

JOSEPH PETERS, et al.,

Plaintiffs,

Case No. 09CV020225

v.

CITY OF MILWAUKEE, et al.,

Defendants.

DEFENDANTS' MOTION TO DISMISS
FOR FAILURE TO COMPLY WITH NOTICE OF CLAIM
REQUIREMENTS OF WIS. STAT. § 893.80

The defendants, City of Milwaukee, et al., by their attorneys, Grant F. Langley, City Attorney, by Adam B. Stephens, Assistant City Attorney, hereby move the court to dismiss the above-captioned matter based upon plaintiffs' failure to comply with the provisions of Wis. Stat. § 893.80(1)(a) and (b). Plaintiffs are three residential property owners in Milwaukee who have challenged a recent enactment by the City of Milwaukee of a residential rental inspection and certification pilot program pursuant to Section 200-53, Milwaukee Code of Ordinances. Plaintiffs' four claims of relief allege that the new ordinance is unconstitutionally vague, fatally defective, fails to provide impartial review and interferes with the constitutional right to contract. However, plaintiffs have failed to comply with the requirements of § 893.80(1)(a) and (b) and their complaint should be dismissed.

In order to bring an action against a municipality, a municipality must receive notice of claim pursuant to Wis. Stat. § 893.80(1)(b) unless an exception is provided for in the statutes or in case law interpreting those statutes. *City of Racine v. Waste Facility Citing Board*, 216 Wis. 2d 616, 620, 575 N.W.2d 712 (1998). Wisconsin Stat. § 893.80(1)(a) and (b) states as follows:

893.80 Claims against governmental bodies or officers, agents or employees; notice of injury; limitation of damages and suits. (1) 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:

- (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; and
- (b) A claim containing the address of the claimant and an itemized statement of the relief sought is presented to the appropriate clerk or person who performs the duties of a clerk or secretary for the defendant fire company, corporation, subdivision or agency and the claim is disallowed.

The purpose of the statute is to provide the governmental subdivision an opportunity to compromise and settle a claim without costly and time consuming litigation. *Racine v. Waste Facility Citing Board*, 216 Wis. 2d at 622; *State ex rel. Auchinleck v. Town of La Grange*, 200 Wis. 2d 585, 593, 547 N.W.2d 587 (1996), citing *DNR v. City of Waukesha*, 184 Wis.2d 178, 195, 515 N.W.2d 888 (1994). Especially important in these difficult budgetary times, the "[t]he governmental entity must have enough information so that it can budget accordingly for either settlement or litigation." *Racine*, 216 Wis. 2d at 622 (citations omitted).

In *City of Racine v. Waste Facility Citing Board*, *supra*, Residents Against Traffic Expansion (RATE) intervened as a defendant and filed a counterclaim against the city

and a cross-claim requesting declaratory relief. The Circuit Court granted judgment to the city because rate failed to comply with the notice of claim requirements. The court held that unless a specific enforcement mechanism existed in the statutes, the notice of claim provision is a "necessary prerequisite to all actions" brought against governmental entities. *Racine*, at 620. No specific statutory provision exists which applies to the facts before this court.

In *Johnson v. City of Edgerton*, 207 Wis. 2d 343, 350, 558 N.W.2d 653 (Ct. App. 1996), the Court of Appeals held that § 893.80 applies to all causes of action, including those seeking injunctive relief, and not to just those in tort or for money damages. In footnote 10 of *Willow Creek Ranch LLC v. Town of Shelby, et al.*, 200 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693, the Supreme Court declined to decide whether to address the "broad" reach of *Johnson* and its applicability to the cases in which equitable estoppel may lie against a municipality so as to enjoin the enforcement of an ordinance.

The defendants' motion to dismiss for failure to comply with § 893.80 is premised specifically on the plaintiffs' failure to supply a notice of claim and itemization of relief sought as required in subsections (1)(a) and (b). Therefore, the holdings relative to immunity under § 893.80(4) in *Schmeling v. Phelps*, 212 Wis. 2d 898, 569 N.W.2d 784 (Ct. App. 1997) and *Willow Creek Ranch LLC v. Town of Shelby, et al.*, 200 WI 56, 235 Wis. 2d 409, 611 N.W.2d 693 are inapplicable to this particular motion. The defendants' acknowledge that municipalities do not benefit from a shield of immunity in actions seeking declaratory relief. *Willow Creek Ranch LLC* at ¶ 36, citing *Schmeling*, 212 Wis. 2d at 519. Courts have recognized that while local officials should not be unduly hampered or intimidated in the use of their discretion or in the execution of their duties,


sound public policy requires that citizens be afforded an opportunity for a court to declare their rights. Therefore, there is no immunity under § 893.80(4) for declaratory actions. *Willow Creek Ranch LLC* at ¶ 48.

The defendants pled a lack of compliance with Wis. Stat. § 893.80(1) as a defense in the answer and affirmative defenses filed on January 14, 2010 and the scheduling conference data sheet filed before this court on February 24, 2010. Upon information and belief, the plaintiffs have not filed a notice of claim with the City of Milwaukee regarding the matter before the court in the above-captioned matter. Plaintiffs carry the burden of proving that the notice of claim requirements have been met. *Moran v. Milwaukee County*, 2005 Wis. App. 30, ¶ 3, 278 Wis. 2d 747, 693 N.W.2d, review denied, 2005 WI 60, 281 Wis. 2d 115, 697 N.W.2d 473 (2005); *Elkhorn Area School District v. East Troy Community School District*, 110 Wis. 2d 1, 5, 327 N.W.2d 206, 208 (Ct. App. 1982).

Because plaintiffs have failed to comply with the requirements of § 893.80(1)(a) and (b), this case should be dismissed.

Dated at Milwaukee, Wisconsin this 19 day of March, 2010.

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