, 2017, the Brown County Board made minor adjustments to the budget proposal for other unrelated issues and Plaintiffs concede these adjustments are not material to this dispute. (Complaint, ¶ 17). Eventually, the County Board adopted the budget and authorized the proposed tax levy. On January 1, 2018 Brown County merchants began collecting the sales and use tax. (Complaint, ¶ 12). On January 2, 2018, the Plaintiffs filed this lawsuit. Because of the procedural basis for this motion, Brown County will not discuss the substantive merits of the Plaintiffs' legal arguments herein.

At no time after the Ordinance was enacted on May 17, 2017, did the Plaintiffs give the required statutory notice under Wis. Stat 893.80.

LEGAL STANDARD

Section 802.06(2)(a)(6) allows a party to move to dismiss a complaint on the grounds that the Complaint fails to state a claim upon which relief can be granted. Such a motion “tests the legal sufficiency of the complaint.” *Peterson v. Volkswagon of America, Inc.*, 697 N.W.2d 61 (citing *Watts v. Watts*, 137 Wis. 2d 506, 512, 405 N.W.2d 305 (1987)). A motion to dismiss is properly granted where “it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations.” *Watts*, 137 Wis. 2d at 512.

Wisconsin courts have granted motions in dismiss when a claimant fails to comply with the language of Wis. Stat. § 893.80(1)(a) and (b). *Schwartz v. City of Milwaukee*, 43 Wis. 2d 119, 128, 168 N.W.2d 107, 111 (1969)(stating “if a claim has not been filed and rejected at the time the issue was raised in the suit, which is commenced before the filing and rejection of the claim, *the action shall be dismissed*”)(emphasis added); see also *Probst v. Winnebago County*, 208 Wis. 2d 280, 560 N.W.2d 291 (Ct. App. 1997).

ARGUMENT

I. **Wis. Stat. §893.80 Required The Plaintiffs To Provide Notice Prior to Filing Suit.**

It is well settled law that before a lawsuit can be commenced against a County, a claimant must comply with the requirements of Wis. Stat. § 893.80(a) which states, in part:

(a) Within 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, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency 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 fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee; and

(b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

(emphasis added).

Claimants need to provide actual notice to governmental entities. Wis. Stat. § 893.80; *Schwartz v. City of Milwaukee*, 43 Wis. 2d 119, 168 N.W.2d 107 (1969); *Rouse v. Theda Clark Medical Center, Inc.*, 302 Wis.2d 358, 735 N.W.2d 30 (2007). Timely notice of a claim enables governmental entities to investigate a claim, to avoid needless litigation, and to (potentially) settle all reasonable claims. *Rouse*, 2007 WI 87, ¶ 18. The notice of claim statute also provides a condition precedent that limits the time within which a certain prescribed act, necessary to the enforcement of the plaintiff's cause of action, shall be done. A plaintiff's failure to satisfy the condition precedent provided by the notice of claim statute results in a loss of the right to

proceed with the action against the governmental entity. *Id.* at ¶ 19; *see also City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 620, 575 N.W.2d 712, 713-714 (1998).

First, the written claim must be definite enough to fulfill the purpose of the notice statute - which is to provide the municipality with the information necessary to decide whether to settle the claim. *Id.* Second, “notices of claim should be construed so as to preserve bona fide claims.” *Id.*

II. Wis. Stat. § 893.80 Applies to Plaintiffs’ Claims.

Plaintiffs’ Complaint is a declaratory judgment action, which also seeks injunctive relief. Both of these claims are clearly subject to the statute’s notice requirements. In *E-Z Roll Off, LLC v. County of Oneida*, the Wisconsin Supreme Court held that absent a specific statutory scheme whose terms conflict with the general notice of claim requirements found in Wis. Stat. § 893.80, a claimant seeking injunctive or declaratory relief must follow the notice of claim requirements. 335 Wis. 2d 720, 736, 800 N.W.2d 421, 429, (2011); *see also Johnson v. City of Edgerton*, 207 Wis. 2d 343, 352, 558 N.W.2d 653, 657 (Ct. App. 1996)(holding “...official immunity provisions of § 893.80(4), like the notice and claim provisions of § 893.80(1), are not limited to tort or money-damage actions, but *are equally applicable to actions which, like the Johnsons’, seek injunctive relief against the governmental subdivision or employee.*”)(emphasis added); *Gillen v. City of Neenah*, 219 Wis. 2d 806 (1998).

In this case, there is no specific statutory scheme which conflicts with Wis. Stat. § 893.80’s notice of claim requirements. As such, Plaintiffs were required to follow that procedure before commencing this declaratory judgment action in which they seek injunctive relief. As discussed below, Plaintiffs have failed to provide any notice of claim to the County’s clerk in a timely manner prior to commencing this action.

III. Plaintiffs' Claim Is Barred As A Matter of Law.

For almost fifty years, Wisconsin has required a notice of claim be filed prior to a lawsuit involving a governmental entity. In the 1969 case of *Schwartz v. City of Milwaukee*, the Supreme Court stated “if the claim has not been filed and rejected at the time the issue is raised in the suit, which is commenced before the filing and rejection of the claim, the action shall be dismissed.” *Schwartz*, 43 Wis. 2d at 128. Nearly thirty years after *Schwartz*, the Court of Appeals affirmed a circuit court’s dismissal of a claim against Winnebago County. In *Probst v. Winnebago County*, the court of appeals affirmed a circuit court finding that Wis. Stat. § 893.80 “unambiguously prohibits commencement as well as maintenance of an action unless ‘a [c]laim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk . . . for the . . . subdivision or agency and the claim is disallowed.’”. 208 Wis. 2d 280, 285, 560 N.W.2d 291, 292 (Ct. App. 1997)(emphasis added).

Pursuant to Wis. Stat. § 893.80(a), the claim was required to be presented “within 120 days after the happening of the event giving rise to the claim.” With regard to the Plaintiffs’ sole claim for declaratory judgment, and assuming (for purposes of this motion) that all facts in the Complaint are true, their claim first arose on May 17, 2017, the date when the Ordinance was enacted. Plaintiffs failed to provide notice within 120 days of May 17, 2017, and to date, have not done so. (Affidavit of Sandy Juno, ¶4) Thus, under *Schwartz* and *Probst*, Plaintiffs should never have commenced this claim, much less be allowed to continue to maintain it now. *Probst* at 285. Since May 17, 2017, Plaintiffs knew that they had a cause of action against Brown County.

Even after May 17, 2017, Plaintiffs had multiple opportunities to comply with the notice of claim provisions but utterly failed to do so.

- On May 19, 2017, the Ordinance was signed by the Brown County Clerk; (Complaint, ¶ 13).
- On May 23, 2017, the Ordinance was signed by the Brown County Executive; *Id.*
- On May 24, 2017, the Ordinance was signed by the Brown County Board Chair; *Id.*
- On October 13, 2017, the Brown County Budget was published to the public; (Affidavit of David Ehlinger, ¶ 3, Ex. A).
- On November 1, 2017, the Brown County Board of Supervisors adopted the amended 2018 Budget. (Complaint, ¶ 17).
- On November 7, 2017, the Brown County Executive signed the 2018 Budget. *Id.*

Significant planning, discussions, budgeting, public meetings, board action, and other actions were undertaken to decide how to use the sales and use tax for the capital projects identified in the May 2017 Resolution. Yet, Plaintiffs decided to ignore the requirement to put the County on notice of their claims for the actions undertaken by the County Board. Instead, Plaintiffs sat silent as the County made the plans necessary to utilize the funds for the benefit of County residents. This “lying in the weeds” approach is exactly why a notice of claim is mandatory. Even assuming that Plaintiffs’ time to provide notice began to run after May 17, 2017, a position with which Brown County disagrees, *at no time* did the Plaintiffs attempt to comply with Wis. Stat. § 893.80’s notice of claim requirements.

Had Plaintiffs done so, Brown County would have had the opportunity, granted to it as a matter of law, to investigate the claim, to avoid needless litigation, and to potentially settle all reasonable claims. *Rouse*, 302 Wis.2d 358, 735 N.W.2d 30 (2007). Notably, Plaintiffs did not even assert in their Complaint they attempted to comply with Wis. Stat. § 893.80(a)’s notice of

claim such that Brown County had an opportunity to disallow the claim.⁵ When Plaintiffs' claims ripened – upon passage of the Ordinance, the subsequent adoption of the county budget or implementation of the sales tax – is of no consequence. Plaintiffs have utterly failed to comply with the notice of claim requirements set forth in statute. As a result, Plaintiffs' suit is barred as a matter of law.

IV. Brown County Did Not Have Actual Notice of the Plaintiffs' Claim Such That Wis. Stat. 893.80's Notice of Claim Requirement Was Waived.

Brown County was also not provided with actual notice under Wis. Stat. § 893.80(1)(a) before the Plaintiffs filed suit. Wisconsin courts have defined “actual notice” as the “equivalent of actual knowledge.” *Elkhorn Area School Dist. v. East Troy Community School Dist.*, 110 Wis. 2d 1, 5, 327 N.W. 2d 206, 209 (Ct. App. 1982). Actual notice requires “that the governmental entity not only have knowledge about events for which it may be liable, but also the identity and type of damage alleged to be suffered by a potential claimant.” *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220, 556 N.W.2d 326, 331 (Ct. App. 1996). Tellingly, Plaintiffs have not asserted any facts or produced any evidence that they provided Brown County notice that they would be filing suit, such that Brown County had actual notice and had the opportunity to investigate and evaluate the potential claim in advance of litigation and to afford it the opportunity to compromise and budget for potential settlement or litigation. Nor have Plaintiffs alleged any facts in their Complaint which could be construed as actual notice to Brown County of their claim. That is simply because such facts do not exist.

⁵ If the Plaintiffs' declaratory claim against Brown County is dismissed, this action should be dismissed. Plaintiffs have only sued the Department of Revenue alleging it is responsible for levying, enforcing, and collecting the tax. (Complaint, ¶ 7). Plaintiffs have not alleged Wis. Stat. § 77.70 is unconstitutional. Thus, if the Plaintiffs cannot bring a claim challenging the levying of the sales and use tax, the entire action must be dismissed as to all defendants.

V. Plaintiffs' Failure to Provide Notice Pursuant to Wis. Stat. 893.80 Has Been Prejudicial to Brown County.

For over seven months, Plaintiffs knew, or should have known, that they could commence suit against Brown County. But they did nothing. Rather, they kept quiet while Brown County proceeded through the 2018 budgeting process, adopted a tax levy, planned capital improvement projects, signed binding contacts in relation to the projects, and made arrangements to implement the sales and use tax.

In *E-Z Roll Off, LLC v. County of Oneida*, the Supreme Court expounded on this concept of prejudice. It stated,

In *Olsen v. Spooner Township* we held that prejudice “refers to a delay which results in the inability of claimants to adequately defend their case.” This holding emphasized that one of the purposes of the notice of claim statute “is to ensure that governmental units have sufficient opportunity to escape prejudice by promptly investigating claims.” As the party opposing summary judgment, E-Z “may not rest upon the mere allegations or denials of the pleadings....” The ultimate burden [] of demonstrating that there is sufficient evidence ... to go to trial at all (in the case of a motion for summary judgment) is on the party that has the burden of proof on the issue that is the object of the motion.” E-Z bears the burden of proving that Oneida County suffered no prejudice.

335 Wis. 2d 720, 746–47, 800 N.W.2d 421, 434–35 (2011)(internal citations omitted).

Only after the sales and use tax began to be collected did the Plaintiffs file suit. Plaintiffs' conscious decision to wait is prejudicial to Brown County because it was denied the opportunity to re-evaluate its budget before the tax took effect. Had Brown County had prior notice of Plaintiffs' claim, it could have appropriately budgeted debt service payments for 2018 as a fail-safe in the unlikely event that the sales tax was enjoined. Moreover, it could have sought declaratory judgment in 2017 that the sales tax Ordinance was valid and enforceable prior to taking further action. (Flynt Aff., ¶ 5). Doing so would have provided Brown County binding legal “comfort” in its position.

Given that it did not receive a notice of claim within 120 days of May 17, 2017, Brown County proceeded to budget for the sales and use tax and these projects under the reasonable expectation that no suits would be filed. Due to the Plaintiffs' failure to follow notice of claim procedures, and under *E-Z Roll Off*, Brown County is now unable to escape prejudice because it is in the unenviable position where it has to waste precious resources on the defense of an already implemented sales and use tax (and an injunction request) while simultaneously addressing contractual and budgeting issues for at least six capital projects which will be negatively affected or cancelled if this lawsuit continues.

Notably, Brown County is also facing a pending motion for injunctive relief, seeking to enjoin the sales and use tax altogether. As will be discussed in further detail in Brown County's forthcoming brief in opposition to the motion for an injunction, Brown County must advise the Court now that the effect of such an injunction (if granted) would be tantamount to a victory for the Plaintiffs on the substantive merits of this case.

If Brown County is enjoined from continuing to collect sales and use tax, it will have to seek bonding for capital projects. Should Brown County be forced to issue bonds, the sales and use tax will **automatically** sunset under the Ordinance. (Complaint, Ex. B, Sec. 9.04). Thus, the grant of an injunction will eliminate the sales and use tax entirely as a matter of law. This severe prejudicial effect of a potential (and procedurally untimely) injunction would undoubtedly have devastating ramifications to the County, the County's budget, and the operations of the County.

If every Plaintiff is allowed to stay silent for more than 120 days after an event giving rise to their claim arises, fails to file any notice of claim, and then seeks to enjoin a governmental subdivision from performing its legal obligations, the orderly operations of county government in the State of Wisconsin would grind to a halt. Here, the County enacted its ordinance and

budgeted for it over seven months before the County (and the State) began collecting the tax. Yet Plaintiffs waited until the tax began to be collected to file this lawsuit. Brown County's situation is exactly what the Legislature intended to prevent by enacting Wis. Stat. § 893.80.

CONCLUSION

For the reasons set forth above, Brown County respectfully requests the Court dismiss this action on the merits on the ground that Plaintiffs' failed to comply with Wis. Stat. §893.80's threshold notice of claim provisions.

Dated at Milwaukee, Wisconsin, this 26th day of January, 2018.

By: Electronically signed by Andrew Phillips

Andrew T. Phillips, SBN 1022232
Steven L. Nelson, SBN 1009779
Smitha Chintamaneni, SBN 1047047

Attorneys for Defendant, Brown County

MAILING ADDRESS:

411 East Wisconsin Avenue, Suite 1000
Milwaukee, WI 53202

PH: (414) 287-1570 (ATP)
(414) 287-1463 (SLN)
(414) 287-1515 (SC)

FAX: (414) 276-6281

Email: aphillips@vonbriesen.com
snelson@vonbriesen.com
schintam@vonbriesen.com

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