
TERRY JOHNSON, PAMELA JOHNSON,
and MARINA BAY BOAT RENTALS,
INC.,

Plaintiffs,

v.

Case No. 09CV624

CITY OF LAKE GENEVA,
Defendant and Third-Party
Plaintiff,

v.

HARBOR COVE CONDOMINIUM
ASSOCIATION, INC.,

Third-Party Defendant.

FILED
CIRCUIT COURT

APR 14 2011

CLERK OF COURTS - WALWORTH CO.
BY ELISABETH YAZBEC

MEMORANDUM DECISION

1.

APPEARANCES

- 1) The Plaintiff Marina Bay Boat Rentals by its Attorneys Godfrey, Leibsle, Blackbourn & Howarth, S.C., by Attorney Lisle W. Blackbourn of Elkhorn, WI.
- 2) The Defendant City of Lake Geneva by its Attorneys Stafford Rosenbaum, LLP, by Attorneys Ted Waskowski and Susan Allen of Madison, WI
- 3) The Third-Party Defendant Harbor Cove Condominium Association by its Attorneys Godfrey, Leibsle, Blackbourn & Howarth, S.C., by Attorney Lisle W. Blackbourn of Elkhorn, WI
- 4) The City of Lake Geneva by its City Attorney Daniel S. Draper, Attorney for Third-Party Plaintiff.

II.

PROCEEDINGS TO DATE

This is an action for declaratory judgment. The original Plaintiff remains. The City of Lake Geneva officials have been dismissed, leaving the Plaintiff a pier owner and the City of Lake Geneva in its municipal capacity.

Apparently there was a 1997 lawsuit between these same parties. This lawsuit was resolved by stipulation giving the Plaintiff time to reduce the length of its pier to 100' before the 2008 boating season. The Plaintiffs have not shortened their pier. The parties both have moved for summary judgment. These motions were heard on July 7, 2010 and adjourned to July 27, 2010. Briefs were ordered. The matter is now ready for decision,

III

DECISION AND DISCUSSION

Both Plaintiff and Defendant have moved for summary judgment.

A summary judgment is permitted under Rule Section 802.08.

The proper procedure the Court must take is set forth in the Rule (above) and as set forth in Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, (Ct. App.)(1993); the Court said at p 289;

*I. Summary Judgment is used to determine whether there are any disputed issues for trial. U.S. Oil Co. v. Midwest Auto Care Services, Inc. (cits omit). Appellate courts and trial courts follow the same methodology. Green Springs v. Kersten (cits omit). First, the pleadings are examined to determine whether they state a claim for relief. See *ibid.* If*

they do, and if the responsive pleadings join issue, the court must then examine the evidentiary record to determine whether there is a "genuine issue as to any material fact," and, if not, whether a party is thereby entitled to "judgment as a matter of law." Rule 802.08(2) Stats.

The well-known purpose of summary judgment is "to avoid trials where there is nothing to try." Rollins Burdick Hunter of Wisconsin, Inc., v. Hamilton, (cits omit).

Issues of fact cannot be determined at a motion for summary judgment.

For a discussion of Geneva Lake, summary judgment procedure, and the public trust doctrine, please see *State v. Town of Linn*, 205 Wis. 2d 426, (Ct. App.)(1996), and more particularly at p 430;

Geneva Lake is located in Walworth County and is a navigable lake which covers approximately 5262 acres. There are approximately 5000 private boats moored or docked on Geneva Lake. . . .

The City of Lake Geneva's ordinance in question is Section 90-141 et seq.

More particularly in question is the following:

*Sec. 90-142. Establishment of pierhead line.
(a) Pursuant to W.S.A., Section 30.31(3), and in the interest of the preservation and protection of the public's rights in the waters of Geneva Lake, the city, within its respective boundaries, does hereby establish a pierhead line on Geneva Lake which shall be at a distance of 100 feet waterward from the shoreline. The shoreline, for the purpose of this section, shall be the bulkhead lines described in the documents on file in the clerk's office.*

And also,

Sec. 90-148. Riviera Docks and other municipal piers excepted from subdivisions provisions.

*It is specifically intended that this subdivision not apply to the facilities known as Riviera Docks or any other municipal piers.
(Ord. No. 05-15, Section 1, 7-11-05)*

The parties entered into a stipulation involving pier length which has been marked as Exhibit One in the court file and annexed hereto containing the following language.

5. Beginning with the 2003 season, the pier length shall be within the 100 foot pierhead line required under existing section 90-142 Lake Geneva Ordinance.

6. In the event Municipal Code section 90-142 is ever amended, plaintiffs shall be allowed to extend the pier to the maximum length allowed under section 90-142 Lake Geneva Municipal Code.

8. The action shall be dismissed with prejudice except that either party may reopen this action for purposes of enforcement of the Stipulation and without costs to either party.

The Hon. Michael S. Gibbs entered an order based upon that stipulation on May 26, 1998.

The parties then entered into a further amended stipulation marked as Exhibit 3 in the court file and annexed hereto containing the following language.

5. Beginning with the 2008 season, unless required sooner hereinabove, or unless an additional extension of time is granted to the Plaintiffs by the Defendant to maintain the pier length described in said Exhibit "A", the pier length shall be reduced to within the 100 foot pier head line required under existing Section 90.142, Lake Geneva Municipal Code.

The undersigned then entered an order based upon that amended stipulation on November 14, 2002.

Also in the record, it should be noted, the Department of Natural Resources, Water Management Specialist issued to the Plaintiff a pier permit on May 4, 1999 in its present configuration which exceeds 100' in length.

With respect to the ordinance it requires the Plaintiffs' pier to be 100' in length both by stipulation and by ordinance I see no amendment permitting longer piers under Section 90-142. The pier is plainly in violation of Section 90-142 and its own stipulation.

The Plaintiff alleges that the DNR permits a pier longer than 100'. A permit is now on file. Section 30.13 Wis. Stats;

*(2) WHARVES, PIERS AND SWIMMING RAFTS
REGULATED. A municipality may enact
ordinances not inconsistent with this section
regulating the construction and location of
wharves, piers and swimming rafts located within or
attached to land within that municipality.*

There is no question that the pier at issue is within the corporate limits of the City of Lake Geneva. What really is at issue is the claim by the Plaintiff that the City has exempted itself by ordinance from the 100' pier length. This gives rise to the denial of equal protection by the City argument and the selective prosecution argument. The Plaintiff points out that the City's Riviera pier with five prongs extending into the lake has commercial aspects, the West end pier has rental slips, a boat launch facility and the White River Lagoon facility all are longer than 100'. All of these piers generate income for the City and all are open to the public for walking, sitting, fishing or sight-seeing.

In Heller v. Doe, 509 U.S. 312 (1993), the Supreme Court teaches us;

We many times have said, and but weeks ago repeated, that rational basis review in equal protection analysis “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993). See also e.g., Dandridge v. Williams, 397 U.S. 471, 486 (1970). Nor does it authorize “the judiciary [to] sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas that neither affect fundamental rights nor proceed along suspect lines.” New Orleans v. Duke, 427 U.S. 297, 303 (1976) (per curiam). For these reasons, a classification neither involving fundamental rights nor proceeding along suspect lines is accorded a strong presumption of validity.

A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification. “[A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.” Beach Communications, supra, 315. See also, e.g., Vance v. Bradley, supra, at 111; Hughes v. Alexandria Scrap Corp., 426 U.S. 794, 812 (1976); Locomotive Firemen v. Chicago, R.I. & P. R. Co., 393 U.S. 129, 139 (1968). A statute is presumed constitutional, see supra, at 319, and “[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,” Lehnhausen v. Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973) (internal quotation marks omitted), whether or not the basis has a foundation in the record.

In State ex rel. Baer v. Milwaukee, 33 Wis. 2d 624 (1967) our Supreme Court also teaches at p 630;

Concerning the underlying presumption of constitutionality of a municipal ordinance and its effect, we have said:

" . . . [A]n ordinance is presumed to be constitutional and . . . the attacking party must establish its invalidity beyond a reasonable doubt. If there is any reasonable basis for its enactment, the ordinance must be sustained. Furthermore, this court will not interfere with a municipality's exercise of police power unless it is clearly illegal."

In short, a person who attacks an ordinance as unconstitutional must carry a burden of proof, beyond a reasonable doubt, that no reasonable basis exists for the enactment of the ordinance.

Further at pp 632 & 633 the Court went on to say;

Five standards for proper classification in an ordinance were promulgated by this court in State ex rel. Ford Hopkins Co. v. Mayor. (cits omit). . .

Before appellant can avail himself of these rules to challenge any distinctions among classes of recreation or classes of pool halls, he again must overcome a presumption that the classifications are reasonable and proper. This court stated this presumption in Kiley v. Chicago, M. & St.P.R. Co. as follows:

" . . . On the other hand, the question whether there is room or necessity for classification is one resting primarily with the legislature, and no court is justified in declaring classification baseless unless it can say without doubt no one could reasonably conclude that there is any substantial difference justifying different legislative treatment."

This Court can easily see that the City has allocated a scarce resource, i.e., access to Geneva Lake for the public by creating a distinction between public and private piers.

Anyone who has walked on the Riviera pier, enjoyed the view of the lake, enjoyed the sun and the sounds of the lake can readily see the reason for the distinction.

The private pier owners can bar entry to the pier by the public, charge whatever the

traffic will bear for slip rental and allocate slips based upon whatever system of discrimination it chooses.

Ultimately the City must respond to public pressure or demands in its pier operation through the City council.

The Plaintiffs' point out that there apparently are five other private pier owners subject to the ordinance which have not abided by the 100' requirement and have not been prosecuted (yet).

In *State v. Dums*, 149 Wis. 2d 314 (Ct. App.)(1989) at p 321,

Wisconsin's separation-of-powers principle prohibits a substantial encroachment by one branch of government on a function that has been delegated to another branch.

Wisconsin case law has repeatedly held that the discretion whether to charge and how to charge vests solely with the district attorney. Unnamed Petitioners, 136 Wis. 2d at 125-26, 410 N.W. 2d at 785. It is also recognized that the district attorney's broad discretion whether to commence a prosecution is almost limitless.

In *Vretenar v. Hebron*, 144 Wis. 2d 655, (Sup.Ct.) at 664;

The town board, acting through the town attorney, is not required to prosecute every infraction of the municipal ordinance code.

And at p 665;

Similarly, there is no obligation on the part of municipal officials to prosecute all cases in which

an individual commits a violation of the municipal ordinance code. See Karpinski, (cits omit). This is true notwithstanding, as the plaintiffs claim, that the violation is open and notorious. To hold otherwise would be tantamount to divesting a municipality of the discretion necessary for effective and efficient law enforcement. This we decline to do.

I decline to entertain the selective prosecution claim per the above.

The City claims it is immune from the Plaintiff's claims under:

893.80 Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits.

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.

Clearly, the City Council resolution requiring compliance with its ordinance and authorizing suit is a legislative function for which there is immunity. I do not reach the issue of the Plaintiffs' right under;

30.133 Prohibition against conveyance of riparian rights. (1) Beginning on April 9, 1994, and except as provided in s. 30.1335, no owner of riparian land that abuts a navigable water may grant by an easement or by a similar conveyance any riparian right in the land to another person, except for the

right to cross the land in order to have access to the navigable water. This right to cross the land may not include the right to place any structure or material, including a boat docking facility, as defined in s. 30.1335(1)(a), in the navigable water.

Nor does it appear that I need to arrive at a decision.

I therefore grant the Defendant City of Lake Geneva's summary judgment in all respects without costs and dismiss the Plaintiffs' motion for summary judgment in all respects.

The matter of the assessment of forfeitures against the Plaintiff by the City will be calendared.

Dated this 14th day of April, 2011.

BY THE COURT:



Hon. John R. Race
Circuit Court Judge, Br. III
Walworth County, Elkhorn, WI

cc: Attorney Lisle W. Blackburn
✓ Attorney Daniel S. Draper
Attorney Ted Waskowski

52798

TERRY JOHNSON
PAMELA JOHNSON
and
MARINA BAY BOAT RENTALS, INC.

STIPULATION AND ORDER

FILED
CIRCUIT COURT
MAY 26 1998

Plaintiffs,

VS

Clerk of Courts Walworth Co.
By: Claudia J. Last

Case No. 97 CV 325

CITY OF LAKE OF GENEVA

Code 30701

Defendant.

IT IS HEREBY STIPULATED AND AGREED by and between the parties that the following shall be presented as an order for the Court's consideration:

1. The pier that is the subject of this action shall remain at its present length during the 1998 season.
2. Beginning with the 1999 season, the length of the pier shall be reduced the equivalent of one boat slip, (approximate reduction of 11 feet). A copy of the pier configuration for the 1999 season is attached as Exhibit "A".
3. The defendant will cooperate in the application process for the reconfigured pier which shall be approved by the Wisconsin Department of Natural Resources.
4. The plaintiffs shall be allowed to maintain the pier described in Exhibit "A" until the end of the 2002 season.
5. Beginning with the 2003 season, the pier length shall be within the 100 foot pierhead line required under existing section 90-142 Lake Geneva Ordinance.
6. In the event Municipal Code section 90-142 is ever amended, plaintiffs shall be allowed to extend the pier to the maximum length allowed under section 90-142 Lake Geneva Municipal Code.

7. All other provisions, agreements contained in the Baker Park Dedication, 1986 Baker Park Resolution and the 1983 Baker Park Agreement remain in effect.

8. The action shall be dismissed with prejudice except that either party may reopen this action for purposes of enforcement of the Stipulation and without costs to either party.

Richard W. Torhorst
Richard W. Torhorst
State Bar No. 01015127
Attorney for Plaintiff
Dated: 5/19/98

Michael J. Rielly
Michael J. Rielly
State Bar No. _____
Attorney for Defendant
Dated: 5/20/98

ORDER

IT IS HEREBY ORDERED that the Stipulation of the parties is the Order of this Court.

Dated this 26 day of May, 1998.

BY THE COURT:

MSJ
Circuit Judge

I certify that on 5-27-98
I served the within document on the
following persons, by mail pursuant
to Wisconsin Statute 801.14 (2).

Michael Rielly
To: Attorney Michael J. Rielly, City Attorney
City of Lake Geneva
PO Box 3
Lake Geneva WI 53147

TERRY JOHNSON
PAMELA JOHNSON
and
MARINA BAY BOAT RENTALS, INC.

AMENDED
STIPULATION AND ORDER

Plaintiffs.

vs.

Case No. 97 CV 325

FILED
NOV 14 2002 \$

CITY OF LAKE GENEVA.

Code 30701

Defendant.

WALWORTH COUNTY
CLERK OF CIRCUIT COURT

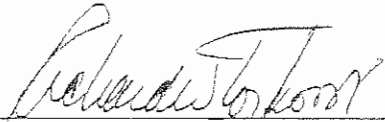
IT IS HEREBY STIPULATED AND AGREED by and between the parties that the following amendment be made to the Order of the Court entered on May 26, 1998. as follows:

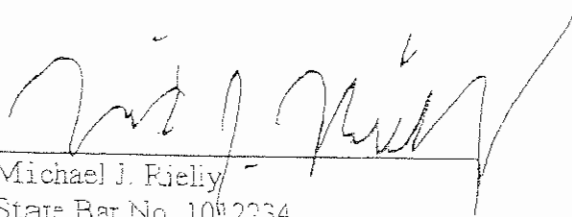
Paragraphs 4 and 5 thereof shall be amended to provide as follows:

4. The Plaintiffs shall be allowed to maintain the pier described in Exhibit "A", on file with the court, until the end of the 2007 season, unless Marina Bay Boat Rentals, Inc. discontinues the existing business upon said pier or the Johnsons transfer a majority interest in Marina Bay Boat Rentals, Inc. to a third party, and in either event the pier length must then be reduced to within the 100 foot pier head line required under §90.142, Lake Geneva Municipal Code.
5. Beginning with the 2008 season, unless required sooner hereinabove, or unless an additional extension of time is granted to the Plaintiffs by the Defendant to maintain the pier length described in said Exhibit "A", the pier length shall be

reduced to within the 100 foot pier head line required under existing §90.142.

Lake Geneva Municipal Code.


Richard W. Torhorst
State Bar No. 01015127
Attorney for Plaintiff
Dated: 11/5/02


Michael J. Rielly
State Bar No. 102234
Attorney for Defendant
Dated: 11/13/02

ORDER

IT IS HEREBY ORDERED that the Amended Stipulation of the parties is the Order of this Court.

Dated this 14 day of NOV, 2002.

BY THE COURT:


Circuit Judge