STATE OF WISCONSIN, CIRCUIT COURT, BROWN COUNTY

BROWN COUNTY TAXPAYERS ASSOCIATION and FRANK BENNETT,

Plaintiffs,

v.

BROWN COUNTY and RICHARD CHANDLER,

Defendants.

Case No. 18 CV 13

DECISION AND ORDER

Before the Court are two motions: Plaintiffs Brown County Taxpayers Association ("BCTA") and Frank Bennett (collectively, "Plaintiffs") filed a Motion for Temporary Injunction and Defendant Brown County filed a Motion to Dismiss Plaintiffs' claims. For the following reasons, Brown County's motion will be **GRANTED**, and the suit will be dismissed without prejudice. Plaintiffs' motion is therefore denied as moot.

FACTUAL BACKGROUND

On May 17, 2017, the Brown County Board of Supervisors, relying on Wisconsin Statutes section 77.70[1], enacted a Sales and Use Tax Ordinance ("Ordinance") creating a 0.5% sales and use tax on purchases made in Brown County. (Compl. Ex. B.) The Ordinance listed nine capital projects to be funded by the collected sales and use tax. (*Id.*) The County Clerk signed the Ordinance on May 19, 2017, the County Executive signed it on May 23, 2017, and the Board Chair signed it on May 24, 2017.

Brown County published its proposed Notice of the 2018 Annual Budget to the public on October 13, 2017, and that budget provided that the revenues from the sales and use tax were to be used for the nine capital improvements listed in the Ordinance. (Compl. Ex. D 17.) The Board of

[1] All subsequent references to the Wisconsin Statutes are to the 2015-16 version unless otherwise indicated.

Supervisors made minor amendments to the proposed budget proposal and adopted it as the County's 2018 budget on November 1, 2018. The County Executive signed the budget with no vetoes on November 7, 2018.

On May 10, 2017, prior to the enactment of the Ordinance, BCTA sent a letter to each member of the Board of Supervisors outlining their objections to the Ordinance, including a concern that the tax increase would violate section 77.70. BCTA also alleges that members made phone calls to the supervisors and directly expressed their concerns to them in other manners. (*See* Pls.' Br. Opp. Brown County's Mot. Dismiss. 7.) BCTA also alleges that County Executive Troy Streckenbach ("Streckenbach") attended a BCTA meeting in December, 2017, at which he addressed the Association and asked that it not sue the County over the tax and indicated that he would defend the tax if suit was filed. (*Id.*) Plaintiffs filed this declaratory judgment action on January 2, 2018.

STANDARD

"A motion to dismiss . . . tests the legal sufficiency of the complaint." *Beloit Liquidating Trust v. Grade*, 2004 WI 39, ¶ 17, 270 Wis. 2d 356, 677 N.W.2d 298. All facts pleaded and reasonable inferences that may be drawn therefrom are accepted as true for the purposes of testing the sufficiency. *Id*. "However, the court is not required to assume as true legal conclusions pled by the plaintiffs." *John Doe 1 v. Archdiocese of Milwaukee*, 2007 WI 95, ¶ 12, 303 Wis. 2d 34, 734 N.W.2d 827 (internal quotations and citation omitted). Rather, "[i]t is the sufficiency of the facts alleged that control the determination of whether a claim for relief is properly plead." *Strid v. Converse*, 111 Wis. 2d 418, 422–23, 331 N.W.2d 350 (1983). "A complaint should not be dismissed as legally insufficient unless it appears certain that a plaintiff cannot recover under any circumstances." *Beloit Liquidating Trust*, 270 Wis. 2d 356, ¶ 17.

ANALYSIS

Brown County moves to dismiss this action on the grounds that Plaintiffs have not complied with the notice requirements of Wisconsin Statutes section 893.80, which states, in relevant part, that "no action may be brought or maintained 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" is served on the entity, the claim contains the address of the claimant and "an itemized statement of the relief sought," and the claim is disallowed. WIS. STAT. § 893.80(1d)(a)-(b). This notice requirement enables the governmental entity to investigate the claim, avoid needless litigation, and settle all reasonable claims. *Rouse v. Theda Clark Med. Ctr., Inc.*, 2007 WI 87, ¶ 19, 302 Wis. 2d 358, 735 N.W.2d 30 (citations omitted). The notice requirement may also be satisfied if the plaintiff gave the entity actual notice of the claim, as long as 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 government entity. WIS. STAT. § 893.80(1d)(a). The parties raise three issues: (1) whether the notice statute applies to this action; (2) whether Brown County had actual notice of Plaintiffs' claims; and (3) when the 120-day time period began to run. The Court will address each issue in turn.

A. Section 893.80 is Applicable to this Action

As a general rule, the notice of claim requirement in section 893.80(1d) applies to "all actions." *See City of Racine v. Waste Facility Siting Bd.*, 216 Wis. 2d 616, 621-24, 575 N.W.2d 712 (1998). However, there are exceptions to this rule. *See, e.g.*, *E-Z Roll Off, LLC v. Cty. of Oneida*, 2011 WI 71, ¶¶ 21-22, 335 Wis. 2d 720, 800 N.W.2d 421 (collecting cases). To determine whether such an exception exists, the courts look to three factors:

> (1) whether there is a specific statutory scheme for which the plaintiff seeks exemption; (2) whether enforcement of the notice of claim requirements found in

> Wis. Stat. § 893.80 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 was enacted would be furthered by requiring that a notice of claim be filed.

Id. at ¶¶ 23-24. Plaintiffs assert that the temporary injunction statute, Wisconsin Statutes section 813.02, constitutes a "specific statutory scheme" that provides for more immediate relief than that afforded by section 893.80, which provides a government entity with 120 days in which to disallow the claim. Brown County asserts that the general injunction statute is not the type of "specific statutory scheme" the *E-Z Roll Off* court had in mind.

The Court agrees with Brown County. The cases cited by the *E-Z Roll Off* court as exceptions to the notice of claim requirement all involved much more specific statutes than the temporary injunction statute. For example, in *Gillen v. City of Neenah*, the statute at issue provided for "immediate injunctive relief" upon a violation of the public trust doctrine. The temporary injunction statute, however, provides for injunctive relief only "when it appears from a party's pleading that the party is entitled to judgment." WIS. STAT. § 813.02(1)(a). A prerequisite to providing injunctive relief under that statute necessarily requires the filing of a claim. This is very different from a statute specifically providing for "immediate injunctive relief" upon the discovery of a specific injury. Furthermore, just as filing a claim is a prerequisite to providing injunctive relief, providing a governmental entity with notice pursuant to section 893.80 is a prerequisite to filing that claim. "[A] cause of action is not properly commenced when a plaintiff prematurely files a summons and complaint, without first complying with notice requirements such as those inscribed in Wis. Stat. § 893.80." *Colby v. Columbia Cty.*, 202 Wis. 2d 342, 361, 550 N.W.2d 124 (1996). Plaintiffs have therefore not demonstrated that the first factor of the test from *E-Z Roll Off* is satisfied here.

Even if Plaintiffs had satisfied the first prong, however, they have not demonstrated that the second and third prongs of the *E-Z Roll Off* analysis are applicable to this case either. A situation in

which a claimant challenges the legality of an ordinance appears to be exactly the type of circumstance for which section 893.80 was enacted; the time periods contained therein ensure that the government entity has adequate opportunity to investigate the claim and determine what action, if any, is appropriate to take in response. Plaintiffs have not adequately demonstrated that theirs is the type of action that demands such prompt resolution that the purposes of the notice of claim requirement would be superseded. Accordingly, the notice of claim requirement found in section 893.80 does apply to this action, and Plaintiffs must comply with those requirements.

B. Plaintiffs did not provide the County with Written Notice

Plaintiffs argue that even if the notice statute applies to their claims, they have satisfied the requirements thereof because the May 10, 2017 letter sent to the County Supervisors met the statutory requirements or, alternatively, the County had actual notice of those claims. Wisconsin Statutes Section 893.80(1d)(a) requires that claimants serve governmental entities with "written notice of the circumstances of the claim signed by the party, agent or attorney" within 120 days of the event giving rise to the claim, and subsection (b) requires that the claim must contain the address of the claimant and an itemized statement of the relief sought.

Here, the only written communication to which Plaintiffs point as having satisfied the requirements of that statute are the letters sent by BCTA to Brown County Supervisors on May 10, 2017. (Second Heidel Aff. Ex. A.) Although those letters do include BCTA's address, it cannot be said that they contain an "itemized statement of the relief sought." WIS. STAT. § 893.80(1d)(b). The letters detailed the questions BCTA had about the propriety of the Ordinance—specifically with respect to the legality of using the tax for new expenses—and encouraged the Supervisors to wait on voting on the Ordinance until more debate had been had and those questions had been answered. (Second Heidel Aff. Ex. A 2.) A request for more information or a delay on a vote is not the same

as an itemized request specifically demanding that the Ordinance be repealed, or even that it be voted down. Furthermore, the letters do not provide Brown County with any indication that Plaintiffs intended to file suit if the Ordinance were passed. These letters, sent prior to the passage of the Ordinance and lacking a concrete statement of the grounds for the claim and the relief sought, are insufficient to put Brown County on notice of a pending claim.

C. Plaintiffs have not demonstrated that the County had Actual Notice

Plaintiffs have not pointed to any other written communication sent to Brown County that would put them on notice of Plaintiffs' claims. In the absence of such written notice, however, Plaintiffs assert that Brown County had actual notice of those claims under section 893.80(1d). "Actual notice" under the notice statute is the equivalent of actual knowledge. *Elkhorn Area Sch. Dist. v. E. Troy Cmty. Sch. Dist.*, 110 Wis. 2d 1, 5, 327 N.W.2d 206 (1982). Wisconsin Statutes section 893.80(1)(a) states that, in order to demonstrate actual notice, the claimant must "show[ ] to the satisfaction of the court that the delay or failure to give the requisite notice has not been prejudicial to the [governmental entity]." The applicable case law holds that "when a governmental entity asserts noncompliance with the statute as a defense to the action, the claimant has the burden of proving the giving of notice or actual notice *and* the nonexistence of prejudice." *Vanstone v. Town of Delafield*, 191 Wis. 2d 586, 597, 530 N.W.2d 16 (Ct. App. 1995) (internal quotations and citation omitted).

Plaintiffs allege that the May 10, 2017 letters provided the County with actual notice because those letters expressed BCTA's opposition to and concerns about the Ordinance and asked that a vote thereon be delayed. As discussed *supra*, however, these letters are not sufficient to provide actual notice of Plaintiffs' potential claims. Plaintiffs did not indicate their intent to file suit if the Ordinance were enacted or even request that it not be enacted at all. (*See* Second Heidel Aff.

Ex. A.) Plaintiffs' concerns, even if arguably valid, do not by themselves constitute notice of their claim. Thus, the letters were insufficient to provide Brown County with actual notice of Plaintiffs' claims.

Plaintiffs also point to other communications between BCTA members and members of the County government. Of particular note are the communications between County Executive Streckenbach and another County government representative at a BCTA meeting in late December, 2017. Plaintiffs indicate that both officials indicated their knowledge of BCTA's intention to file suit and challenge the legality of the Ordinance. (Dillenburg Aff. ¶¶ 6-9.) There are scant details about these communications, however, and it is unclear whether they would be sufficient to constitute actual notice.

Even if Plaintiffs had sufficiently demonstrated that Brown County had actual notice of their claims, they also have the burden of showing, to the Court's satisfaction, that their failure to serve Brown County with formal notice of their claim has not been prejudicial to Brown County. WIS. STAT. § 893.80(1d)(a); *Vanstone*, 191 Wis. 2d at 597. Plaintiffs assert that the County is not prejudiced by any delay here because the prejudice cited by the County relates to the grant of the requested temporary injunction, *not* to the alleged lack of notice, and that the only possible prejudice to the County is the alleged inability to reach a compromise or budget a contingency. In contrast, the County alleges that it is prejudiced by the delay because it did not have the opportunity to reevaluate its budget before the tax took effect. The Court need not determine whether Plaintiffs have shown that Brown County was not prejudiced by their failure to give notice, however, because the Court concludes that the 120-day time period in which the Plaintiffs were required to provide notice to Brown County has not yet expired.

D. The 120-day Time Period Began on November 7, 2017

The County argues that Plaintiffs' suit is barred because they did not notify the County of their claim within 120 days of May 17, 2017, the day on which the Ordinance was enacted. Plaintiffs argue that the 120-day time period did not begin to run until the tax went into effect on January 1, 2018, or, if not then, when the budget was adopted on November 7, 2017 at the earliest. If the 120-day clock began in May, it has long since expired; if it began on November 7, 2017, it does not expire until March 7, 2018.

"It is well settled that a cause of action accrues when there exists a claim capable of enforcement, a suitable party against whom it may be enforced, and a party with a present right to enforce it." *Pritzlaff v. Archdiocese of Milwaukee*, 194 Wis. 2d 302, 315, 533 N.W.2d 780 (1995) (citations omitted). "A party has a present right to enforce a claim when the plaintiff has suffered actual damage, defined as harm that has already occurred or is reasonably certain to occur in the future." *Id.* The County argues that the clock began in May, 2017 because at that time Plaintiffs would have been "reasonably certain" that they would suffer harm in the future as a result of the Ordinance.

The Court is not convinced by the County's arguments that Plaintiffs would have been certain of future harm in May, 2017. The Ordinance itself contained contingencies that had to be met on or before August 15, 2017. There does not appear to have been any evidence presented by any party with respect to how likely it was that those contingencies would have been met. Furthermore, Plaintiffs also point out that, until the budget was formally adopted, the County Board could have decided to use the tax proceeds for the reduction of the tax levy rather than for new expenses, thus negating the need for a potential lawsuit from Plaintiffs. The Court is therefore satisfied that the 120-day time period in which Plaintiffs must provide notice to Brown County

began when the 2018 Annual Budget for Brown County was signed by County Executive Streckenbach on November 7, 2018. Plaintiffs therefore have until March 7, 2018, to provide Brown County with written notice of their claims pursuant to Wisconsin Statutes section 893.80.

E. Brown County as an Indispensable Party

Brown County notes in a footnote that the entire action should be dismissed if its motion is granted, and Defendant Richard Chandler ("Chandler"), Secretary of the Wisconsin Department of Revenue ("DOR"), echoes this argument in his brief in response to the County's motion. Plaintiffs argue that the suit can proceed without the County because the DOR is responsible for collection, administration, and distribution of the proceeds of the tax. However, as Chandler points out, the DOR takes no position on the legality of the tax itself; thus, if Brown County is dismissed as a party, there will be no party defending the legality of the tax and, by extension, the interests of Brown County. Brown County would therefore be prejudiced by the continuation of the suit in its absence. *See* WIS. STAT. § 803.03(3). Accordingly, because suit against Brown County is not proper at this time due to a lack of notice, the entire suit must be dismissed without prejudice.

CONCLUSION AND ORDER

Based upon the foregoing, it is hereby **ORDERED** that Brown County's Motion to Dismiss is **GRANTED**, the entire action is dismissed without prejudice, and BCTA's motion for temporary injunction is **DISMISSED** as moot.

Electronically signed by William Atkinson

Circuit Court Judge

03/01/2018

Electronic Copy: Attorney Richard Esenberg
Electronic Copy: Attorney Thomas Kamenick
Electronic Copy: Attorney Andrew Phillips
Electronic Copy: Attorney Smitha Chintamaneni
Electronic Copy: Attorney Steven Nelson
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