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**DISTRICT II**

May 6, 2015

To:

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Donald W. Keniston  
1429 S. 11th. St.  
Sheboygan, WI 53081

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

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2014AP1675

Donald W. Keniston v. City of Sheboygan (L.C. #2014CV40)

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

Donald Keniston appeals pro se from a circuit court order dismissing, on summary judgment, his complaint against the City of Sheboygan and various municipal officials. Based upon our review of the briefs and record, we conclude at conference that this case is appropriate for summary disposition. WIS. STAT. RULE 809.21 (2013-14).<sup>1</sup> We affirm the circuit court because Keniston did not give notice of claim as required by WIS. STAT. § 893.80(1d) and the individual defendants and Sheboygan are immune from suit pursuant to § 893.80(4).

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<sup>1</sup> All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

Keniston sued the City of Sheboygan for promulgating allegedly unconstitutional housing code ordinances, which were then enforced against him as a result of defects in his residence. A city building inspector, Patrick Eirich, issued citations for ordinance violations, an assistant city attorney, Charles Adams, prosecuted Keniston for ordinance violations, and a municipal judge, Catherine Delahunt, found that Keniston violated the ordinances. Keniston litigated two separate municipal ordinance violation appeals, and he did not prevail in either appeal.<sup>2</sup> The circuit court granted the City defendants' summary judgment motion and dismissed Keniston's claims. Keniston appeals.

We review the circuit court's grant of summary judgment de novo, and we apply the same methodology employed by the circuit court. *Brownelli v. McCaughtry*, 182 Wis. 2d 367, 372, 514 N.W.2d 48 (Ct. App. 1994). "We independently examine the record to determine whether any genuine issue of material fact exists and whether the moving party is entitled to judgment as a matter of law." *Streff v. Town of Delafield*, 190 Wis. 2d 348, 353, 526 N.W.2d 822 (Ct. App. 1994).

We agree that Keniston's claims against the City of Sheboygan and its employees fail for lack of a WIS. STAT. § 893.80(1d) notice of claim. Section 893.80(1d) provides in pertinent part:

Except as provided in subs. (1g), (1m), (1p) and (8), no action may be brought or maintained against any volunteer fire company organized under ch.213, political corporation, governmental subdivision or agency thereof nor against any officer, official, agent or employee of the corporation, subdivision or agency for acts done in their official capacity or in the course of their agency or employment upon a claim or cause of action unless:

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<sup>2</sup> Sheboygan County circuit court case Nos. 2013CV315 and 2013CV920.

(a) Within 120 days after the happening of the event giving rise to the claim, written notice of the circumstances of the claim signed by the party, agent or attorney is served on the volunteer fire company, political corporation, governmental subdivision or agency and on the officer, official, agent or employee under s. 801.11. Failure to give the requisite notice shall not bar action on the claim if the fire company, corporation, subdivision or agency had actual notice of the claim and 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 defendant fire company, corporation, subdivision or agency or to the defendant officer, official, agent or employee[.]

At the summary judgment hearing, Keniston did not argue that the City defendants had actual notice of his claims arising from the ordinance violation cases and that the City defendants were not prejudiced by his failure to give notice of his claims. “‘Actual notice’ ... ‘is the equivalent of actual knowledge’” of the events for which the municipality may be liable and “the identity and type of damage alleged to have been suffered” by the claimant. *Markweise v. Peck Foods Corp.*, 205 Wis. 2d 208, 220, 556 N.W.2d 326 (Ct. App. 1996) (citation omitted). The circuit court explained the actual knowledge requirement in this case:

In this particular instance, the defendant knew that the plaintiff was cited for property code violations and subsequently found in violation of the ordinance. However, the defendants did not know, assuming, as the court must in a motion to dismiss, that the plaintiff’s facts are true as alleged, that the plaintiff was forced to sell his house as a result of the defendants’ conduct. As such, the defendants could not foresee that damages claimed, prohibiting a negotiated settlement before suit or setting aside of funds to deal with damages imposed as a result of a law suit. Those are the very purposes for which the statute was put in place. The court cannot waive the requirements of this statute. It is the plaintiff’s burden to prove that he has complied with the statute; in this matter, he has not.

Keniston had the burden to make the actual knowledge showing. WIS. STAT. § 893.80(1d). He did not make this showing, and his appellate arguments in relation to the

notice of claim requirement are unavailing. The circuit court properly dismissed Keniston's claims against the City defendants for lack of a notice of claim.

Because Keniston's lawsuit could not proceed without complying with the notice of claim requirement, we need not address any of Keniston's complaints about how the suit proceeded or the disposition of any other motions he filed in the circuit court. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983) (if we resolve an appeal based on one issue, we need not decide the other issues).

We also agree with the circuit court that Keniston's claims against Sheboygan and the individual defendants were barred on immunity grounds.

No suit may be brought against any volunteer fire company organized under ch. 213, political corporation, governmental subdivision or any agency thereof for the intentional torts of its officers, officials, agents or employees nor may any suit be brought against such corporation, subdivision or agency or volunteer fire company or against its officers, officials, agents or employees for acts done in the exercise of legislative, quasi-legislative, judicial or quasi-judicial functions.

WIS. STAT. § 893.80(4). All three individual defendants are City employees or officials.

It cannot be disputed that the Sheboygan City Council acted within its legislative function when it enacted the housing code ordinances. It is further beyond dispute that the municipal judge, Delahunt, acted within her judicial function in adjudicating Keniston's ordinance violations. Both Sheboygan and Delahant were immune from Keniston's suit pursuant to WIS. STAT. § 893.80(4).

Generally, public officers are immune from civil liability for damages resulting from their discretionary acts. *Kimps v. Hill*, 200 Wis. 2d 1, 10-11, 546 N.W.2d 151 (1996). On

summary judgment, the City defendants asserted that Assistant City Attorney Adams and building inspector Eirich had to exercise discretion in performing their functions as public officers. Keniston did not counter this argument. Adams and Eirich were immune from Keniston's suit pursuant to WIS. STAT. § 893.80(4).

Keniston's appellant's brief argues that the circuit court judge should be removed from this case for bias. We do not address this claim raised for the first time on appeal. *Segall v. Hurwitz*, 114 Wis. 2d 471, 489, 339 N.W.2d 333 (Ct. App. 1983).

Upon the foregoing reasons,

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

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*Diane M. Fremgen*  
*Clerk of Court of Appeals*