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DISTRICT II

July 30, 2014

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You are hereby notified that the Court has entered the following opinion and order:

2013AP2427

Stillwater Condominium Association, Inc. v. City of Pewaukee
(L.C. #2013CV1541)

Before Brown, C.J., Reilly and Gundrum, JJ.

Stillwater Condominium Association, Inc., petitioned the circuit court for a writ of certiorari. *See* WIS. STAT. § 801.02(5) (2011-12).¹ The circuit court granted the City of Pewaukee's motion to dismiss for lack of personal jurisdiction on grounds that Stillwater's pleadings were fundamentally defective. Stillwater appeals. Based upon our review of the briefs

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

and the record, we conclude that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21. We agree and affirm the order.

The city council denied Stillwater's request to construct a gate across a private road in the adult, gated community. Stillwater installed the gate nonetheless. The City denied Stillwater's after-the-fact application for a permit. The common council upheld that decision. After an evidentiary hearing, the denial again was upheld on administrative review.

Stillwater filed a petition in the circuit court seeking a writ of certiorari to review that ruling and served the City with the petition. It did not file or serve a summons. Upon being served with the petition, the City filed a notice of retainer and request for substitution of judge. The City then moved to dismiss the action on the basis that Stillwater's failure to serve an authenticated summons with its petition was a fundamental defect that deprived the circuit court of personal jurisdiction over the City and of its competency to exercise subject matter jurisdiction. After oral arguments, the court rejected Stillwater's contention that any defect was technical and that the City's early court filings waived the objection to jurisdiction. It granted the motion to dismiss. After its motion for reconsideration was denied, Stillwater appealed.

A certiorari action may be commenced by (1) summons and complaint pursuant to WIS. STAT. § 801.02(1); (2) service of an appropriate writ; or (3) filing a complaint and serving it along with an order, in lieu of a summons, upon the defendant. Sec. 801.02(5); *Tobler v. Door Cnty.*, 158 Wis. 2d 19, 23, 461 N.W.2d 775 (1990). Stillwater asserts that it properly commenced its action under the writ method. It contends it timely filed with the court and served on the City the writ petition and "the Writ of Certiorari included therein," thus negating the need for a summons.

Stillwater misapprehends the distinction between a petition for a writ and a writ. The petition is a request for a writ; the court decides whether to issue it. *See State ex rel. Skogstad v. Anderson*, 130 Wis. 227, 229, 109 N.W. 981 (1906). Stillwater cannot have served “an appropriate writ” on the City before the court issued one. The alleged writ “included therein” was simply the caption of the cause of action in the petition.

The third method of commencing an action is not at issue. By default, then, Stillwater had to file a summons and complaint with the circuit court and serve authenticated copies of both on the defendant to satisfy the statutory requirements. WIS. STAT. § 801.02(1), (5). Stillwater did not file or serve a summons, authenticated or otherwise.

The failure to timely file a summons is a fundamental defect. *Johnson v. Cintas Corp. No. 2*, 2012 WI 31, ¶28, 339 Wis. 2d 493, 811 N.W.2d 756. Where the defect is fundamental, personal jurisdiction does not attach. *American Family Mut. Ins. Co. v. Royal Ins. Co. of Am.*, 167 Wis. 2d 524, 533, 481 N.W.2d 629 (1992). The failure to abide by statutory mandates that are “central to the statutory scheme” of which they are a part also deprives the circuit court of competency to exercise its subject matter jurisdiction. *Village of Elm Grove v. Brefka*, 2013 WI 54, ¶18, 348 Wis. 2d 282, 832 N.W.2d 121 (citation omitted).

The City did not subject itself to the court’s jurisdiction by filing a notice of appearance and motion for judicial substitution. “[A]ppearances in an action do not waive a personal jurisdiction defense,” *Useni v. Boudron*, 2003 WI App 98, ¶12, 264 Wis. 2d 783, 662 N.W.2d 672, or the right to object to the court’s competency to proceed, *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶28, 273 Wis. 2d 76, 681 N.W.2d 190. As the hearing here demonstrates,

a challenge to jurisdiction is a contested matter. The substitution request properly was made first. *See* WIS. STAT. § 801.58(1).

Upon the foregoing reasons,

IT IS ORDERED that the order of the circuit court is summarily affirmed, pursuant to WIS. STAT. RULE 809.21.

Diane M. Fremgen
Clerk of Court of Appeals