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DISTRICT II

October 19, 2022

To:

Hon. Scott C. Woldt
Circuit Court Judge
Electronic Notice

Samuel C. Hall, Jr.
Electronic Notice

Tara Berry
Clerk of Circuit Court
Winnebago County Courthouse
Electronic Notice

Charles J. Hertel
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Michael J. Roman
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Nathan Bayer
Electronic Notice

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

2021AP1753	Harve C. Ross v. Town of Omro (L.C. #2020CV438)
2021AP2118	Harve C. Ross v. Town of Omro (L.C. #2020CV438)

Before Gundrum, P.J., Grogan and Lazar, 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).

In these consolidated cases, the Town of Omro appeals from a judgment and an order overturning its resolution opposing a zoning code amendment. The circuit court overturned the Town's resolution as a sanction for the Town's failure to provide the record that the Town was statutorily obligated to produce in order for the court to conduct certiorari review in a lawsuit brought by property owners requesting the zoning amendment. The Town's delay may have been unusually long, but the court erred when it imposed the drastic sanction of adverse judgment without a clear finding that the Town's action constituted bad faith or egregious

conduct. 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 (2019-20).¹ We reverse and remand for further proceedings.

Background

Respondents Harve C. Ross, Renee M. Ross, Eric Wagner, and Sundee Wagner (collectively the “Property Owners”) entered a contract under which the Rosses would sell to the Wagners some land in the Town of Omro in Winnebago County. The Wagners hoped to build and operate a storage facility on this land, and their obligation to purchase the land was conditioned on a zoning change for the property to allow the storage unit project. Starting in early 2019, the Property Owners worked with the Town and the County to obtain this zoning change, expending considerable time and tens of thousands of dollars to provide the necessary information and comply with zoning change procedures. The Property Owners submitted a petition to the Winnebago County Zoning Department that resulted in the County recommending on April 20, 2020, and adopting on May 19, 2020, an amendment to the zoning ordinance that would allow for storage units on the property.

The final step for effecting the Property Owners’ desired zoning change would have been for the Town to approve the County’s amendment. *See* WINNEBAGO COUNTY, WIS., CODE ch. 23, art. 7-3(7), 7-4 (2019).² On June 15, 2020, after initially working with the Property

¹ All references to the Wisconsin Statutes are to the 2019-20 version unless otherwise noted.

² The cited sections of the Winnebago County Code can be found at: http://co.winnebago.wi.us/sites/default/files/uploaded-files/chapter23_-_adopted_8-20-19_3.pdf. These sections codify WIS. STAT. § 59.69(5)(e)3., which provides:

(continued)

Owners, the Town adopted Resolution 01-0620, opposing the County’s zoning change. The Town listed nine reasons for its resolution, including opposition from adjoining property owners, inconsistency with the Town’s land-use plan, and increased traffic through adjacent residential areas. The resolution effectively acted as a veto of the County’s change; the County did not take any further steps to enact the ordinance.

The Property Owners timely filed suit against the Town and the County on July 9, 2020, seeking a declaratory judgment against the Town to invalidate the resolution, mandamus ordering the Town to approve the zoning change, and certiorari review of the Town’s resolution. Thus, the Property Owners were seeking “an extraordinary remedy for which a record [of the Town’s resolution] must be reviewed.” WIS. STAT. § 781.03(1). An amended complaint was filed on November 17, 2020. The relevant statute provides that “the defendant”—in this case, the Town—“shall cause the record to be transmitted to the clerk of court in which the action or proceeding is pending.” *Id.* The statute does not provide an explicit deadline for compilation and transmittal of the record. However, a reasonable amount of time can be presumed and the Town was on notice as of the filing of the initial complaint.

Except as provided under subd. 3m., if a town affected by the proposed amendment disapproves of the proposed amendment, the town board of the town may file a certified copy of the resolution adopted by the board disapproving of the petition with the agency before, at or within 10 days after the public hearing. If the town board of the town affected in the case of an ordinance relating to the location of boundaries of districts files such a resolution, or the town boards of a majority of the towns affected in the case of all other amendatory ordinances file such resolutions, the agency may not recommend approval of the petition without change, but may only recommend approval with change or recommend disapproval.

The circuit court conducted five scheduling conferences from September 24, 2020, through April 16, 2021. The Town repeatedly promised to produce the record each time, but failed to do so, missing multiple deadlines that it had set for itself. Nor did the Town respond to the Property Owners' discovery requests. Among the excuses the Town made for its delay—many of which are repeated in the briefing it submitted to this court—were the employment of an inexperienced part-time municipal clerk to replace the clerk who retired in 2020, elections and a recall election that “strained the Town’s ability,” the implications of COVID-19, and audio recordings of Town Board meetings that were kept in random order with no date or time stamps.

Finally, on May 28, 2021, the Property Owners moved the circuit court for judgment in their favor based on the Town’s failure to meet its statutory obligation to transmit the record and respond to discovery requests and for failure to prosecute its defense. Following the notice of hearing, the Town produced to the circuit court—on June 28, 2021, nearly a year after the Property Owners filed suit—the Town’s records and audio recordings (not transcribed) of various proceedings “compiled by current officials to the best of their knowledge and ability.” At the hearing on July 20, 2021, the Town admitted this record was not certified, but asserted that it had produced a complete record and that if the Property Owners believed documents were missing, they could move the court to compel production of those documents. The Town further offered to work with the Property Owners to add any missing items to supplement the record.

At that same hearing, the circuit court said to the parties that “there [was] no record” for it to review in order to decide the case on the merits and it saw a record produced “to the best of [the Town’s] ability” as insufficient based on the statute for a full and complete record. Thus, the circuit court did not review the record the Town submitted. The court found that the Town “intentionally made [the staffing decisions that led to an inadequate record] because they wanted

to be tightwads.” Based on the Town’s “inexcusable neglect,” the court granted the Property Owners’ motion for relief by reversing the Town’s resolution opposing the zoning change. Five months later, on December 13, 2021, the circuit court granted the Property Owners’ motion to enforce judgment, ordering the County to publish and enact its original amendment to the zoning ordinance.

The Town appealed both the judgment and the order, arguing primarily that the circuit court could only interfere with the Town’s opposition to the County’s zoning amendment (its “legislative decision-making”) in the case of an erroneous exercise of discretion, excess of power, or error of law—and not without considering the record submitted. The Property Owners focus their response on the court’s broad inherent power to sanction parties in order to control litigation as the court sees fit.

Discussion

We agree with the Property Owners that this case is about the circuit court’s power to sanction; the circuit court did not decide the Property Owners’ lawsuit on the merits. The circuit court decided that the untimely and noncertified record was the equivalent of no record at all.

Thus, there is no decision on the legality of the zoning resolution for us to review.³ Rather, we review the sanction decision by the circuit court.

Courts have inherent power to “maintain their dignity, transact their business, [and] accomplish the purposes of their existence,” including “efficiently and effectively to provide the fair administration of justice.” *City of Sun Prairie v. Davis*, 226 Wis. 2d 738, 748, 751, 595 N.W.2d 635 (1999) (citation omitted). This includes the power to dismiss a lawsuit or enter judgment against a party. *Chevron Chem. Co. v. Deloitte & Touche*, 176 Wis. 2d 935, 947-50, 501 N.W.2d 15 (1993); *see also* WIS. STAT. §§ 804.12(2)(a)3., 805.03. In Wisconsin, though, these drastic sanctions may only be imposed when a party acts “egregiously or in bad faith.” *Industrial Roofing Servs., Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898, *opinion clarified on denial of reconsideration*, 2007 WI 62, 301 Wis. 2d 30, 731 N.W.2d 634 (per curiam). “Egregious” misconduct includes that which is “extreme, substantial, and persistent.” *Industrial Roofing Servs.*, 299 Wis. 2d 81, ¶43 (citation omitted); *Hudson Diesel, Inc. v. Kenall*, 194 Wis. 2d 531, 543, 535 N.W.2d 65 (Ct. App. 1995). A finding of bad faith necessarily requires a finding that the party being sanctioned acted intentionally or deliberately to delay or obstruct the litigation. *See Hudson Diesel*, 194 Wis. 2d at 543. When the conduct that is the basis for adverse judgment is not intentional and so not in bad faith, but still properly

³ The cases the Town relies upon in urging us to review the circuit court’s reversal of its resolution (mindful of the “limited judicial interference” allowed) say nothing about any interplay between a court’s power to sanction and a town’s legislative authority. Nor do they offer any reason why the court’s power to manage litigation should be diminished when a litigant is a municipality—especially where, as here, the municipality’s failure to prosecute would result in the very status quo that it wants. *See Quinn v. Town of Dodgeville*, 122 Wis. 2d 570, 584, 364 N.W.2d 149 (1985) (upholding shared zoning power between county and town on constitutionality challenge); *Cushman v. City of Racine*, 39 Wis. 2d 303, 307, 311, 159 N.W.2d 67 (1968) (noting the court’s limited scope of authority to review city’s zoning ordinance but nevertheless striking down the zoning ordinance at issue as unconstitutional).

characterized as “egregious,” the court must determine whether less severe sanctions would be effective. *Id.* at 545.

“[W]e review a circuit court’s decision to impose sanctions, as well as the particular sanction it chooses, for an erroneous exercise of discretion.” *Schultz v. Sykes*, 2001 WI App 255, ¶8, 248 Wis. 2d 746, 638 N.W.2d 604. We are not to determine whether we would have imposed the same sanction, but we determine whether the circuit court exceeded its discretion in sanctioning a party by failing to examine the relevant facts, apply the appropriate law, and reach a reasonable conclusion. *Industrial Roofing Servs.*, 299 Wis. 2d 81, ¶¶40-41; *Schultz*, 248 Wis. 2d 746, ¶8. Although we certainly understand the frustration of the circuit court with respect to the Town’s repeated delays in submitting a record, we conclude the circuit court erroneously exercised its discretion when it granted adverse judgment to the Property Owners.

Here, the circuit court erroneously exercised its discretion because it failed to ground its drastic sanction of judgment against the Town in a finding of egregious conduct or bad faith and, thus, did not apply the appropriate law. In fact, the court made no factual findings other than “inexcusable neglect.” The court noted that the Town “did not intend to thwart the legal process” but that it did “intentionally stick [its] head in the sand,” suggesting, perhaps, that it did not believe the Town acted in bad faith. And, as to egregious misconduct, there is no record of a finding of, for example, “extreme, substantial and persistent” behavior and no finding that other sanctions would be inadequate. See *Hudson Diesel*, 194 Wis. 2d at 543. And, the circuit court imposed the sanction despite the fact that the Town ultimately did file a record.

We do not disagree with the circuit court that “towns that know what they’re doing don’t [fail to keep records and produce them when obligated].” And we acknowledge the Property

Owners' frustration in a lack of resolution, through no fault of their own, for a case that has been pending for over two years. But, without a supported finding in the record of egregiousness or bad faith with regard to the Town's conduct in this litigation, we can only conclude the circuit court, by failing to apply the correct law, erroneously exercised its discretion by imposing the sanction of judgment against the Town.⁴

For these reasons, we reverse and remand for further proceedings.

IT IS ORDERED that the judgment and order of the circuit court are reversed and cause remanded for further proceedings. *See* 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

⁴ Because we have concluded the circuit court erroneously exercised its discretion, we do not address the Town's substantive claims regarding the court's failure to review the record it did submit or the related issue as to whether the Town's resolution should be upheld or overturned.