STATE OF WISCONSIN CIRCUIT COURT RACINE COUNTY

VINCENT MILEWSKI, and
MORGANNE MACDONALD,

Plaintiffs,

vs.

Case No.: 14-CV-1482
Case Code: 30701
Declaratory Judgment

TOWN OF DOVER, BOARD OF
REVIEW FOR THE TOWN OF DOVER, and
GARDINER APPRAISAL SERVICE, LLC,

Defendants.

DEFENDANT, GARDINER APPRAISAL SERVICE, LLC'S BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

NOW COMES the Defendant, Gardiner Appraisal Service, LLC ("Gardiner"), by its attorneys, Axley Brynelson, LLP, and submits this Brief in Support of its Motion for Summary Judgment.

INTRODUCTION

This is an action challenging a real property tax assessment. Plaintiffs own a residence in the Town of Dover, Racine County. Gardiner was hired by Dover to provide expert assessment help for a revaluation of the entire town. In that process, Gardiner changed the Plaintiffs' assessment, which had remained the same from 2004 to 2013. Gardiner made that change without the benefit of inspecting the interior of the premises because the Plaintiffs intentionally refused the assessor's request for entry. Plaintiffs are not happy that their assessment increased and claim, without any factual support, that the assessment was a deliberate act of retaliation, rather than a professional exercise of discretion to set a reasonable assessment with less than full information available.

There are two claims plead against Gardiner: (1) Claim for violation of 42 USC §1983; and (2) Claim for violations of Wis. Stats. §§ 70.503 and 70.501. In response, Gardiner first contends that Plaintiffs, by virtue of their refusal to allow inspection and failure to lawfully challenge their assessment at the board of review level, are barred from challenging this assessment. Second, there are no facts in the record to support a Section 1983 claim against Gardiner. Third, Plaintiffs have no right to recovery under their Chapter 70 direct claims against Gardiner.

PROPERTY TAX ASSESSMENT LAW

Wis. Stats. Chap. 70 governs property taxation in Wisconsin. The general directive is as follows:

> Real property shall be valued by the assessor in the manner specified in the Wisconsin property assessment manual provided under s. 73.03 (2a) from actual view or from the best information that the assessor can practicably obtain, at the full value which could ordinarily be obtained therefor at private sale. In determining the value, the assessor shall consider recent arm's length sales of the property to be assessed if according to professionally acceptable appraisal practices those sales conform to recent arm's-length sales of reasonably comparable property; recent arm's length sales of reasonably comparable property; and all factors that, according to professionally acceptable appraisal practices, affect the value of the property to be assessed.

Wis. Stats. §70.32(1) (emphasis added).

The Wisconsin Property Assessment Manual ("WPAM")[1] "serves as the guide for uniform assessment throughout the State." (Intro) "WPAM is developed and maintained by the Department of Revenue, Office of Assessment Practices per sec. 73.03(2a), Wis. Stats., and is updated on an annual basis." (Intro) Wis. Stats. § 70.32 "requires that assessors utilize WPAM when valuing real property." (Intro)

[1] The Affidavit of Gregory Gardiner, at Exhibit E, incorporates the excerpts of the Wisconsin Property Tax Assessment Manual as referenced in this Brief.

Here, Gardiner was performing a full revaluation of the Town of Dover. "A 'revaluation' is the hiring of expert help by a municipality to aid the assessor in making new, equitable assessments." (Guide for Property Owners[2], 19) A revaluation is appropriate when "PRC [Property Report Card] is outdated or inaccurate, or assessment uniformity is poor or full revaluation hasn't been done in 10 years …." (WPAM, 4-3) For full revaluations, the WPAM requires the assessor to "Inspect Interior" of "All Buildings." (4-3)(19-1;19-12)

Per the WPAM, "[t]he statutes require that real … property be valued from actual view or the best information obtainable." (WPAM, 14-57)(*See* Wis. Stats. 70.32). "In the case of real property, actual view requires a detailed viewing of the interior and exterior of all buildings and improvements and the recording of complete cost, age, use, and accounting treatments." (WPAM, 14-57)(emphasis added).

In keeping a record of every parcel, the assessor is directed to keep accurate parcel data. (WPAM, 5-33). "The assessor must therefore make reasonable attempts to obtain and verify the data in each field. This includes sending a request by certified mail to the property owner for a physical viewing of the interior, if unable to gain entry during the normal course of field verification." (WPAM, 5-33) (emphasis added) The WPAM also requires that the property record for each parcel contain information as to the basement, physical condition of interior, fireplaces, plumbing fixtures, and the date of most recent interior viewing. (WPAM, 5-34). "It is essential that the assessor perform a thorough, detailed, and objective viewing of each property" which is "field verified and accurate." (WPAM, 8-20, 8-21) All such data emphasize the need and import of an interior inspection. (*See* WPAM, 8-21 to 8-23)

[2] The Affidavit of Gregory Gardiner, at Exhibit F, incorporates the "Guide for Property Owners" published by the WI Department of Revenue, as referenced in this Brief.

The WPAM also addresses the "Collection of Property Data" by assessors. "The data collected on each property should be complete, accurate, and consistent. All information should be collected and recorded on the property record cards. When making a field viewing, the lister should: … (6) View the interior of the building, recording physical data…." (WPAM, 19-12)

The WPAM contains language for a model letter to property owners seeking to inspect the interior. The model language includes the statement: "Please note that failure to make an appointment may be considered a refusal to allow an interior viewing in which case we will estimate the quality, condition, and attributes of the interior of your property." (WPAM, 13-10) The WPAM gives specific content for the letter at pages 18-18, 18-19.

Appraisers also look to "The Appraisal of Real Estate"[3] to guide their assessment practices. (Gardiner Affidavit, ¶22) "An important part of every appraisal is the description of the type, quality, and condition of the building or buildings on the site and the analysis of the structure's design." (The Appraisal of Real Estate, 219) "The process of analyzing the building improvements encompasses three interrelated tasks: site visit, building description, [and] description and analysis of architectural style and functional utility." Id. "In the valuation process, the appraiser gathers much of the information needed to describe and analyze the improvements by personally visiting the site of the real estate:

> Careless or inadequate inspection of the physical characteristics and features of the subject and comparable properties can create difficulties for an appraiser in later phases of the appraisal. For example, if a structural problem is overlooked, the conclusions of all three approaches to value could be meaningless. The goal of the site visit is identifying the site and building characteristics that create value.

Id.

[3] The Affidavit of Gregory Gardiner, at Exhibit G, incorporates excerpts from "The Appraisal of Real Estate" published by the Appraisal Institute, as referenced in this Brief.

"The importance of a site visit should not be underestimated." Id. at 221. "Much of the primary data and appraiser collects comes from the process of visiting the site and observing the site and improvements." Id.

Fannie Mae[4] also requires an inspection for an appraisal "based on the interior and exterior." (Gardiner Affidavit, ¶23, Exh. H, at p. 4) "The appraiser is expected to consider and describe the overall quality and condition of the property...." Id.

Further, the Residential Guidebook for Summary Appraisal Reports[5], emphasizes the need to inspect a premises to evaluate the "effective age," defined as "the age indicated by the condition and utility of the structure. Effective age can be more, less, or the same as actual age. The effective age estimate takes into consideration abuse, neglect, general maintenance, and all other influences on the physical condition of the improvements and is determined by an appraiser's judgment, not through market derivation." (Gardiner Affidavit, ¶24, Exh. I, at p. 19)

Finally, the "Standard Specifications for Revaluation of General Property Pursuant to Chapter 70, Wisconsin Statutes[6]," provide in part: "The assessor shall inspect the interior of a minimum of 90% of the major buildings of each class of improvements, noting both the interior and exterior features on the proper report card to provide an accurate and complete listing for each improvement." (Gardiner Affidavit, ¶25, Exh. J, at p. 3: No. 20(c)) The Standard Specifications also affirm that if a written request to inspect the interior of a building is denied, the refusal "shall constitute a loss of appeal of the assessment to the local board of review and further appeal avenues; should the requests to inspect major buildings be denied, the appraiser

[4] The Affidavit of Gregory Gardiner, at Exhibit H, incorporates excerpts from "Appraisal and Property Report Policies and Forms Frequently Asked Questions" published by Fannie Mae, as referenced in this Brief.
[5] The Affidavit of Gregory Gardiner, at Exhibit I, incorporates excerpts from the "Residential Guidebook for Summary Appraisal Reports," as referenced in this Brief.
[6] The Affidavit of Gregory Gardiner, at Exhibit J, incorporates the "Standard Specifications for Revaluation of General Property Pursuant to Chapter 70, Wisconsin Statutes," as referenced in this Brief.

shall list and value the improvements according to the best information practicably obtainable." (Gardiner Affidavit, ¶25, Exh. J, at p. 4: No. 20(h))

The WPAM incorporates the prohibition set forth in §70.47(7)(aa) when a property owner refuses a property view: "No person shall be allowed to appear before the BOR, to testify to the BOR by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property." (WPAM, 18-8; 18-17; 18-21)

Section 70.47(7)(a) establishes that: "No person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of that person's property liable to assessment in such district and the value thereof."

FACTUAL BACKGROUND

Gardiner Appraisal Service, LLC ("Gardiner"), is a private entity engaged by numerous local governments across the State of Wisconsin to perform assessment services for purposes of property taxes. (Gardiner Affidavit, ¶ 6) Gardiner for many years has provided such services to the Town of Dover ("Dover") in Racine County. (Gardiner Affidavit, ¶ 7)

In 2013, Gardiner was acting under a written contract with Dover to perform a Revaluation of the entire town. (Gardiner Affidavit, ¶ 8) The "Revaluation Contract" between Gardiner and Dover specifies that:

- Dover "desires to obtain an appraisal of all specified real property parcels within the Town of Dover, Racine County…."
- "All work shall be accomplished in general accordance with the standard specifications set up for re-valuation or re-assessment of real and personal property pursuant to Chapter 70 of the Wisconsin Statutes."
- "The project would begin in 2012 and be completed for the 2013 Board of Review."

- "Assessors will view the exterior and interior of all structures unless denied access after mailing a request to owner by certified mail."

(Gardiner Affidavit, Exh. A)

With respect to the Plaintiff's residence, an assessor for Dover was last inside the home in 2004. Plaintiffs had then granted permission for inspection. (Gardiner Affidavit, ¶ 9)

In 2013, Gardiner sent a written notice to Plaintiffs stating that "We must view the interior of your property for the Town wide revaluation program which is in progress." It continues, "An assessor will stop by to view your property on Tues, Aug 20 at 6:10 PM." (Gardiner Affidavit, ¶ 10)

On August 20, 2013, a representative of Gardiner appeared at the Plaintiffs' residence, 1232 Linden Lane, and sought to inspect the interior of the residence. The homeowner denied entry to the interior of the home. (Gardiner Affidavit, ¶ 11)

Thereafter, Gardiner sent a letter to Plaintiffs dated October 4, 2013, stating: "We have not yet viewed the interior of your building located in the Town of Dover on land identified as tax parcel number, 032022243000, located at 1232 Linden Ln, because you have refused us entry." (Gardiner Affidavit, ¶12, Exh. B) The letter invites the Plaintiffs to schedule an appointment to view the property by a date certain. It notes that "[i]f you fail to schedule an appointment your property will then be assessed according to the Wisconsin State Statutes provided below." Id. (quoting from Wis. Stats. §§70.32(1) and 70.47(7)(aa) – the latter of which prohibits an appearance at the Board of Review upon refusal to view a property). This letter was sent Certified Mail by Gardiner. (Gardiner Affidavit, ¶12, Exh. B)

The Plaintiffs responded with an undated letter admitting that: "Today I received a certified letter from Gardiner Appraisal Service that reiterates their incorrect interpretation of state statutes and threatens to refuse to allow us to appear before the Board of Review if we do

not allow them entry into our residence." (Gardiner Affidavit, ¶13, Exh. C) Said letter made clear that no internal viewing of the residence would be allowed. Id.

At no time after the October 4th letter did the Plaintiffs contact Gardiner to arrange an internal viewing of their residence. No such inspection ever occurred as part of the 2013 revaluation. (Gardiner Affidavit, ¶14)

The Plaintiffs appeared at the Dover Board of Review on November 25, 2013 seeking to object to the assessment on their property. The Board of Review rejected this request, finding that Plaintiffs had refused a reasonable request by certified mail of the assessor to view the property, and therefor waived their appeal rights before the Board of Review. (Gardiner Affidavit, ¶15)

In making its assessment of the Plaintiffs property at 1232 Linden Lane, Gardiner did not intentionally establish an assessed value at more than its true value as prescribed by law. Gardiner was not motivated to set the value at an incorrect amount. (Gardiner Affidavit, ¶16)

Because Gardiner was not permitted into the home in 2013, Gardiner could not accurately determine the effective physical, functional and economic obsolescence of the structure, curable or non-curable. Without the accurate information, it was not possible to do an accurate cost, market, or income approach to valuation. Gardiner could not verify whether any remodeling had been performed in the prior nine (9) years. A single remodel project, like a kitchen or bath, could have significantly increased the value of the home. On average, approximately 70 percent of a home's value is on the interior. Gardiner could not verify whether any such remodeling or improvements were made over those nine (9) years. (Gardiner Affidavit, ¶17)

The Plaintiff's improvements were assessed at $227,800 from 2004 through 2012. In 2013, Gardiner changed the assessment on improvements to $261,000. See Exhibit D. Gardiner

reached this number after considering: (a) the possibility of remodeling over a nine (9) year period which was not disclosed and could not be verified; (b) an inability to determine if the effective age of the home increased or decreased; (c) reasonable assumption that homes in which no inspection is permitted will have less increase in effective age than average; (d) that it is not fair to assume that there have been no improvements for any home where access has been denied; (e) that assessed values did increase in 2013 for many homes in the Town of Dover and the overall assessed value of improvements increased in 2013 over the prior year; and (f) a thirteen percent increase in value from 2004 to 2013 is not uncommon. (Gardiner Affidavit, ¶18)

Per the testimony of Mr. Gardiner, Gardiner used its best professional judgment as to the assessed value of the Plaintiffs' home in 2013. Gardiner believes the increase was reasonable given the entirety of the history and circumstances cited herein, as a change from 2004 to 2013 assessed value. (Gardiner Affidavit, ¶19)

SUMARY JUDGMENT STANDARD

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. § 802.08(2), Stats.; *see also* M & I First Nat'l Bank v. Episcopal Homes Management, Inc., 195 Wis. 2d 485, 496-97, 536 N.W.2d 175, 182 (Ct. App.1995). Summary judgment methodology is well-established. The Court should examine the summary judgment submissions to determine whether there actually is any "genuine issue of material fact," and if not, "whether a party is thereby entitled to 'judgment as a matter of law.'" Transportation Ins. Co. v. Hunzinger Const. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993); Tamminen v. Aetna Cas. & Sur. Co., 109 Wis. 2d 536, 550, 327 N.W.2d 55 (1982).

Once a prima facie case for summary judgment is established, the opposing party "may not rest upon the mere allegations or denials of the pleadings, but must, by affidavits or other statutory means, set forth specific facts showing that there exists a genuine issue requiring a trial." Board of Regents v. Mussallem, 94 Wis. 2d 657, 673, 289 N.W.2d 801 (1980). If the party opposing summary judgment fails to offer specific evidentiary facts to demonstrate a genuine issue for trial in response to the movant's submissions, then summary judgment "shall be entered against such party." Larson v. Kleist Builders, Ltd., 203 Wis. 2d 341, 345, 553 N.W.2d 281 (Ct. App. 1996). An asserted factual dispute must be material; that is, it must concern a fact that affects the resolution of the controversy. Clay v. Horton Mfg. Co., Inc., 172 Wis. 2d 349, 353-54, 493 N.W.2d 379 (Ct. App. 1992).

DISCUSSION

I. WIS. STATS. CHAPTER 70 PRECLUDES PLAINTIFFS FROM SEEKING RELIEF OUTSIDE THE APPEAL PROCESSES PROVIDED THEREIN, WHICH PLAINTIFFS HAVE WAIVED BY THEIR ACTS AND OMISSIONS.

The Plaintiffs here are seeking to circumvent a clear statutory limitation on the right to appeal a real property tax assessment. Because they deliberately rejected the statutorily-required interior inspection of their home, there are consequences. The first consequence was the prohibition on their objecting at the Board of Review. The subsequent consequence, relevant here, is the lack of a judicial remedy when there were no proceedings at the Board of Review. Based on the undisputed factual history, the Plaintiffs waived their rights to pursue this appeal.

The law in Wisconsin is clear: "No person shall be allowed to appear before the board of review, to testify to the board by telephone or to contest the amount of any assessment of real or personal property if the person has refused a reasonable written request by certified mail of the assessor to view such property." Wis. Stats. §70.47(7)(aa). The Plaintiffs lost the opportunity

to contest their assessment at the Board of Review because of their refusal of such a request to view their property.

Section 70.47(13) sets forth the process for judicial review of a property tax assessment:

> Except as provided in this subsection and in ss. 70.85 and 74.37[7], appeal from the determination of the board of review shall be by an action for certiorari commenced within 90 days after the taxpayer receives the notice under sub. (12). The action shall be given preference. . . . If the appellant challenges the value determination that the board made at a proceeding under sub. (7)(c), the court shall presume that the board's valuation is correct, except that the presumption may be rebutted by a sufficient showing by the appellant that the valuation is incorrect. If the presumption is rebutted, the court shall determine the assessment without deference to the board of review and based on the record before the board of review, except that the court may consider evidence that was not available at the time of the hearing before the board, that board refused to consider, or that the court otherwise deems to should be considered in order to determine the correct assessment....

Section 70.47(13) provides the only methods for appeal of a property tax assessment. The Plaintiffs here have not availed themselves to any of those methods. None of those remedies, notably, are available to a party who has failed to proceed with an objection before the board of review. Hermann v. Town of Delevan, 215 Wis.2d 370, 381 (Wis. 1998). As the Hermann Court concluded:

> The tax appeal administrative procedures of chs. 70 and 74 of the Wisconsin Statutes are a highly evolved and carefully interwoven set of statutes providing a comprehensive remedy for individuals seeking redress of excessive assessments. Under this exclusive statutory scheme, an objection before the board of review pursuant to Wis. Stat. 70.47(7) was an express condition precedent to filing the taxpayer's challenging the valuation at which their real property was assessed for taxation. Being a statutory condition precedent, it was necessary for the taxpayers to allege compliance therewith in their complaint. No such objection was alleged. As a result, there are no conditions under which the taxpayers can recover....

Hermann , 215 Wis.2d at 394 (emphasis added).

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[7] Sec. 70.85 covers review of assessments by the Department of Revenue, and is not applicable. Sec. 74.37 covers claims for excessive assessments. The Plaintiffs have not filed such a claim nor followed the procedures outlined in that section, such that sec. 74.37 is also inapplicable here.

Wisconsin Courts have made clear that a taxpayer must exhaust his administrative remedies before the board of review prior to seeking judicial relief. It is also clear that failure to proceed before the Board of Adjustment is an automatic failure to exhaust administrative remedies. Clear Channel Outdoor, Inc. v. City of Milwaukee, 2011 WI App 117, ¶7-9.

As noted in Clear Channel: "No person shall be allowed in any action or proceedings to question the amount or valuation of property unless such written objection has been filed and such person in good faith presented evidence to such board in support of such objections and made full disclosure before said board, under oath of all of that person's property liable to assessment in such district and the value thereof." Wis. Stats. § 70.47(7)(a).

Clear Channel relied on Hermann v. Town of Delevan, which addressed the public policy reasons to compel exhaustion of remedies: "If the owners of taxable property could neglect to assert their rights before the board of review and then be heard to litigate questions of value in court, the administration of municipal tax laws would be seriously hampered." 2011 WI App 117, ¶16 (quoting Hermann, 215 Wis.2d at 392-93).

The Plaintiffs, in the case at bar, never presented their evidence as so required to the Board of Review because of the statutory effect of Wis. Stats. § 70.47(7)(aa). (Gardiner Affidavit, ¶15) These statutes, working in tandem and immediately following each other, can only be construed to prevent all actions to challenge the assessment of property. *See* Wis. Stats. §§ 70.47(7)(a) and 70.47(7)(aa). Because the Plaintiffs here ultimately question the value of their property assessment, their claim must be barred.

As a result, the plaintiffs' efforts to challenge the assessment via 42 U.S.C. §1983 are an end around of the clear statutory system restricting the remedies available to challenge an assessment. That claim must be dismissed as a matter of law.

II. PLAINTIFFS' SECTION1983 CLAIM ALSO CANNOT PROCEED ON ITS MERITS.

The elements of a 42 U.S.C. §1983 claim require the plaintiffs to establish: (1) conduct by a "person;" (2) who acted "under color of law;" (3) proximately causing; (4) a deprivation of a federally protected right. 42 U.S.C. 1983. The allegation in the Complaint is that "Gardiner, by raising the assessment of the Plaintiffs' Property in retaliation for exercising their constitutional rights, deprived them of the right to be free from unreasonable searches as secured by the Fourth and Fourteenth Amendments to the United States Constitution." (See Complaint, ¶55)

As noted above, this action seeks to circumvent the exclusive statutory remedies available to challenge an assessment in Wisconsin. Even if this action could be pursued, however, it is fundamentally flawed.

First, Gardiner is a private contractor hired by the Town of Dover to perform "expert assessment help." Wis. Stats. §70.055. Gardiner is not an elected assessor or Town employee or Town officer. *See* Wis. Stats. §70.05(1). Gardiner was therefore not acting under color of law subjecting it to liability under 42 U.S.C. §1983.

Second, on the allegation of a wrongful search and seizure in violation of the Fourth Amendment, there no evidence that Gardiner searched the Plaintiffs' premises. Gardiner never set foot inside the premises as part of the 2013 revaluation. Moreover, there is no evidence that Gardiner seized any of Plaintiffs' property. The record is abundantly clear that Plaintiffs' forbade Gardiner from entering their property. Under these facts, there can be no violation of the Fourth Amendment.

The facts here are simple and limited. Gardiner at all times followed the protocol which is established by Chapter 70 and the Wisconsin Real Property Assessment Manual. Gardiner

requested an interior inspection. Gardiner was denied. Gardiner did nothing further to force entry or otherwise invade the property rights of Plaintiffs. Instead, Gardiner made an assessment without the benefit of such an inspection, as contemplated by the statutes and manual. Where, in this conduct, is there a tortious invasion of the plaintiffs' constitutional rights?

Gardiner understands that Plaintiffs believe that the system established by Chapter 70 is unconstitutional. Gardiner, however, cannot be held liable for damages for carefully obeying the directives of Chapter 70 in its existing format. Gardiner is not the State of Wisconsin which adopted Chapter 70 and the WPAM. Gardiner is not the taxing entity, Town of Dover. Gardiner is a professional contractor. Based on the undisputed facts, Gardiner can have no liability under 42 U.S.C. §1983.

III. PLAINTIFFS' STATUTORY CLAIMS DIRECTLY AGAINST THE ASSESSOR CANNOT PROCEED BASED ON THE UNDISPUTED FACTS.

A. CLAIM PURSUANT TO WIS. STATS. §70.503.

Wis. Stats. §70.503 applies in the event an assessor "is guilty of any violation or omission of duty as specified in ss. 70.501 and 70.502...." A guilty party "shall be liable in damages to any person who may sustain loss or injury thereby, to the amount of such loss or injury; and any person sustaining such loss or injury shall be entitled to all remedies given by law in actions for damages to tortious or wrongful acts." Wis. Stats. §70.503.

The Plaintiffs' Complaint, Count V, alleges that "Gardiner intentionally fixed the value of the property at more than its true value thereof prescribed by law and failed to perform its statutory duty of valuing the Property from actual view or the best information that the assessor could practically obtain." (Complaint at ¶85) The Complaint alleges that Gardiner is personally

liable for the amount of excessive tax which Plaintiffs' attribute to an allegedly excessive assessment. (Complaint at ¶86)

The underlying statute here, in relevant part, is Wis. Stats. §70.501, which proscribes conduct "intentionally fixing the value of any property assessed by that person at less or more than the true value thereof prescribed by law for the valuation of same...."

In response, there is absolutely no evidence that Gardiner intentionally acted to impose an assessment greater than true value. As such, Plaintiffs cannot prevail as a matter of law.

The regulations and guidance for assessors is abundantly clear that interior inspections of real property are a critical part of the assessment process. The WPAM, for full revaluations such as the Dover revaluation, requires the assessor to inspect the interior of all buildings. (4-3;19-1;19-12) This brief, *supra* pgs. 2-6, fully describes the scope of direction to assessors emphasizing interior inspections. The Wisconsin Legislature has deemed such inspections important enough that Chapter 70 prohibits an owner from challenging their assessment if the owner denies the inspection.

Acting according to those regulations and guidance, Gardiner had to set an assessed value for the Plaintiffs' improvements. Gardiner, through the Affidavit of Gregory Gardiner, makes clear the motivation and rationale for the assessment:

- In making its assessment of the Plaintiffs' property at 1232 Linden Lane, Gardiner did not intentionally establish an assessed value at more than its true value as prescribed by law.
- Gardiner was not motivated to set the value at an incorrect amount. Gardiner issued an assessment based on its best professional judgment without bias or malice or intent to treat the Plaintiffs unfairly.
- Because Gardiner was not permitted into the home in 2013, Gardiner could not accurately determine the effective physical, functional and economic obsolescence of the structure, curable or non-curable. Without the accurate information, it is not possible to do an accurate cost, market, or income approach to valuation.

- Gardiner could not verify whether any remodeling had been performed in the prior nine (9) years. A single remodel project, like a kitchen or bath, could have significantly increased the value of the home. On average, approximately 70 percent of a home's value is on the interior. Gardiner could not verify whether any such remodeling or improvements were made over those nine (9) years.
- The Plaintiff's improvements were assessed at $227,800 from 2004 through 2012. In 2013, Gardiner changed the assessment on improvements to $261,000. Gardiner reached this number after considering: (a) the possibility of remodeling over a nine (9) year period which was not disclosed and could not be verified; (b) an inability to determine if the effective age of the home increased or decreased; (c) reasonable assumption that homes in which no inspection is permitted will have less increase in effective age than average; (d) that it is not fair to assume that there have been no improvements for any home where access has been denied; (e) that assessed values did increase in 2013 for many homes in the Town of Dover and the overall assessed value of improvements increased in 2013 over the prior year; and (f) a thirteen percent increase in value from 2004 to 2013 is not uncommon.
- Gardiner used its best professional judgment as to the assessed value of the Plaintiffs' home in 2013. Gardiner believes the increase was reasonable given the entirety of the history and circumstances cited herein, as a change from 2004 to 2013 assessed value.

See Gardiner Affidavit, ¶¶ 16-19.

All of these facts are undisputed. These facts, in no fashion, can support or even lead to an inference, let alone prove, that Gardiner is guilty of deliberately assessing property at an inflated level for retaliatory purposes. Such a suggestion is absurd.

Professional assessment firms attempt to view thousands of properties every year. Any single property, and the denial to view same, would not create any motivation for retribution. Why would a private assessor, whose compensation is not dependent on the individual assessments of any property, and has no personal knowledge of a property owner, set about on a path to retaliate against a particular homeowner? This allegation defies common sense.

Accordingly, based on the irrefutable testimony from Gardiner, Plaintiffs cannot prove as a matter of law that Gardiner "intentionally fix[ed] the value of any property assessed by that person at less or more than the true value thereof prescribed by law for the valuation of same...."

B. CLAIM PURSUANT TO SEC. 70.501.

Wis. Stats. §70.501 establishes a forfeiture provision payable to the State of Wisconsin. The section applies in the event "any assessor...intentionally fixes the value of any property assessed by that person at less or more than the true value thereof prescribed by law for the valuation of same...." The forfeiture may range from $50 to $250. Wis. Stats. §70.501.

The Plaintiffs' Complaint, at paragraph 86, alleges that Gardiner is "also liable for a forfeiture of not less than $50, nor more than $250 to be paid to the state." The State of Wisconsin is not a party plaintiff to this lawsuit. There is no evidence in the record that the State of Wisconsin has made any direct claim against Gardiner pursuant to Wis. Stats. §70.501.

Section 70.501 does not explicitly grant any right or authority to a private party plaintiff to enforce said statute and seek a forfeiture for the benefit of the State. Plaintiffs' attempt to act as agent of the State is clearly not permitted by the plain language of the statute.

Additionally, consider that the Legislature, in other contexts, has explicitly conveyed a right to private citizens to pursue a forfeiture. For example, the Wisconsin Open Meetings Law contains a provision for a private citizen to enforce that Law in the event the District Attorney fails to act. *See* Wis. Stats. §19.97(4). No such authority exists for a private party in the context of section 70.501.

Moreover, the Legislature separately granted a private civil remedy to individuals claiming an injury for the conduct described in section 70.501. Wis. Stats. §70.503. The private party plaintiff is entitled to "all the remedies given by law in actions for damages for tortious or wrongful acts." Id. There is no mention therein of the private party plaintiff pursuing a claim for forfeiture for the benefit of the State.

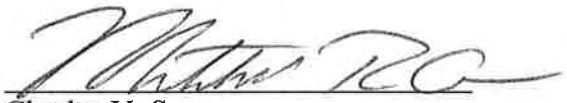
Thus, under a plain reading of sections 70.501 and 70.503, there is no basis for these Plaintiffs to pursue, or this Court to award, a forfeiture to the State under section 70.501. Summary Judgment should be entered dismissing that claimed right to relief.

CONCLUSION

Based on the foregoing, the Defendant, Gardiner Appraisal Service, LLC, respectfully requests the Court award summary judgment in its favor dismissing all claims in the Plaintiffs' Complaint as alleged against Gardiner.

Dated this 6th day of March, 2015.

AXLEY BRYNELSON, LLP



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