COURT OF APPEALS
DECISION
DATED AND FILED

September 24, 2002

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 01-3186 **Cir. Ct. No. 00 CV 10667**

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

CITY OF MILWAUKEE,

PLAINTIFF-RESPONDENT,

V.

THADDEUS J. DERYNDA,

DEFENDANT-APPELLANT.

APPEAL from a judgment of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed*.

Before Fine, Schudson and Curley, JJ.

¶1 PER CURIAM. Thaddeus J. Derynda appeals from a judgment entered in favor of the City of Milwaukee and dismissing his counterclaim. Derynda argues that: (1) he was denied due process of law because he was not personally served with a raze order and because the notice provision of the raze order statute was unconstitutionally applied to him; (2) he was denied his right to a

remedy under article I, section 9 of the Wisconsin Constitution; and (3) the trial court erred in granting summary judgment because mitigation remained a material factual issue. We affirm.

I. BACKGROUND

¶2 In September 1999, the City issued an order, pursuant to WIS. STAT. § 66.0413(1)(b)1 (1999-2000),[1] giving Derynda 20 days to raze and remove a building on his property. Complying with the notice provision of the statute, the City posted the order at Derynda's property, published the order, recorded it with the Milwaukee County Register of Deeds, and, on five different occasions, attempted personal service at Derynda's residence (leaving cards instructing Derynda to contact the City). *See* WIS. STAT. § 66.0413(1)(d), (e). Having received no response, the City razed and removed Derynda's building on February 3, 2000.

¶3 In December 2000, the City filed the underlying action seeking to recover the costs incurred or associated with the razing and removing of Derynda's building. Derynda counterclaimed, alleging that he had made repairs

[1] All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise indicated. WISCONSIN STAT. § 66.0413(1)(b)1 provides, in part:

> (b) *Raze order.* The governing body, building inspector or other designated officer of a municipality may:
>
> 1. If a building is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and unreasonable to repair, order the owner of the building to raze the building or, if the building can be made safe by reasonable repairs, order the owner to either make the building safe and sanitary or to raze the building, at the owner's option.

ordered by the City, that the City was not entitled to raze his building because it had never personally served him with a raze or condemnation order, and claiming damages exceeding $40,000. The trial court found that the City made a diligent effort to serve Derynda. Dismissing his counterclaim, the trial court granted summary judgment to the City and ordered judgment in the amount of $8,437.35.

II. DISCUSSION

A. Standard of Review

¶4 In reviewing a circuit court's decision on motions for summary judgment, we apply the standards set forth in WIS. STAT. § 802.08(2) in the same manner as the trial court. *See* ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). Summary judgment is properly granted where no material issue of fact exists and only a question of law is at issue. *See* ***id.*** Here the facts are not in dispute. The issue is whether the City was reasonably diligent in serving Derynda, pursuant to WIS. STAT. § 66.0413(1)(d) and (e). Reasonable diligence in serving process presents a factual question. *See* ***Welty v. Heggy***, 124 Wis. 2d 318, 324, 369 N.W.2d 763 (Ct. App. 1985). This determination will not be overturned unless it is clearly erroneous. *See* ***id.*** If the basic facts regarding diligence in service of process are undisputed, the determination of appropriate service is a question of law. *See* ***id.***

B. Due Process and Constitutional Claims

¶5 Derynda argues that, because he was not personally served, he was denied due process of law contrary to the Fourteenth Amendment to the United

States Constitution and article I, § 1 of the Wisconsin Constitution.[2] He also argues that WIS. STAT. § 66.0413(1)(d) and (e) were unconstitutionally applied to him because his address was known and the City failed to serve him by mail. His arguments are frivolous.

¶6 Derynda's arguments hinge on whether he was given reasonable notice of the raze order; i.e., whether the City was reasonably diligent in attempting to serve him. *See* ***East Troy v. Town & Country Waste Serv. Inc.***, 159 Wis. 2d 694, 704, 465 N.W.2d 510 (Ct. App. 1990) (due process focuses on reasonableness of notice); *see also* ***Welty***, 124 Wis. 2d at 324. According to the statute, a raze order is issued by an officer of a municipality where a building is in disrepair and is dangerous or unfit for human habitation. *See* WIS. STAT. § 66.0413(1)(b)1. The officer is required to serve a property owner with a raze order prior to the demolition of the building. WISCONSIN STAT. § 66.0413(1)(d) and (e), governing service of a raze order, provide:

> (d) *Service of order.* An order [to raze a building] shall be served on the owner of record of the building that is subject to the order … in the same manner as a summons is served in circuit court. An order [to raze] shall be served … by 1st class mail at the holder's last known address and by publication[.] If the owner … cannot be found, the order may be served by posting it on the main entrance of the building[.]
>
> (e) *Effect of recording order.* If a raze order … is recorded with the register of deeds in the county in which the building is located, the order is considered to have been served[.]

¶7 Derynda does not dispute that the City attempted personal service at his residence five times. He does not dispute that the City published the raze

[2] *See* U.S. CONST. amend. XIV, § 2; WIS. CONST. art. I, § 1 (amended 1986).

order, posted it on his property, and recorded it with the Milwaukee County Register of Deeds. He argues, however, that because his address was known, the City's failure to serve him by mail denied him notice and due process. Accordingly, he maintains that he was deprived of the opportunity to exercise the statutory remedy: within 30 days of service of a raze order, a property owner may apply to the circuit court for a restraining order to prevent demolition of the building. *See* WIS. STAT. § 66.0413(1)(h); *see also* WIS. STAT. § 893.76.

¶8 Derynda's arguments have no merit. The City complied with the statute exactly as it is written. A rule requiring service of a property owner by mail, by publication, by posting on the property, by recording with the register of deeds, in addition to personal service, would place an undue burden on municipalities and could encourage unscrupulous property owners to try to avoid service.

C. Right to a Remedy

¶9 Derynda argues that he was denied the right to seek a legal remedy under Wisconsin Constitution, article I, § 9, which provides:

> Every person is entitled to a certain remedy in the laws for all injuries, or wrongs which he may receive in his person, property, or character; he ought to obtain justice freely, and without being obliged to purchase it, completely and without denial, promptly and without delay, conformably to the laws.

The Wisconsin Supreme Court "has never construed the rights guaranteed by Art[.] I, sec. 9 to be fundamental." ***Doering v. WEA Ins. Group***, 193 Wis. 2d 118, 130, 532 N.W.2d 432 (1995). "The [c]ourt has held that sec. 9, art. I of our constitution, does not entitle Wisconsin litigants to the exact remedy they desire, but merely to their day in court … [and that] the legislature may impose

reasonable limitations upon the remedies available to parties." ***Id.*** at 130-31. (quoting ***Metzger v. Dept. of Taxation***, 35 Wis. 2d 119, 129, 150 N.W.2d 431 (1967)).

¶10 The remedy to which Derynda refers is the opportunity to seek a restraining order as provided by WIS. STAT. § 66.0413(h). The legislature enacted this section of the statute as a remedy and, given the overriding public interest in not having dangerous property remain in the community longer than necessary, the 30-day time limit is reasonable. The City complied with the statutory requirements and posted the raze order on Derynda's building, thus presenting him with the opportunity to seek the statutory remedy. Derynda simply did not take advantage of the available remedy, but he was not denied the right to do so. Therefore, his argument fails.

D. Mitigation Claim

¶11 Derynda also claims that the trial court erred in dismissing his counterclaim. Specifically, he argues that whether the City's razing costs were reasonable, and whether the City mitigated these costs, were issues for trial. Derynda, however, waived these arguments.

¶12 A party alleging an error has the burden "to establish by reference to the record that the error was specifically called to the attention of the trial court." ***Allen v. Allen***, 78 Wis. 2d 263, 270, 254 N.W.2d. 244 (1977). Derynda did not bring what he now asserts to be error to the trial court's attention. He did not object to the trial court's ruling. "A failure to make a timely objection constitutes waiver of the objection." ***Id.***

¶13 WISCONSIN STAT. § 805.11(1) provides that "[a]ny party who has fair opportunity to object before a ruling or order is made must do so in order to avoid waiv[er]." At the hearing, when Derynda stated his mitigation claim, the court asked whether he had any "facts in affidavit or any other form for the Court to weigh in regard to the summary judgment." He responded, "I do not have a – an affidavit alleging – addressing the cost of repairs to the building." The Court asked, "You have no facts to assert that there is any way that this could have been mitigated?" Derynda responded, "No, I do not."[3] Indeed, at the hearing, the city attorney commented: "If the defendant had alleged facts to the contrary, with regard to the cost of demolition, our reply brief would have included an affidavit explaining the competitive bidding process[.]"

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

[3] This court notes that the appendix to Derynda's brief to this court includes a copy of the transcript of this hearing but "conveniently" deletes the pages containing this colloquy.