STATE OF WISCONSIN CIRCUIT COURT BROWN COUNTY

Brown County Taxpayers Association, *et al.*,
Plaintiffs,

v.

Brown County, *et al.*,
Defendants.

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

PLAINTIFFS' BRIEF IN OPPOSITION TO BROWN COUNTY'S MOTION TO DISMISS

INTRODUCTION

Brown County's Motion to Dismiss is based on repeated claims that the Plaintiffs "sat silent" and were "lying in the weeds" and that the County had no idea its sales tax was legally suspect. Those claims are false. Brown County was well aware that it was treading on shaky legal ground. It knew that the sales tax might be unlawful *because the Plaintiffs told them so*. In May 2017, the Brown County Taxpayers Association ("BCTA") sent every Brown County supervisor a letter objecting to the sales tax, specifically noting that it may violate the state law requiring sales taxes to be used to lower property tax levies. After the County ignored that warning and, in November 2017, adopted a budget that used sales tax revenue to raise spending and not lower property taxes, County Executive Troy Streckenbach appeared at a BCTA meeting, urging the organization *not* to file the lawsuit he knew was coming.

More importantly, there is no requirement for a "Notice of Claim" under the circumstances of this case. Wisconsin courts have created numerous exceptions to the application of § 893.80. *See 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 ("[T]he 'no action' command in § 893.80(1)(b)

[the predecessor to § 893.80(1d)] does not apply to many actions." One important exception pertinent here is that the Notice of Claim law does not apply to a plaintiff seeking "immediate injunctive relief." *See E-Z Roll Off, LLC v. County of Oneida*, 2011 WI 71, ¶28, 335 Wis. 2d 720, 800 N.W.2d 421. That is precisely the relief that the Plaintiffs seek here.

Plaintiffs and others are already suffering from the imposition of this illegal sales tax. (*See* Second Heidel Aff., ¶6; Dillenburg Aff., ¶9.) Requiring them to suffer irreparable harm for months and months before they can sue is intolerable.

I. There is No Requirement for a Notice of Claim under the Circumstances of this Case.

The County relies 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. It fails to note that despite the "no action" language, courts have in fact recognized several exceptions to the notice requirements of § 893.80.[1] *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); *see also Dixson v. Wis. Health Org. Ins. Corp.*, 2000 WI 95, 237 Wis. 2d 149, 612 N.W.2d 721 (not applicable to third-party complaints for contribution); *Oak Creek*, 2007 WI App 196 (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).

The Wisconsin Supreme Court in *E-Z Roll-Off* adopted a three-part test to determine when there should be an exception to the notice-of-claim requirements of Wis. Stat. § 893.80:

(1) whether there is a specific statutory scheme for which the plaintiff seeks exemption;

[1] The County also argues that Plaintiffs failed to plead compliance with § 893.80(1d) (D. Br. 10-11), but plaintiffs are not required to plead compliance. *Weiss v. Milwaukee*, 79 Wis. 2d 213, 227, 255 N.W.2d 496 (1977).

> (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.

E-Z Roll Off, 2011 WI 71, ¶23.

That test is met here. First, the temporary injunction statute constitutes, in the circumstances of this case, a "specific statutory scheme" for which the Plaintiffs seek exemption. In *E-Z Roll Off*, the Wisconsin Supreme Court cited with approval one of its own per curiam cases, *Gillen v. City of Neenah*, 219 Wis. 2d 806, 580 N.W.2d 628 (1998), which had held that a claim under a statute allowing for "immediate injunctive relief" was not subject to the notice of claim requirements under § 893.80. 2011 WI 71, ¶¶26-28. Key to the *Gillen* court's decision was the fact that the injunction statute allowed plaintiffs to immediately halt an ongoing injury. *Id.*, ¶¶28 (quoting *Gillen*, 219 Wis. 2d at 821).

The County argues that *E-Z Roll Off* precludes the Plaintiffs' suit. But *E-Z Roll Off* was a damages case in which the plaintiffs did not seek injunctive relief, a distinction expressly relied on by the court. 2011 WI 71, ¶¶26-28. The court expressly distinguished *Gillen*, noting that unlike a damages claim, "immediate injunctive relief" is "designed to prevent injury" and therefore is incompatible with the notice of claim statute. *Id.*, ¶28.

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, she is 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.

An exception is particularly apt when a local government has engaged in unlawful behavior and created an ongoing injury for which there is no adequate remedy at law. 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.

As the *E-Z Roll Off* court described *Gillen*, that case engaged in a similar analysis, concluding that because the statute provided for "immediate injunctive relief," making the plaintiffs wait until a claim was disallowed would "frustrate[] the plaintiffs' specific right to injunctive relief, the procedures setting forth injunctive relief took precedence over the general notice provisions of § 893.80." 2011 WI 71, ¶26 (citing *Gillen*, 219 Wis. 2d at 822).

Here, the Plaintiffs are employing the procedures set forth in § 813.02 to halt illegal government actions with immediate injunctive relief. The purpose of § 813.02 would be frustrated if it were necessary to allow the illegal actions to continue for over 120 days. It cannot be the law, and <u>it is not the law</u>, that the County can collect taxes for four months or more with impunity. *See Oliveira v. City of Milwaukee*, 2000 WI App 49, 233 Wis. 2d 532, 543, n. 3, 608 N.W.2d 419 (*<u>rev'd on other grounds</u>*, 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)], 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.").

The Plaintiffs do not seek damages here, but permanent and temporary injunctive relief under the statutory injunction scheme found in Wis. Stat. § 813.02. The County is levying an illegal tax. The costs it will impose upon taxpayers and businesses cannot be undone. The County complains of the uncertainty that a pending request for injunctive relief casts upon its financing. Can it go ahead with the additional spending that is financed by the sales tax? Must it provide for alternative means of financing? The delays associated with the application of § 893.80 would only prolong and aggravate that uncertainty. Given that the legislature has provided for injunctive relief if the Plaintiffs can prove that the tax is illegal, resolution of their claim ought to be prompt.

Third, the purposes of § 893.80(1) would not be furthered by requiring that additional notice be provided 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). Brown County is not exposed to liability; this is not a damages case.

More importantly, because the County had actual notice of the Plaintiffs' claims before acting, additional notice would not be necessary. On May 10, 2017, BCTA sent a letter to each of the 26 Brown County Supervisors outlining their objections to the tax. (Second Heidel Aff. ¶3, Ex. A.) One of the objections expressly questioned whether the tax violated Wis. Stat. § 77.70, noting that the tax was expected to raise $147 million over six years and levy reductions

were expected to only be $21 million. (*Id.*) Members of BCTA's executive committee also telephoned each Supervisor to express the same concerns found in their letter, speaking with the Supervisors or leaving voice mails. (*Id.*, ¶4; Dillenburg Aff. ¶3.) More details are contained in Section II below, but the point here is that Brown County knew of BCTA's objections to the tax and proceeded anyway.

In that regard this case is similar 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 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.*

Brown County knew about BCTA's claims. They knew what state law said about the requirements for imposing a county sales tax. They had every opportunity to review the legality of their proposed tax and address BCTA's concerns. They proceeded anyway, and applying § 893.80 to the Plaintiffs would serve no legitimate purpose.

II. If § 893.80 Applies, It Is Satisfied

The County claims in its brief that the Plaintiffs "sat silent," "kept quiet," and even were "lying in the weeds" waiting to surprise the County with this lawsuit. (D. Br. 10, 12.) Those claims are blatantly false, and the County should know better. The Plaintiffs have been vociferously objecting to the sales tax since the beginning.

As stated above, on May 10, 2017, BCTA sent a letter to each of the 26 Brown County supervisors outlining their objections to the tax. (Second Heidel Aff. ¶3, Ex. A.) One of the objections expressly questioned whether the tax violated Wis. Stat. § 77.70, noting that the tax was expected to raise $147 million over six years and levy reductions were expected to only be $21 million. (*Id.*) Members of BCTA's executive committee also telephoned each Supervisor to express the same concerns found in their letter, speaking with the Supervisors or leaving voice mails. (*Id.*, ¶4; Dillenburg Aff. ¶3.) BCTA also sent a letter objecting to the sales tax to the Green Bay City Council members,[2] four of whom were also Brown County supervisors. (Second Heidel Aff., ¶5, Ex. B.)

Members of County government actually engaged in dialogue with BCTA about the tax. Sometime before May 17, 2017, County Director of Administration Chad Weininger came to the house of Dave Dillenburg, BCTA's Second Vice President. (Dillenburg Aff. ¶4.) Weininger came to explain why the County wanted to have a sales tax and was seeking Dillenburg's support within BCTA for the tax. (*Id.*) Dillenburg told Weininger that the tax was illegal under state law because it was not being used to lower the property tax levy. (*Id.*, ¶5.)

The County even specifically knew that BCTA wanted to file a lawsuit when information about the suit leaked well before it was filed. On December 21, 2017, Streckenbach and Weininger attended BCTA's regular monthly meeting (which are open to the public). (*Id.*, ¶¶6-7.) Streckenbach was allowed to address the Association, speaking for about five minutes. (*Id.*, ¶8.) He stated that he already knew BCTA was planning on suing the County over the sales tax, argued in favor of the tax, asked BCTA not to sue, and said he would defend the tax if sued. (*Id.*) He obviously knew about BCTA's concerns and their intent to sue and expressly denied

[2] The sales tax was conditioned on particular actions by the incorporated municipalities in Brown County, and BCTA was urging Green Bay to slow down the process. (*See* Compl. Ex. B; Second Heidel Aff., Ex. B.)

BCTA's claim that the tax was unlawful. Weininger also approached Dillenburg after the meeting attempting to talk about the lawsuit, but Dillenburg demurred. (*Id.*, ¶9.)

The County had plenty of actual notice of the Plaintiffs' claims. *See* Wis. Stat. § 893.80(1d)(a) ("Failure to give the requisite notice shall not bar action on the claim if the [county] had actual notice of the claim and . . . the delay or failure to give the requisite notice has not been prejudicial to the defendant."). The provisions of § 893.80(1d)(b) were also complied with, as the May 10, 2017 letter from BCTA contained the Association's address and specified relief (not enacting the sales tax or at least not voting before sufficient public discussion and/or a public referendum).

Nor would the County be prejudiced by allowing this suit to continue. Most of the County's complaints of prejudice have nothing to do with any alleged lack of notice, but rather stem from harms it might suffer if this Court grants a temporary injunction (*e.g.*, expending resources defending the lawsuit, addressing contractual and budgetary issues if the tax is struck down, having to bond[3] to pay for expenditures). Those also are the same harms that will befall the County if the Court waits until the issue is fully resolved before entering a permanent injunction. The only prejudice the County complains of specifically related to notice is its claimed inability to reach a compromise or budget a contingency. But those problems are obviated by the actual notice the County had. The County actually did attempt to reach out and resolve the dispute, was specifically informed about the tax's potential illegality, and could have budgeted a contingency.

Furthermore, Brown County is not precluded from bonding now to pay for their new projects (assuming they can meet the procedural requirements for bonding). They complain that

[3] The County claims it will "have to" bond for capital projects if the tax is enjoined. (D. Br. 13.) It does not. It could also adopt a new budget that does not contain those expenditures. If the County chooses to bond, causing the sunset of the sales tax, the County could also choose to re-enact the sales tax before it expires at the end of the year.

had they known about BCTA's objections, they could have budgeted "fail-safe" bonding to cover the contingency of the sales tax being enjoined. (D. Br. 12.) But the County can still do that if this Court enjoins the tax, as the County acknowledges in its brief. (*See Id.* at 13.)

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. The County was told that BCTA thought the tax was unlawful, but went ahead and enacted it, budgeted based on it, and imposed it on January 1, 2018, effectively disallowing it and permitting a claim to proceed. *See State v. Town of Linn*, 205 Wis. 2d 426, 440, 556 N.W.2d 394 (Ct. App. 1996) (actions by government entity can effectively disallow a § 893.80 claim).[4]

III. IF PLAINTIFFS HAVE NOT YET SATISFIED § 893.80, THE CLOCK HAS NOT YET RUN TO DO SO

If this Court concludes that Plaintiffs were required to comply with § 893.80 and, despite the above information, have not done so, their claims are still not barred, because the 120-day clock of § 893.80(1d) has not finished running. The County argues that the clock began running on May 17, 2017, the date the Ordinance creating the sales tax was passed. (D. Br. 9.) The clock, if any, began running on January 1, 2018, or November 7, 2017 at the earliest.

Section 893.80 requires Plaintiffs to serve a notice of claim "[w]ithin 120 days after the happening of the event giving rise to the claim." Here, that event did not occur until January 1, 2018, because that is the date the Plaintiffs first suffered a legal injury – the date the sales tax went into effect. Before that date, they were not harmed by the sales tax.

The very earliest the Plaintiffs' claim could be considered to have arisen would have been November 7, 2017, the date the 2018 budget was signed into law by the County Executive.

[4] Because the County never sent a formal notice of disallowance, the six-month statute of limitations never began running. *Linstrom v. Christianson*, 161 Wis. 2d 635, 640, 469 N.W.2d 189 (Ct. App. 1991).

(Compl., ¶17; Brown County Ans., ¶17.) Contrary to the County's arguments, the enactment of the sales tax alone was not legally sufficient for a claim to arise. *See Olson v. Town of Cottage Grove*, 2008 WI 51, ¶43, 309 Wis. 2d 365, 749 N.W.2d 211 (facts must be sufficiently developed to allow a conclusive adjudication of a declaratory judgment claim). The sales tax alone, even earmarked for new expenses, did not violate § 77.70. It was always possible that the County Board, perhaps after considering BCTA's objections, would adopt a budget that still reduced the tax levy by a sufficient amount. It was only when the Board adopted a budget that failed to reduce the levy (actually increasing it) were the facts sufficiently developed to demonstrate that the tax, once imposed, would be unlawful.

There are other reasons May 17, 2017 cannot be the proper date the notice of claim period began running. The Ordinance was signed by the County Clerk on May 19, the County Executive on May 23, and the County Board Chair on May 24. (Compl. ¶13.) More importantly, the Ordinance itself contained significant conditions precedent before the sales tax would be implemented, including reaching agreements with seven incorporated municipalities within Brown County and a private corporation agreeing to renegotiate a contract with Brown County. (Compl., Ex. B.) The record in this case contains no information about when those conditions were satisfied; if one of them had not been, the sales tax never would have gone into effect.

Therefore, if this Court concludes that Plaintiffs' claims against the County must be dismissed, that dismissal should be without prejudice. Plaintiffs still have the legal ability to file a notice of claim with the County and sue once it has been disallowed.

IV. THE LAWSUIT CAN CONTINUE WITHOUT THE COUNTY

The County argues in a footnote that this case cannot proceed with just the Department of Revenue ("DOR") as Defendant. (D. Br. 11, n. 5.) To the contrary, it is the County itself that is not a necessary party to this suit. The County is not involved with the levying, enforcing, and collecting of the sales tax; that is the DOR's responsibility. Wis. Stat. § 77.76. Once the tax is enacted, the County's only involvement is receiving distributions from the DOR. The Plaintiffs included the County as a Defendant as a courtesy out of perceived fairness.

If the County does not wish to be heard, this case can continue with only the DOR as Defendant.[5] If the sales tax is declared unlawful, it is the DOR that will halt collection, administration, and distribution of the tax. The County does not need to be ordered to do anything in aid of a judgment in favor of the Plaintiffs. While the Complaint and Motion for Temporary Injunction do ask for relief against the County, that relief is extraneous and unnecessary. While, if the sales tax is enjoined, it might be nice to be able order the County to help spread the word to vendors to stop collecting the tax, that step is not required.

In fact, it is at least arguable that the County has no legal right to be heard in this matter at all. Wis. Stat. § 77.76(2) provides that "no county or special district may intervene in any matter related to the levy, enforcement, and collection of the taxes under this subchapter." It is true that that sentence immediately follows a phrase relating to judicial review of "departmental [meaning the DOR] determinations." But the language "any matter" implies that the prohibition on County intervention applies not only to judicial review of DOR determinations (if that were the case, the statute would likely say "may intervene in such matters"), but to any legal claim at all related to sales taxes.

[5] Notice of claim requirements against state defendants, § 893.82, do not apply to equitable claims for relief. *Casteel v. McCaughtry*, 176 Wis. 2d 571, 585, 500 N.W.2d 277 (1993).

While such an extreme reading may not be correct, it does make clear that counties are not necessary parties in legal disputes involving county sales taxes. Sections 77.76(2) and 77.79 provide that county sales taxes are subject to the administrative provisions of Subchapter III of Chapter 77 (§§ 77.51-77.67), the Subchapter providing for the state sales and use tax. That Subchapter contains legal claims that can be brought solely against the DOR, such as a claim for a refund of overpaid sales taxes. *See, e.g.*, § 77.59(6). If a vendor or customer could file a claim for a refund, arguing the county sales tax is illegal, and then take that claim to court once denied, all without involving the county, there is no reason the County is a necessary party here.

CONCLUSION

For the reasons set forth above, the Plaintiffs request that the Court deny Brown County's Motion to Dismiss.

Dated this 2nd day of February, 2018.

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