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DISTRICT II

January 20, 2021

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

2019AP390

Rodney Jensen v. Village of Somers (L.C. #2017CV1079)

Before Neubauer, C.J., Gundrum and Davis, JJ.

Summary disposition orders may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

Rodney Jensen and Kadinger Express, LLC (hereinafter, referred to in the singular as Jensen, appeal from a judgment denying Jensen's tort claims and granting summary judgment in favor of the Village of Somers (Village). Based upon our review of the briefs and record, we

conclude at conference that this case is appropriate for summary disposition. *See* WIS. STAT. RULE 809.21 (2017-18).¹ We affirm.

Jensen operated an ice-cream truck business and a delivery company on property owned by his mother, Opal Jensen (hereinafter, Opal.) Opal has lived in Florida since about 1995, and Jensen has occupied the premises under a rent-free verbal agreement since 1996. Both Opal and Jensen receive mail at the property and Jensen normally opens his mother's mail.

In August 2015, the Village sent to Opal, as owner of the premises, a certified property maintenance notice advising that the condition of the premises violated "one or more ordinances of the Town of Somers," including but not limited to Ordinance § 9.08(A) (regulating the "Storage of Junk,") and Ordinance § 9.09(B)(2) (regulating the storage of vehicles on "Private Property.>"). The notice gave Opal until September 14, 2015, to report compliance, and advised that the failure to report compliance could result in legal action. Receiving no response, the Village sent a second notice giving Opal until October 29, 2015, to comply.

On November 13, 2015, Jensen responded to the notice by emailing Village Building Inspector Russ Nolen. Jensen agreed to remove all inoperable vehicles from the premises by January 1, 2016. Jensen did not comply and, on January 4, 2016, the Village issued Opal a citation for violating Ordinance § 9.08. The citation provided notice of a mandatory court date.

Neither Jensen nor Opal appeared at the mandatory court hearing. Instead, Jensen sent a friend. The municipal court judge informed Jensen's friend that he could not appear on Opal's

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

behalf and set a trial date for March. The judge instructed Jensen's friend to notify Opal that she needed to contact either Nolen or the Village attorney to work out a plan to clean up the property and to remove all non-roadworthy vehicles from the premises. Thereafter, at Opal's request, the March trial date was adjourned to April.

Prior to the April trial date, Jensen met with Nolen and the Village attorney at the premises for an inspection. They came up with a plan and a timeline for removing inoperable vehicles from the premises. Jensen also agreed to provide three documents before his next court date: (1) a list of vehicles that would be removed from the premises, (2) a complete list of registration information for all vehicles on the premises, and (3) a power of attorney authorizing Jensen to act on Opal's behalf. The parties agreed to move the trial date for a second time to May 5, 2016.

Jensen did not provide the agreed-upon documents by May 5, 2016, and neither he nor Opal appeared in court. However, the municipal court did not enter default judgment on the nonappearance, but instead adjourned the trial to June 2, 2016, directing the Village attorney to notify Jensen.

Jensen never provided the Village with the agreed-upon documentation and, on June 2, 2016, neither Opal nor Jensen appeared for trial. The municipal court found Opal guilty of the citation by default, imposed a fine of \$50.00 per day retroactive to January 4, 2016, and authorized the removal of any vehicles on the premises in violation of Ordinance § 9.08. Judgment was entered on June 9, 2016, and notice of entry was provided.

On August 3, 2016, Village officials entered the premises to bring it into compliance with Ordinance § 9.08 by removing "in excess of seventy-five (75) dilapidated, junk, inoperable, and

unregistered vehicles” to a salvage yard. Later that month, the municipal court entered an amended judgment to account for the scrap value of materials removed from the premises.

In October 2017, Jensen filed suit against the Village in circuit court, alleging that the removal of his vehicles was an unconstitutional taking without just compensation.² The complaint also alleged that the Village’s action in removing the vehicles violated Jensen’s due process rights. The Village moved for summary judgment, and Jensen filed a cross-motion for summary judgment. The circuit court granted summary judgment in favor of the Village. Jensen appeals.

Jensen argues that the circuit court erred in granting summary judgment to the Village rather than to Jensen because the Village’s removal of junked vehicles from his mother’s property violated his due process rights. He argues that his procedural due process rights were violated because the Village’s removal of the junked cars was premised entirely on equitable relief ordered by the municipal court and that the municipal court lacked such equitable authority. We are not persuaded.

First, as the Village argues, and Jensen does not dispute,³ the Village had the authority under Ordinance § 9.08, and the Village’s broad police power to remove the junked vehicles

² Prior to commencing the lawsuit, Jensen filed with the Village a “Notice of Injury Giving Rise to Claim for Damages Pursuant to Wisconsin Statute Sec. 893.80(1)(a).” We will not address arguments concerning the sufficiency of Jensen’s notice.

³ Jensen has not filed a reply brief addressing the Village’s argument on this point. Arguments that are not refuted on appeal may be deemed conceded. See *Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979). See also *Schlieper v. DNR*, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994) (a proposition asserted by a respondent on appeal and not disputed in the appellant’s reply is taken as admitted).

after a citation was issued and the property was not brought into compliance. The Village did not rely on the authority of the municipal court to fashion an equitable remedy, but instead exercised its own authority to “take such steps as are necessary to have the Premises put into compliance” under § 9.08.

Second, even if we assume that the municipal court’s order somehow exceeded its authority and that the Village removed the junked vehicles pursuant to that order, Jensen has not set forth a cognizable due process violation. Jensen largely ignores the standard for procedural due process claims, which fundamentally require notice and an opportunity to be heard. *City of S. Milwaukee v. Kester*, 2013 WI App 50, ¶13, 347 Wis. 2d 334, 830 N.W.2d 710. Jensen was provided abundant notice and ample opportunity to be heard. He failed to avail himself of these opportunities before, during, and after his municipal court proceeding. He never provided the agreed-upon documentation to the Village, and he neither appeared at nor requested an adjournment of the June 2016 trial date. Thereafter, he did not appeal to the circuit court or seek to reopen the municipal court’s judgment. *See City of Middleton v. Hennen*, 206 Wis. 2d 347, 355, 557 N.W.2d 818 (Ct. App. 1996), *rev. denied*, 207 Wis. 2d 286, 560 N.W.2d 275 (1997) (a party who fails to avail himself [or herself] of the statutory appellate procedures cannot complain that they were denied the opportunity to be heard).

We also reject Jensen’s suggestion that a due process violation occurred if the municipal court exceeded its authority. The cases on which he relies are readily distinguishable and do not support his position. In fact, Jensen’s argument that due process requires states or municipalities to follow their own procedures has been roundly rejected. Due process requires notice and an opportunity to be heard, not strict compliance with state or local procedures.

Upon the foregoing reasons,

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

IT IS FURTHER ORDERED that this summary disposition order will not be published.

Sheila T. Reiff
Clerk of Court of Appeals