COURT OF APPEALS
DECISION
DATED AND FILED

January 21, 2009

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2008AP109 **Cir. Ct. No. 2007CV4764**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

MK INVESTMENTS, LLC
AND MAKBUL SAJAN,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed*.

Before Curley, P.J., Brennan and Kessler, JJ.

¶1 CURLEY, P.J. MK Investments, LLC and Makbul Sajan (collectively referred to as MK Investments) appeal following a judgment entered in favor of the City of Milwaukee (the City). MK Investments argues that the trial court erred when it dismissed its counterclaim against the City.

¶2 At issue is whether the allegations set forth in MK Investments' counterclaim are sufficient to state a claim for a deprivation of MK Investments' constitutional rights or interests under 42 U.S.C. § 1983.[1] Because the counterclaim is devoid of any allegations regarding a municipal policy or custom which resulted in constitutional infringements, we conclude that MK Investments' counterclaim does not present a cognizable claim under § 1983. Accordingly, we affirm the trial court, albeit on different grounds. *See* ***State v. Holt***, 128 Wis. 2d 110, 125, 382 N.W.2d 679 (Ct. App. 1985) ("An appellate court may sustain a lower court's holding on a theory or on reasoning not presented to the lower court.").

I. BACKGROUND.

¶3 The City filed a lawsuit against MK Investments seeking to recover the costs associated with razing and removing a building owned by MK Investments located at 6057 West Fond du Lac Avenue in Milwaukee. MK Investments answered and counterclaimed alleging a violation of 42 U.S.C. § 1983.

¶4 In response, the City filed a motion seeking dismissal of MK Investments' counterclaim, contending that MK Investments failed to pursue the

[1] Title 42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

exclusive remedies available to it under the Wisconsin statutes and the municipal code and failed to state a claim under 42 U.S.C. § 1983. MK Investments argued that it was not properly served with a raze order, and that although WIS. STAT. § 66.0413 (2005-06) provides exclusive remedies for relief from raze orders, it does not bar MK Investments from asserting other claims, namely, a separate claim under § 1983.[2] MK Investments further asserted: "Since the improper service effectuated upon [it] was made by an employee of the [City] it is clear that it is a policy of [the City] which caused the deprivation."

¶5 The trial court granted the City's motion to dismiss the counterclaim. In doing so, the trial court explained that it was not persuaded by MK Investments' argument that the exclusive remedies available to it under state statutes and the municipal code were not triggered because of defective service of the raze order. The trial court stated:

> I'm also granting the motion to dismiss the counterclaim. In my view the counterclaim is barred in that the exclusive statutory remedies admittedly not pursued bar the assertion of the counterclaim.
>
> I do not accept the fundamental premise of the Defense that the remedy, exclusive remedy provided by the statute, and I don't want to minimize concerns that [MK Investments] has with respect to what was done and how it was done and so forth; but the simple fact of the matter is that there's exclusive remedies provide[d] by statute, a forum's provided for redress of those supposed grievances.

[2] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

MK Investments argues: "The document which was allegedly served on Appellants was not a Raze Order. It was titled 'Inspection Report and Order to Correct Condition' and it gave Appellants 60 days to repair the property or in the alternative raze the building." For resolution of this appeal, it is irrelevant whether we reference the order as a raze order or as an order to correct condition.

> They weren't pursued. They had to be pursued pursuant to the statute. And because they weren't they can't be asserted here.
>
> ….
>
> Not every municipal employee becomes a party to any lawsuit in which that municipal party is named … [s]o I don't believe that the service was defective.
>
> That also as I understand the theory of 42 U.S.C. [§ 1983] liability[,] I also think that determination renders the substantive counterclaim deficient because as the parties have advised me in their briefs in order to make this type of 42 U.S.C. [§ 1983] claim you have got to allege[] a policy, practice, uniform policy practice, or procedure on the part of the City that violates a person's constitutional rights.
>
> My understanding of what is being asserted here is that a[] uniform policy, practice, or procedure that forms the basis of the claim is the uniform policy, practice, or procedure of the City serving notice through employees who by statute are barred from serving those notices.
>
> And because in my view the statute does not render those employees as ineligible to serve the notice, clearly there is not a uniform and deficient policy, practice, or procedure that would render the City liable under 42 U.S.C. [§ 1983].

¶6 The City subsequently filed a motion for summary judgment on the underlying complaint. The trial court granted the motion, resulting in a judgment for the City in the amount of $53,270.14. MK Investments now appeals.

II. ANALYSIS.

A. Standard of Review.

¶7 Whether a counterclaim states a claim for relief presents a legal issue that we review *de novo*. *See* ***Hausman v. St. Croix Care Ctr.***, 214 Wis. 2d 655, 662, 571 N.W.2d 393 (1997). "In determining whether a party has stated a claim,

we are concerned only with the legal sufficiency of the [counterclaim]." ***Kohlbeck v. Reliance Constr. Co.***, 2002 WI App 142, ¶9, 256 Wis. 2d 235, 647 N.W.2d 277.

¶8 Upon review, all facts that are alleged in a complaint or, in this case, a counterclaim, must be taken as true, and "a claim should be dismissed as legally insufficient only if 'it is quite clear that under no conditions can the plaintiff recover.'" ***Morgan v. Pennsylvania Gen. Ins. Co.***, 87 Wis. 2d 723, 731, 275 N.W.2d 660 (1979) (citation omitted). Notwithstanding, "[b]are legal conclusions attached to narrated facts do not suffice to meet the requirements of notice pleading." *See* ***Wilson v. Waukesha County***, 157 Wis. 2d 790, 799, 460 N.W.2d 830 (Ct. App. 1990).

¶9 At the outset, we note that the City filed a motion to dismiss pursuant to WIS. STAT. § 802.06(2) contending that MK Investments was properly served with the raze order, failed to pursue the exclusive remedies available to it under the Wisconsin statutes and the municipal code, and failed to state a claim under 42 U.S.C. § 1983. Section 802.06(2)(b) provides in part:

> If on a motion asserting the defense described in par. (a) 6. to dismiss for failure of the pleading to state a claim upon which relief can be granted … matters outside of the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in s. 802.08, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by s. 802.08.

¶10 With its brief in support of its motion, the City filed exhibits and an affidavit documenting, among other things: the date the raze order was posted on the property; the date the raze order was recorded with the Milwaukee County Register of Deeds; the date the raze order was personally served on Makbul Sajan; and the City employees responsible for these actions. In responding to the City's

argument that MK Investments failed to state a claim under 42 U.S.C. § 1983, MK Investments argued: "This is a Summary Judgment Motion within the Motion to Dismiss and as such should not be considered by this court."

¶11 In ***Alliance Laundry Systems LLC v. Stroh Die Casting Co., Inc.***, 2008 WI App 180, ___ Wis. 2d ___, ___ N.W.2d ___, we recently had the opportunity to address whether WIS. STAT. § 802.06(2)(b) allows a trial court to convert a motion to dismiss for failure to state a claim into a summary judgment motion. We held: "When [a party] attaches affidavits or other matters outside the pleadings to its motion to dismiss and the court, in its discretion, considers these outside matters, the court *must* convert the [party]'s motion into one for summary judgment." ***Alliance***, 2008 WI App 180, ¶14 (emphasis added). Here, although the trial court apparently considered the materials submitted by the City, it made no mention of converting the motion into one for summary judgment. It is apparent that the trial court and the parties treated the motion as one for dismissal. The trial court's consideration of the materials submitted by the City, however, required that it provide both parties with "reasonable notice" pursuant to § 802.06(2)(b), that it was going to or did convert the motion. *See* ***Alliance***, 2008 WI App 180, ¶20 ("[Section] 802.06(2)(b) requires the court to provide both parties with *reasonable* notice that it will or might convert a motion to dismiss into a summary judgment motion." (emphasis in ***Alliance***)). "Reasonable notice is that which informs the nonmoving party of the conversion or likelihood of conversion so that they are not taken by surprise." ***Id.***

¶12 Neither party identified any procedural deficiencies related to the motion hearing in its appellate briefing. Nevertheless, because our review is *de novo*, we have not considered the extra-pleading materials and have treated the City's motion as one for dismissal. *See* ***id.*** ¶17 (explaining that instead of

converting the motion to one for summary judgment, "the [trial] court may refuse to consider the extra-pleading materials and treat the motion as one for dismissal").

B. Failure to State a Claim.

¶13 In its counterclaim, MK Investments alleges the City violated 42 U.S.C. § 1983. "Section 1983, by itself, does not create any substantive constitutional rights. [Instead, s]ection 1983 provides a remedy for a deprivation of such rights." ***Penterman v. Wisconsin Elec. Power Co.***, 211 Wis. 2d 458, 472, 565 N.W.2d 521 (1997). "A municipality is subject to liability under § 1983 if 'the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers.'" ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶19, 235 Wis. 2d 610, 612 N.W.2d 59 (quoting ***Monell v. Department of Soc. Servs.***, 436 U.S. 658, 690 (1978)). Therefore, unless the City instituted a policy or had a custom which itself violated a federally protected right, it is not liable. *See* ***Wilson***, 157 Wis. 2d at 799 ("Custom or policy is a variant of [42 U.S.C. §] 1983's color of law requirement and is an essential element of a section 1983 claim against a municipality or governmental body." (internal quotation marks omitted)).

¶14 MK Investments' counterclaim does not include facts supporting the existence of a policy or custom from which its 42 U.S.C. § 1983 claim flows. The counterclaim consists of six paragraphs and reads as follows:

COUNT ONE

Cause of Action Pursuant to 42 U.S.C. Sec. 1983 as a separate cause of action against the City, M[K] Investments, LLC and Makbul Sajan alleges [sic] as follows:

1. That [the] subject matter of this action is real property which was located on a parcel of land known as 6057 West Fond du Lac Avenue, Milwaukee, WI, County Tax Key Parcel Number 226-0990-100.

2. That M[K] Investments, LLC is rightful owner of that parcel of land.

3. That City of Milwaukee, by and through Department of Neighborhood Services, impaired M[K] Investments, LLC's ownership and enjoyment of said real property and further perpetrated unconstitutional taking of the property without due process of law by authorizing the entering onto the M[K] Investments, LLC's real property and removing the building thereon on or about January 3, 2007.

4. That, at all times material hereto, the above-named City of Milwaukee while acting under color of law deprived M[K] Investments, LLC and Makbul Sajan of any use and enjoyment of his Property.

5. That, while acting under color of law, the above-named City of Milwaukee effectuated unconstitutional taking of said property without any due process.

6. That, as a direct and proximate cause of the above-identified wrongful conduct perpetrated by the City of Milwaukee under color of law, M[K] Investments, LLC and Makbul Sajan incurred substantial actual financial loss [of an] approximate sum of $350,000.00, as well as was subjected to general, special, incidental and consequential damages in the sum not yet determined but to be proven at trial.

¶15 The City points out: "MK Investments neither alleges an unconstitutional policy, nor does it allege a constitutional policy that has resulted in a widespread practice of unconstitutional taking of property without due process of law against MK Investments and others."[3] We agree. Additionally, MK Investments' counterclaim is devoid of any reference to either the issue of service of raze orders or the placarding of buildings by the City, upon which its 42 U.S.C. § 1983 claim is apparently based, as evidenced by its appellate briefing.[4] The only

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[3] It is not clear whether MK Investments is alleging a violation of its substantive or procedural due process rights. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶¶45, 53, 235 Wis. 2d 610, 612 N.W.2d 59 ("Substantive due process forbids a government from exercising 'power without any reasonable justification in the service of a legitimate governmental objective.' … The procedural due process clause protects individuals from governmental 'denial of fundamental procedural fairness.'" (citations omitted)).

[4] We note that even if service of the raze order was improper, an issue we do not decide, we fail to see how it resulted in any violation of MK Investments' federally protected rights. Particularly where, as the City points out, "MK Investments does not argue that it did not receive notice, it argues that the person who served the Order was an employee of the City[;] therefore the service was not valid." MK Investments failed to develop an argument that any federal constitutional right was violated as a result of service of the raze by a City employee, and, had we addressed this issue in greater detail, we would have refrained from crafting an argument for it. *See* ***State v. Pettit***, 171 Wis. 2d 627, 647, 492 N.W.2d 633 (Ct. App. 1992) (declining to address issues where briefs were "so lacking in organization and substance that for us to decide [a party's] issues, we would first have to develop them").

Furthermore, with respect to the placarding of buildings by the City, even accepting MK Investments' assertions at face value, we cannot conclude that a wrongful taking occurred. MK Investments argues that it was prevented from effectuating the requisite repairs due to a placard, which stated:

NOTICE

> **AN ORDER TO RAZE AND REMOVE** has been issued pursuant to section 66.0413 of the Wisconsin Statutes, and Section 218-4, Milwaukee Code of Ordinances, requiring the razing and removal of this building. Therefore, effective immediately, this structure cannot be used for human inhabitation, occupancy or use…. Any person occupying or using these premises … is subject to arrest.

(Formatting and bolding as it appears in original.)

(continued)

allegation setting forth potentially relevant facts is in the third paragraph of the counterclaim, where MK Investments alleges the City "authorize[ed] the entering onto the M[K] Investments, LLC's real property and removing the building thereon on or about January 3, 2007." The allegation containing these facts, however, amounts to little more than "[b]are legal conclusions attached to narrated facts." *See* ***Wilson***, 157 Wis. 2d at 799.

¶16 We conclude that the allegations of the counterclaim are insufficient to state a claim for relief under 42 U.S.C. § 1983. The nature and bases of MK Investments' § 1983 claim are wholly unclear and insufficient to notify the City of MK Investments' position, even under Wisconsin's liberal rules of pleading. *See* ***Farr v. Alternative Living Servs., Inc.***, 2002 WI App 88, ¶11, 253 Wis. 2d 790, 643 N.W.2d 841 ("Wisconsin is a notice pleading state, and a pleading need only notify the opposing party of the pleader's position in the case—no 'magic words' are required." (citation omitted)). As such, MK Investments' counterclaim was properly dismissed.[5] Accordingly, we affirm.

Although both parties included copies of the notice in the appendices attached to their briefs, neither provides a correlating record citation, in violation of WIS. STAT. § 809.19(2)(a) and contrary to counsels' own certifications. *See* ***State v. Bons***, 2007 WI App 124, ¶¶22-25, 301 Wis. 2d 227, 731 N.W.2d 367. Indeed, the notice does not appear to be present in the appellate record; as such, we do not consider it further. *See* ***South Carolina Equip., Inc. v. Sheedy***, 120 Wis. 2d 119, 125-26, 353 N.W.2d 63 (Ct. App. 1984) ("[A]n appellate court can only review matters of record in the trial court and cannot consider new matter[s] attached to an appellate brief outside that record."); *see also* ***Suburban State Bank v. Squires***, 145 Wis. 2d 445, 451, 427 N.W.2d 393 (Ct. App. 1988) ("When an appeal is brought upon an incomplete record, this court will assume that every fact essential to sustain the trial court's decision is supported by the record.").

[5] The City also seeks dismissal of MK Investments' appeal on grounds that it is untimely and because MK Investments improperly served the City with a notice of appeal. However, because we have decided the appeal in the City's favor, we need not address these other issues raised by the City. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (unnecessary to decide non-dispositive issues).

By the Court.—Judgment affirmed.

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