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 REPLY BRIEF IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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

DISCUSSION

I. Gardiner's Motion for Summary Judgment is properly presented.

The Plaintiffs' Response Brief and Affidavit of Counsel suggest that the parties were restricted on the scope of the issues/claims which could be addressed on summary judgment. Gardiner's counsel recalls no such limitation arising from the January 7, 2015 telephone scheduling conference. The Court did not issue a scheduling order limiting such motions. Moreover, Chapter 802 certainly allows the filing of a dispositive motion during the pendency of an action. Accordingly, the implication that Gardiner's motion is premature is baseless.

Moreover, the Plaintiffs suggest an inability to conduct discovery which arguably should postpone action on summary judgment motions against the Plaintiffs. However, the Court should note that Plaintiffs have served multiple extensive written discovery demands on Gardiner, all of which have been answered timely and completely. Plaintiffs have never asked for the deposition of a Gardiner representative, despite the filing of Gardiner's motion for summary judgment back on or about March 6, 2015. Plaintiffs should not get a "pass" based on their purported dissatisfaction with the discovery they have conducted to date.

Thus, Gardiner maintains that its motion is properly before the Court for consideration.

II. The "Factual Issues" asserted by Plaintiffs are not relevant to Gardiner's Motion seeking dismissal of the Plaintiffs' Sec. 1983 Claim.

Gardiner's Motion contends that Plaintiffs' Section 1983 Claim must be dismissed because: (a) Wis. Stats. Chap. 70 bars relief; and (b) the Section 1983 Claim cannot proceed on its merits.

On the first point, it is undisputed that Plaintiffs did not permit an inspection of their home by the assessor, and were not allowed to formally object and appeal their assessment before the Board of Review. Gardiner's prior submissions on summary judgment, including the Affidavits of Gregory Gardiner and Linda Gardiner, prove same. The Plaintiffs' suggestions of "exterior inspections" and "interviews" as an alternative to an interior inspection of the home are irrelevant, because Wisconsin law does not contemplate those "alternatives." *See* Linda Gardiner Affidavit.

On the second point, Gardiner has repeatedly admitted that it was performing professional assessor services for the Town of Dover. Yet, Plaintiffs insist that Gardiner was an assessor by "election" or acting as an "officer" of the Town, pursuant to sec. 70.05. Plaintiffs are wrong. Gardiner's Affidavits and Discovery Submissions have repeatedly denied Plaintiffs'

contention. Gardiner was a contractor hired per Wis. Stats. sec. 70.055, and therefore not acting under color of state law.

Further, after again using improper "fair market value" figures rather than assessed value figures, Plaintiffs contend, as "additional facts," that Gardiner assumed the property owners were hiding information and increased assessments to "punish" homeowners who did not consent to inspections. (Response Brief, p. 3-4) There are no facts to support such a serious allegation of nefarious intent.

The only "facts" submitted by Plaintiffs are a very limited and self-serving sample of properties which were assessed without the benefit of an inspection. The lack of building permits, an exterior inspection, or an interview, are all meaningless. None of those items can tell an assessor the condition of the home's interior, where its primary value lies. There is just as much likelihood the home's condition was improved, or did not deteriorate as much as others, as there may be the chance it deteriorated worse than others. The point is that the homeowner forces the assessor to make an assessment that is fair without full information. The Gardiner Affidavits submitted previously explain how the process is handled under a denial of inspection scenario. (*See* Affidavits of Gregory Gardiner and Linda Gardiner). That undisputed explanation is sufficient to support this assessment.

III. Chapter 70 precludes the Plaintiffs' Sec. 1983 Claims versus Gardiner.

Plaintiffs seek to impose damages against Gardiner for its role in assessing the subject home. Gardiner's response is that Gardiner followed statutory protocol at all times. Conversely, Plaintiffs violated Wisconsin law and were forbidden from challenging the assessment set by

Gardiner, on behalf of the Town of Dover, before the Town of Dover Board of Review. It was that Board of Review, not Gardiner, that imposed state law prohibiting appeal.

Thus, Gardiner contends that no claim for damages arising from an assessment, a product which it made on behalf of the Town and in full compliance with state law, can be made against Gardiner.

IV. Gardiner has not "punished" Plaintiffs.

Plaintiffs operate under the belief that they are entitled to treatment separate and distinct from all other property owners in the State of Wisconsin. Plaintiffs further believe that assessors should have a special method to assess their home, which differs from the WPAM protocol and long-standing practice in Wisconsin. Because Gardiner did not treat these Plaintiffs under their special set of rules, Plaintiffs contend they were "punished." Nothing could be further from the truth.

As described in Gardiner's prior briefs and affidavits, Gardiner had no motivation to punish these Plaintiffs. Among the key and compelling facts are the following:

- Gardiner does not know these Plaintiffs personally. There is no evidence there is any sort of personal animus in play here. Gardiner expressly denies animus, which is undisputed.
- Gardiner is not a resident of Dover, an official of Dover, or in any position to benefit from a larger or smaller assessment. It makes absolutely no difference to Gardiner what any specific property is assessed at; and there is no motivation to increase or decrease any property.
- Gardiner is in no way better or worse off regardless of whether any homeowner permits or refuses an inspection.
- Gardiner is in no way better or worse off regardless of whether any homeowner appeals its assessment.
- Gardiner works as a professional assessor contractor for local governments and has no way to know if it will be assessing for that local government in the future. Hence, there is no motivation to unfairly increase the assessment of those who refuse inspections, in order to

compel them to allow an inspection in the future by whatever assessor may then be in place.

- There is no evidence that the assessment made by Gardiner for the Plaintiffs in 2013 was not a reasonable estimate under circumstances where the home had not been viewed in 9 years and the homeowners were not allowing a viewing.

Absent any legitimate factual evidence of such "punishment," this Court must deny the allegations of such conduct attributed to Gardiner. But for that allegation, there is no basis to find that Gardiner deprived plaintiffs for their alleged "exercise of a constitutional right."

V. Gardiner cannot be held liable under secs. 70.501 and 70.503.

The facts and argument presented at pages 12 to 17 of the Plaintiffs' Response Brief are insufficient to avoid summary judgment. The Plaintiffs have the burden to prove that Gardiner "intentionally set the assessed value at more or less than the true value thereof prescribed by law." Wis. Stats. sec. 70.501 (per Wis. Stats. sec. 70.503). Plaintiffs fail to present evidence establishing all three components of this provision.

First, as discussed at length above and in prior submissions, there is no evidence of intentional conduct by Gardiner to set a false assessment.

Second, there is no evidence that the assessed value is actually more or less than what it should be. Clearly, the Plaintiffs think it is too much. But there is no competing evidence in the record from a licensed municipal assessor which opines the assessment is too high under the circumstances in which it was rendered.

Third, we are dealing with the "true value as prescribed by law." There is no dispute that the assessment process employed by Gardiner was in compliance with Chapter 70 and the WPAM.

Plaintiffs divert the Court's attention with discussion of exterior viewings and interviews. But the WPAM and established assessment protocol direct the assessor to perform an interior view. While those other actions may be part of the assessment process, they are nowhere suggested to be a substitute for an interior inspection. As established in the Affidavits of Gregory Gardiner and Linda Gardiner, it is the interior inspection which drives the assessment of a home. As a result, Gardiner made its assessment based on the data it had available, which was outdated and limited, because of the limitations imposed by the Plaintiffs. Gardiner acted reasonably to estimate the assessed value under the circumstances and in accordance with the law.

Summary Judgment should be granted to Gardiner dismissing the claim for sec. 70.501 damages. The request by Plaintiffs for summary judgment is without merit both factually and legally.

VI. There is no basis for Plaintiffs to recover the forfeiture under sec. 70.501.

The Plaintiffs appear to misunderstand the interaction of secs. 70.501 and 70.503. The latter grants a civil remedy to a homeowner for a violation of the former. The former also grants the State the right to impose a forfeiture between $50 and $250. Gardiner argues that a private party cannot step in the State's shoes to enforce the forfeiture.

The key language in sec. 70.503 is: "and any person sustaining such loss or injury shall be entitled to all the remedies given by law in actions for damages for tortious or wrongful acts." Thus a claimant is entitled to compensation for their loss or injury. Not for the State's forfeiture. Further, the remedy is for damages for tortious or wrongful acts. A statutory forfeiture is not a remedy sounding in tort or the like.

Thus, while a modest sum of money, it is a significant issue for a professional assessor not to be subjected to a civil forfeiture. The State is not a party here to pursue the forfeiture. The Plaintiffs have their own potential remedy, and that remedy is distinct from the State's remedy. Plaintiffs cannot have both remedies. The statutes are clear in that regard.

CONCLUSION

Based on the foregoing, and all the previous Briefs and Affidavits submitted on its behalf, the Defendant, Gardiner Appraisal Service, LLC, respectfully requests the Court grant its motion for summary judgment.

Dated this 21st day of April, 2015.

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