

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
HON. CHRISTOPHER R. FOLEY
CIVIL DIVISION
BRANCH #14

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JERUSALEM EMPOWERED AFRICAN
METHODIST EPISCOPAL CHURCH,

Plaintiff,

vs.

Case No. 12 CV 008079,

CITY OF MILWAUKEE,

Defendant.

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MOTION HEARING

The following proceedings were had upon
the above-entitled matter before the HONORABLE
CHRISTOPHER R. FOLEY, Circuit Court Judge, Civil
Division, Branch #14, Milwaukee, Milwaukee County,
State of Wisconsin, on the 16th day of September,
2013.

June K. Teegarden, Court Reporter.

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APPEARANCES:

MICHAEL D. FISCHER,
and
THOMAS C. KAMENICK,
Attorneys-at-Law,
Wisconsin Institute for Law & Liberty, Inc.,
1139 East Knapp Street,
Milwaukee, Wisconsin 53202,
appeared on behalf of the Plaintiff.

CHRISTINE M. QUINN,
Assistant City Attorney,
City Attorney's Office,
Milwaukee City Hall,
Suite # 800,
200 East Wells Street,
Milwaukee, Wisconsin 53202-3551,
appeared on behalf of the Defendant.

1 P_R_O_C_E_E_D_I_N_G_S_

2 WHEREUPON, the following proceedings
3 were had in open court:

4 THE CLERK: 12 CV 8079, Jerusalem
5 Empowered African Methodist Episcopal Church
6 versus Milwaukee City.

7 Appearances, please.

8 MR. KAMENICK: Good morning, your
9 Honor.

10 Attorney Tom Kamenick for the
11 Plaintiff. With me is Attorney Michael Fischer.

12 MR. FISCHER: Good morning, your
13 Honor.

14 MS. QUINN: Good morning, your Honor.
15 Assistant City Attorney Christine
16 Quinn appearing on behalf of the City.

17 THE COURT: Okay. We are here on the
18 Church's motion for summary judgment seeking a
19 declaration that Section 74.35, as applied to
20 them and operating to bar them from challenging
21 the City's determination that a portion of their
22 church property is not tax exempt unless they
23 prepaid the disputed property tax which it is
24 conceded they cannot pay violates their right to
25 due process, violates the State constitutional

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right to a remedy, and violates the equal protection clause.

If correct on their first point they further seek a declaration that the property, the entirety of their church property is exempt under Section 70.11(4), as they assert the vacant land is necessary for the convenience of the Church's building, which according to the caselaw is kind of a lawyer's way of saying is used for the benevolent purposes for which the Church exists.

On the record that exists before me in that the City has not disputed any of the overwhelming showing, including the concession of the two City Tax Assessors that the property -- the disputed portion of the property should be exempt as reviewed by the Assessors the property is used for the benevolent purposes. The only real dispute, at least in my mind, is the constitutional question.

We also have some dispute, and having read the transcript from the prior hearing, I understand why we have some dispute or misunderstanding of where we stand procedurally. But it's my position that Footnote I of the reply brief of the Church sets forth an accurate

1 assessment of what transpired at the hearing on
2 the motion to dismiss. If that wasn't what I
3 said that's what I intended to say. Let's put it
4 that way.

5 I think the argument that because of
6 the prior rulings that if the Plaintiffs are
7 right on the Constitutional issues that I have
8 put myself in a position where I can't say you
9 get the relief you're seeking; that's not where I
10 was at.

11 Okay. With that anything to add to
12 what was in the briefs on the part of the
13 Plaintiffs, Mr. Kamenick?

14 I usually add at that point you've
15 bored me to death already, but actually found
16 this quite fascinating. So anything to add from
17 what was in the brief, Mr. Kamenick?

18 MR. KAMENICK: I think just two
19 things, briefly, your Honor.

20 THE COURT: Okay.

21 MR. KAMENICK: First, I would like to
22 introduce you to Pastor Sandra Banks, who is
23 accompanied by several members of her
24 congregation.

25 THE COURT: Hello, Pastor.

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PASTER BANKS: Good morning, Judge.

THE COURT: I assume they told you you've got the nicest and smartest judge in Wisconsin. They told you that?

PASTER BANKS: Yes.

THE COURT: They did. That's good. They're suppose to tell you that when they come in here. Okay.

MR. KAMENICK: The Church just celebrated it's tenth anniversary. And the members would like to continue to celebrate those. And if things go as they seem they might be going under the way the law is written they're about to lose their Church for no good reason, and it's because of a tax they can't pay, it's because of a tax the City isn't legally entitled to collect, the tax the City's own Assessor say is wrong, a tax the City wouldn't defend on the merits in its brief, and to tax that for some inscrutable reason the City won't rescind no matter how many times we asked, nor how many -- nor how good our reasons are.

And as you know the law says as it's written we can't do anything about it because we didn't pay during that narrow window.

1 If this were a \$27,000.00 check I had
2 right here I could go down to City Hall and pay
3 those taxes right now it still wouldn't matter.
4 We couldn't get into court and ask that the
5 exemption be granted. We couldn't even get a
6 refund after we paid it the way the law is
7 written.

8 What's worse even if the Court --
9 even if the Church could get the money together
10 to pay 2013's taxes this January then come to
11 court with a 74.35 claim, then asking for a
12 refund, and win on the merits, and get a
13 declaration from the Court that the property was
14 tax exempt, they still wouldn't be able to do
15 anything about the 2010, 2011, 2012, taxes. The
16 City could still foreclose on that property, on
17 those three tax years. There was never anything
18 they could do about this. There was never a
19 point at which they could bring it before a
20 court, because they didn't have the money to pay
21 during that narrow window of time; and that's why
22 we're here today. That is the injustice we're
23 seeking to prevent. And that is why we ask you
24 to declare 74.35(2)(m) to be unconstitutional as
25 applied to the Church and anybody who doesn't

1 have the money to pay the taxes during that
2 narrow window.

3 THE COURT: Miss Quinn.

4 MS. QUINN: Judge, well, it may seem
5 that the City is being stubborn, and inflexible,
6 and unreasonable. The fact of the City is
7 defending a fundamental bedrock principle that is
8 well-established in law, that the government has
9 a right to taxation. And to contest the case an
10 individual or entity is to pay taxes first and
11 sue for refund. If that principle is overturned
12 here then anybody who either asserts or cannot,
13 whether it's true or not, if anyone says they
14 couldn't pay their taxes they can file suit, and
15 can claim an exemption that puts any tax -- an
16 inability to budget and foreclose, it's money to
17 budget for the future, actually collect that
18 money would be thrown in complete chaos as is a
19 well-established rule in law.

20 THE COURT: That didn't fly too well
21 in McKesson, although that was post-payment, but
22 it didn't fly too well in McKesson.

23 MS. QUINN: Well, I think
24 post-payment is a different situation. I think
25 post-payment -- if the taxes are paid up-front we

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wouldn't be here. We would have probably found a way to come to a resolution.

The fact remains the taxes are assessed. They need to be paid before any kind of entity can bring suit and litigate a case.

THE COURT: So you're telling me if I made them a loan before this weekend and they had paid it I wouldn't have had to put up with all of this?

Not that my wife and I would with all seven of ours could have made them the loan, but never mind.

Okay. Go ahead, Miss Quinn.

MS. QUINN: If the taxes were paid this is something that could be probably resolved short of Circuit Court. If the taxes are not paid the City's position is this, simply that we object and as a result litigate that case. In fact, they don't have a right to be here.

It's my understanding that in addition to not paying taxes while not a development for the record here the church is not paying the lawyer. So they may not be a going concern.

In any event, I don't know if, well,

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the effect of a legal analysis, I think that's a fact that the Court needs to be aware of to consider this.

THE COURT REPORTER: (Indicating she's not hearing Miss Quinn.)

MS. QUINN: I think rules are at the door regarding the mortgage as well as for the failure to pay taxes to the City, that's unfortunate, indeed. However, the fact remains the taxes need to be paid before a case, a 74.35 can be made -- can be litigated. So bearing that I have nothing else to say.

THE COURT: Mr. Kamenick, please.

MR. KAMENICK: Your Honor, there is nothing in the record about a mortgage or state of payment on. I think that's totally inappropriate to be discussed at this time.

THE COURT: Okay. I reread McKesson last night. And it is very clear that the judiciary needs to be highly deferential to the legislative and executive responsibility to assure that through taxation the governmental entity remains viable. There's all sorts of fancy language in McKesson I should quote but I didn't write it down so I won't quote it, and I

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am fully aware of that.

But I have reached the conclusion that as applied to the Church that the functioning of 74.35 deprives them of due process. And I have concluded that it denies them a right to a remedy under the Wisconsin Constitution.

To be honest with you the arguments about equal protection got so convoluted and circular that I didn't bother to go there in the end because I was formerly convinced that there were due process -- there was a due process denial and there was a denial of the right remedy.

Here is the due process analysis.

We all know without dispute, certainly from McKesson we know, because they say it explicitly that taxation is a property taking for due process purposes. The State must provide procedural safeguards against unlawful taking.

Although we have to be -- the judiciary has to be highly deferential to the manner in which the legislative and executive entities determine how taxes should be collected to protect those parts of the government, those

1 branches of the government, in fulfilling their
2 responsibilities. And while it is very clear
3 that absent, and this language I did write down
4 somewhere, I don't know where.

5 There it is. A part from special
6 circumstances no court should enjoin the State
7 from requiring prepayment as a condition of
8 challenging taxes.

9 I'm fully aware that's McKesson's
10 well-reasoned position. I don't -- I'm not smart
11 enough to be the taxing authority. I don't want
12 to run the City of Milwaukee. Tom Barrett is
13 much smarter than I am, noting he's a Marquette
14 high grad, too.

15 But when, as is conceded here, an
16 entity, and I'm not, you know, while I'm very,
17 very sensitive to the argument that you do this,
18 Judge, we're going to have all sorts of goofy
19 lawsuits by people saying I didn't pay my taxes
20 because I couldn't pay them, you're denying me
21 due process by doing that; I'm not buying that.

22 This is a benevolent organization,
23 tax exempt, everybody agrees with that. The City
24 has not disputed the fact that solely because of
25 their financial circumstances they are incapable

1 of meeting the pre-condition to challenging the
2 lawfulness of the tax, the determination that
3 this portion of their property was subject to
4 property taxes. They are incapable of meeting
5 that pre-condition to challenging that
6 determination. Thereby, that pre-condition
7 absolutely and completely bars them access to
8 procedural protection which the Constitution
9 requires that they have access to.

10 They are deprived because of their
11 financial circumstances of a meaningful
12 opportunity to be heard with respect to whether
13 this determination was or was not lawful. You
14 can't do that under the Constitutional.

15 It also denies them a right to remedy
16 based on the very same analysis. I will just
17 comment on I don't believe the City's argument in
18 regards to this is viable. It goes something
19 along the lines of: They can't validly argue
20 that they have been deprived the right to a
21 remedy because they're in court arguing their
22 summary judgment motion.

23 But in essence the City says: Yes,
24 they're here, but Judge, you can't listen to
25 them, and you can't grant them the relief that

1 they're seeking. That denies them a right to
2 remedy if that were a valid argument.

3 As I said, I don't know, equal
4 protection stuff, it got so convoluted that
5 having reached the conclusion due process and the
6 right to a remedy establishes that they're
7 entitled to this relief I didn't go there.

8 Once that determination is made
9 there's no question in here. There seems
10 declaratory judgment that under the other
11 statute, I'll look back in my notes, 70.11(3), is
12 that right?

13 MR. KAMENICK: (4).

14 THE COURT: (4), that this property
15 is exempt. As the assessors say that, I looked
16 at this case, I don't remember the name of the
17 case, but it was Judge Cameron's case from up
18 north somewhere. What case is it?

19 MR. KAMENICK: I'm not sure --

20 THE COURT: 118, Wis. 2d, I think is
21 the one. It's either the 118 Wis. 2nd one, or
22 the 125 Wis. 2nd one, in which the garage and the
23 landscaped portions of the Senior Living property
24 owned by the Lutheran Senate.

25 There's no question that this

1 property meets the standard of the convenience of
2 the building, that being that it's used for the
3 benevolent purposes for which the Church exists
4 so.

5 MR. KAMENICK: Your Honor, that's St.
6 John's Lutheran Church versus City of Bloomer.

7 THE COURT: Thank you.

8 Okay. Anything else this morning?

9 I'm not going to this other issue
10 that was brought up. I'm quite distressed here
11 that I hope the Church works that out. I -- I
12 don't know how that plays out. I don't want to
13 get involved in that one. So I had enough
14 trouble with this.

15 So anything else this morning?

16 MR. KAMENICK: So your Honor, to be
17 clear, that's declaring that the 2010, 2011, and
18 '12; taxes, interests, and penalties thereon are
19 void?

20 THE COURT: That's correct.

21 MR. KAMENICK: Thank you, your Honor.

22 THE COURT: Okay. Thank you very
23 much, everybody.

24 PASTOR BANKS: Thank you.

25 THE COURT: Let's all be clear. I do

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want to also emphasize that this is as applied.
This is as applied. I'm not making any
determination that the precondition is
unconstitutional or falls across all taxpayers.

So okay. Thank you, everybody.

PASTOR BANKS: Thank you, your Honor.

MR. KAMENICK: Thank you.

(Proceedings concluded for the day.)

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STATE OF WISCONSIN)
(SS:
MILWAUKEE COUNTY)

I, June K. Teegarden, do hereby
certify that I am the Official Court Reporter
for the Honorable Christopher R. Foley, Circuit
Court Judge, Branch #14, Juvenile Division,
Milwaukee, Milwaukee County, State of Wisconsin;
that as such Court Reporter, I made full and
correct stenographic notes of all the testimony
in the above-entitled action, and that the
transcript annexed hereto is a true and
correct transcript of the hearing at said time.

I further certify that said
transcript was requested by Stacy A. Stueck,
Executive Director/Paralegal for the Wisconsin
Institute for Law and Liberty, Inc., by written
request dated September 18, 2013, received by me
on or about September 23, 2013, with said
request being completed by me on October 1,
2013.

June K. Teegarden, R.P.R., C.P.