COURT OF APPEALS
DECISION
DATED AND FILED

July 22, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2009AP727 **Cir. Ct. No. 2005CV3774**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

DSG EVERGREEN F.L.P.,

PLAINTIFF-APPELLANT,

V.

TOWN OF PERRY,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: C. WILLIAM FOUST, Judge. *Affirmed*.

Before Dykman, P.J., Lundsten and Higginbotham, JJ.

¶1 HIGGINBOTHAM, J. DSG Evergreen F.L.P. appeals a summary judgment order entered against it in this "right to take" action brought against the

Town of Perry, pursuant to WIS. STAT. § 32.06(5).[1] DSG argues that the Town was not entitled to summary judgment with respect to seven of its claims. Viewing the evidence in the light most favorable to DSG, we conclude for the following reasons that no disputed material facts exist and that the Town is entitled to judgment as a matter of law. We therefore affirm the circuit court's summary judgment order in favor of the Town.

BACKGROUND

¶2 The dispute in this case arises from DSG's desire to construct a farm residence, an agricultural accessory building and a driveway on a 22-acre parcel owned by DSG, and an attempt by the Town to condemn 12.13 acres of the 22-acre parcel for an historic park preservation district pursuant to WIS. STAT. § 32.06. The 12.13 acres is part of a 325-acre tract of land. In 2000 and 2001, David Gehl, the principal for DSG, sought permits to construct the improvements, which the Town Board denied. DSG subsequently filed a complaint and petition in circuit court against the Town and members of the Town Board in their individual capacity seeking mandamus and certiorari relief in connection with these denials.[2] DSG also filed unlawful takings and inverse condemnation claims against the Town Board Members.

¶3 After several unsuccessful efforts to condemn the 12.13-acre parcel, the Town served DSG in 2005 with an appraisal of the parcel and subsequently

[1] All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

[2] The circuit court in Dane Co. Case No. 2004CV1799 affirmed the Town's denial of these permits, which we affirmed in ***Gehl v. Town of Perry***, 2005AP1971, unpublished slip op. (June 15, 2006).

served DSG with a jurisdictional offer on the same parcel. Pursuant to WIS. STAT. § 32.06(5), DSG filed a right to take action alleging the Town had no right to take its land, which is the instant action.

¶4 The Town moved to dismiss the complaint on grounds that this lawsuit concerned the same subject matter between the same parties as a pending case before a different circuit court, ***DSG Evergreen, F.L.P. v. Town of Perry***, Dane County Case No. 2004CV2676. Following oral arguments, the court denied the motion. The court then ordered the Town to file its answer.

¶5 The Town failed to file a timely answer. DSG subsequently moved for default judgment, after which the Town filed its answer, affirmative defenses and counterclaims and a motion to extend the time to file its answer, and renewed its motion to dismiss. At a hearing on DSG's motion, the court granted the motion and entered default judgment against the Town. The Town moved for reconsideration of the order granting default judgment and for relief from default judgment, pursuant to WIS. STAT. § 806.07(1). The court granted the Town's motion for relief from judgment.

¶6 Approximately one year later, the Town served DSG with a fourth amended jurisdictional offer for the same 12.13 acres at issue in Dane County Case 2005CV3774. DSG filed another right to take action, pursuant to WIS. STAT. § 32.06(5). *See* ***DSG Evergreen F.L.P. v. Town of Perry***, Dane County Case No. 2007CV2119. The court consolidated Dane County Case Nos. 2005CV3774 and 2007CV2119.

¶7 DSG and the Town each moved for summary judgment, and the court granted the Town's motion in two oral rulings and a written decision. DSG appeals these rulings.

STANDARD OF REVIEW

¶8 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. ***State v. Bobby G.***, 2007 WI 77, ¶36, 301 Wis. 2d 531, 734 N.W.2d 81. Summary judgment is appropriate when the affidavits and other submissions show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2). We draw all reasonable inferences from the evidence in the light most favorable to the non-moving party. ***Burbank Grease Servs., LLC v. Sokolowski***, 2006 WI 103, ¶40, 294 Wis. 2d 274, 717 N.W.2d 781 (citation omitted).

DISCUSSION

¶9 DSG argues that summary judgment should not have been granted to the Town on the following seven grounds: (1) the Town's fourth amended jurisdictional offer did not cure the fundamental defects arising from issuing a jurisdictional offer containing a legal description inconsistent with the one in the appraisal; (2) the Town's attempt to condemn DSG's property was void because of DSG's pending inverse condemnation and regulatory takings claims; (3) the Town failed to establish excusable neglect and therefore DSG was entitled to default judgment; (4) the Town failed to obtain a proper agricultural impact statement from the Department of Agriculture, Trade, and Consumer Protection ("the department") and have it published and therefore the condemnation proceedings are barred; (5) the Town lacks the right to take because the act of condemning a small lot violates Dane County ordinances regarding lot size; (6) there are sufficient facts to establish bad faith by the Town; and (7) summary judgment was

improper on DSG's 42 U.S.C. § 1983 claim against members of the Town Board. We address and reject each argument in turn.

1. Defects in the Town's Fourth Jurisdictional Offer

¶10 DSG argues that the Town failed to comply with the statutory procedures pertaining to submitting a jurisdictional offer to DSG to acquire the land for condemnation, which is required to contain a legal description of the property that is consistent with the legal description of the land that was appraised. DSG alleges that the appraisal, which describes the land to be condemned, is inconsistent with the legal description contained in the Town's fourth jurisdictional offer. This is the same argument we rejected in ***Town of Perry v. DSG Evergreen Family Ltd. Partnership***, No. 2008AP163, unpublished slip op. (WI App Apr. 23, 2009), *review denied* (WI July 16, 2009). We again reject this argument on claim preclusion grounds. ***Wickenhauser v. Lehtinen***, 2007 WI 82, ¶22, 302 Wis. 2d 41, 734 N.W.2d 855 ("[A] final judgment is conclusive in all subsequent actions between the same parties [or their privies] as to all matters which were litigated or which might have been litigated in the former proceedings." (Citation omitted.)

2. Whether the Town's Attempt to Condemn DSG's Land Was Void

¶11 DSG contends that the Town cannot proceed with the condemnation of DSG's land while DSG's inverse condemnation and right to take actions are pending, citing ***Maxey v. Redevelopment Authority of Racine***, 94 Wis. 2d 375, 395, 288 N.W.2d 794 (1980). DSG concedes it made this same argument in ***State ex rel. Gehl v. Town of Perry***, No. 2007AP1067, unpublished slip op. (WI App Mar. 12, 2009), *review denied* (WI Dec. 14, 2009), and in ***Town of Perry***, No. 2008AP163, which we rejected in both opinions. At the time DSG filed its brief

on this appeal, petitions for review in both cases were pending before the Wisconsin Supreme Court. DSG states that it raises this issue in this case in order to preserve its claim here. However, the supreme court has rejected both petitions. Consequently, this issue is also rejected on claim preclusion grounds and we therefore do not consider it.

3. Whether DSG Was Entitled to a Default judgment

¶12 The Town failed to timely answer DSG's complaint following the circuit court's denial of the Town's motion to dismiss this action. The Town was required to answer the complaint within twenty days of the court's dismissal order. *See* WIS. STAT. § 802.06(1). DSG moved for default judgment. Upon finding no excusable neglect for failing to file a timely answer, the court granted DSG's motion. The Town later sought relief from the default judgment under WIS. STAT. § 806.07(1). The court granted the Town's motion and reopened the case. DSG argues that the court should have granted DSG's motion for default judgment because the Town has not shown excusable neglect. The Town contends that the court properly exercised its discretion under § 806.07(1)(h) in relieving the Town from the default judgment.

¶13 We begin by clarifying the issue before us on appeal. DSG frames the issue presented as whether the circuit court properly exercised its discretion in denying DSG's motion for a default judgment under WIS. STAT. § 806.15(2)(a). Section 806.15(2)(a) provides in pertinent part: "When an act is required to be done at or within a specified time, the court may order the period enlarged but only on motion for cause shown and upon just terms." DSG maintains that once the court denied the Town's motion to dismiss, the Town had twenty days to file

an answer pursuant to WIS. STAT. § 806.07(1), and that its failure to do so was not supported by any evidence of excusable neglect.

¶14 The Town, on the other hand, frames the issue as whether the circuit court properly granted its motion for relief from the default judgment under WIS. STAT. § 806.07(1)(h). WISCONSIN STAT. § 806.07(1)(g) and (h) provide that a court may relieve a party from judgment when "[i]t is no longer equitable that the judgment should have prospective application" or because of "[a]ny other reasons justifying relief from the operation of the judgment." In the alternative, the Town argues that it established excusable neglect and therefore the court erred in concluding otherwise.

¶15 We conclude that the issue before us is whether the circuit court properly exercised its discretion under WIS. STAT. § 806.07(1)(h) in granting the Town relief from the default judgment entered in favor of DSG. We observe that the court did not address the Town's motion for reconsideration of the order granting DSG default judgment and therefore the court's order granting DSG a default judgment is not before us. Thus, the only order we may properly review is the order granting the Town relief from the default judgment.

¶16 Turning to DSG's argument, we observe that DSG's entire argument in its brief-in-chief focuses on whether the circuit court properly exercised its discretion in granting DSG's motion for default judgment. DSG does not discuss the court's order granting the Town relief from the default judgment in its brief-in-chief, except to simply make reference to it in the context of arguing that the Town failed to show excusable neglect. Rather, DSG's sole argument is that it was entitled to default judgment because the Town failed to establish excusable neglect for not filing a timely answer. To the extent that DSG argues that the court

erroneously granted the Town's motion for relief from the default judgment, DSG waited until its reply brief, and even then its argument is not fully developed. DSG has therefore forfeited its opportunity to make the argument that the court misused its discretion in granting relief to the Town from the default judgment. *See* ***State v. Mechtel***, 176 Wis. 2d 87, 100, 499 N.W.2d 662 (1993) (arguments raised for first time in reply briefs are generally not addressed by appellate court); ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (underdeveloped arguments are usually not addressed).

4. Agricultural Impact Statement

¶17 WISCONSIN STAT. § 32.035 requires a condemnor of property to notify the Department of Agriculture, Trade, and Consumer Protection of any project involving the actual or potential exercise of its powers of eminent domain that affects a farm operation. Section 32.035(3).[3] The condemnor is to pay a fee to the department for preparing an agricultural impact statement (AIS). ***Id***. Once the AIS has been prepared, the department is required to publish the statement in

[3] WISCONSIN STAT. § 32.035(3) states:

> The condemnor shall notify the department of any project involving the actual or potential exercise of the powers of eminent domain affecting a farm operation. If the condemnor is the department of natural resources, the notice required by this subsection shall be given at the time that permission of the senate and assembly committees on natural resources is sought under s. 23.09(2)(d) or 27.01(2)(a). To prepare an agricultural impact statement under this section, the department may require the condemnor to compile and submit information about an affected farm operation. The department shall charge the condemnor a fee approximating the actual costs of preparing the statement. The department may not publish the statement if the fee is not paid.

compliance with § 32.035(4)(c) and (5).[4] A condemnor must wait until thirty days from publication to engage in condemnation negotiations or serve a jurisdictional offer. Section 32.035(4)(d).[5]

¶18 In 2002, the Town notified the department about its intent to condemn a total of 28.98 acres of farmland from three farmland owners for the

[4] WISCONSIN STAT. § 32.035(4)(c) and (5) reads:

> *Preparation time; publication.* The department shall prepare the impact statement within 60 days of receiving the information requested from the condemnor under sub. (3). The department shall publish the statement upon receipt of the fee required under sub. (3).
>
> ….
>
> **(5)** PUBLICATION. Upon completing the impact statement, the department shall distribute the impact statement to the following:
>
> (a) The governor's office.
>
> (b) The senate and assembly committees on agriculture and transportation.
>
> (c) All local and regional units of government which have jurisdiction over the area affected by the project. The department shall request that each unit post the statement at the place normally used for public notice.
>
> (d) Local and regional news media in the area affected.
>
> (e) Public libraries in the area affected.
>
> (f) Any individual, group, club or committee which has demonstrated an interest and has requested receipt of such information.
>
> (g) The condemnor.

[5] Regarding the waiting period, WIS. STAT. § 32.035(4)(d) states that "[t]he condemnor may not negotiate with an owner or make a jurisdictional offer under this subchapter until 30 days after the impact statement is published."

proposed Hauge Log Church Historic District Park. David Gehl of DSG Evergreen owned a 325-acre parcel, of which 13.42 acres would be affected by the condemnation project. In response to the Town's notice, the department properly prepared and published an AIS. The AIS assessed the impact the condemnation project would have on the three farms that were subject to condemnation, including DSG's farm. The only impact the AIS noted on DSG's farm was that it would eliminate its access to the rest of its farmland. The AIS stated, however, that the Town would provide a 30-foot wide access easement to DSG.

¶19 In the ensuing years, Gehl and a neighbor farmer made several land transfers, including 1.29 acres to the neighbor from the property subject to the condemnation project. At the Town's request, the department prepared an addendum to the 2002 AIS, taking into consideration the land transfers between DSG and the neighbor. As with the 2002 AIS, the addendum noted DSG's concern that the project would eliminate access to other parts of its farmland. The addendum further noted, however, that the Town would provide a 66-foot access road to the remainder of DSG's farmland.

¶20 DSG contends that the 2002 AIS "does not properly analyze or reflect the impact of the proposed condemnation upon DSG's 132 acre farm operation" because the statement does not reflect the change in size of the affected farmland. Consequently, according to DSG, the Town must repeat the steps under WIS. STAT. § 32.035 before engaging in condemnation negotiations and before it may serve a jurisdictional offer. Should DSG prevail on this argument, it would result in requiring the Town to once again begin anew the condemnation proceedings for the Hauge Log Church Historic District Park.

¶21 In an overlapping argument, DSG contends that the addendum to the 2002 AIS prepared by the department does not satisfy the publication requirements of WIS. STAT. § 32.035(4)(c), which requires the department to prepare an AIS within sixty days of receiving notice from a condemnor, and to publish the AIS upon receipt of the fee required under sub (3). Consequently, according to DSG, the Town prematurely commenced these condemnation proceedings. We reject each argument.

¶22 We observe that DSG has conceded the appropriateness of the 2002 AIS process. Thus, the issue we must address is whether the Town, and in turn the department, must comply with the requirements of WIS. STAT. § 32.035 concerning the preparation and publication of an AIS because of the land transfers between DSG and its neighbor. We conclude the answer is no.

¶23 As the Town points out, WIS. STAT. § 32.035(4) requires a separate AIS be prepared for each project and that these proceedings have involved only one proposed condemnation project, the Hauge Log Church Historic District Park. Based on this statute, the land transfers did not make it necessary for the Town to initiate a new condemnation project. The land transfers have not affected the scope of the condemnation project. The Town notified the department of the land transfers in a letter dated January 27, 2005, prior to serving its jurisdictional offer, and, based on this information, the department issued the April 4, 2005 addendum to the 2002 AIS. In that addendum, the department considered the potential impact the land transfers would have on the agricultural land owned by DSG and made no note of any new or different agricultural impacts the project would have on DSG's land. As with the AIS, the addendum noted Gehl's concern that the project would eliminate his access to the rest of his farmland, which, as we noted, the Town has accommodated.

¶24 Finally, and perhaps more significantly, DSG has not directed our attention to any requirement under WIS. STAT. § 32.035 that an addendum, once prepared, must be published in the manner required by § 32.035(4)(c) and (5). We also see nothing in the statute prohibiting a condemnor from engaging in condemnation negotiations or serving a jurisdictional offer until after an addendum is prepared and published for the same condemnation project. We therefore conclude that the Town was not required under § 32.035 to wait until the department prepared and published the April 2005 addendum prior to commencing condemnation negotiations and serving a jurisdictional offer on DSG.

5. Whether the Condemnation Violates Dane County Land Use Ordinances

¶25 DSG contends the Town's condemnation of a 1.5-acre parcel on DSG's land violates Dane County land use ordinances that establish the minimum lot size for agricultural-exclusive parcels at 35 acres. *See* DANE COUNTY, WIS., CODE § 10.123(5)(a) (2009).[6] DSG also argues that the condemnation has created an unlawful parcel because DANE COUNTY, WIS., CODE § 75.19(6)(b)[7] requires lots of less than 35 acres to front on a public road, and the 1.5-acre parcel does not front on a public road. In response, the Town argues that the 1.5-acre parcel

[6] DANE COUNTY, WIS., CODE § 10.123(5)(a) (2009) states "*Area, frontage and population density regulation.* **(a)** The minimum lot size is 35 acres." All references to the Dane County Ordinances are to the 2009 version found at http://danedocs.countyofdane.com/webdocs/pdf/ordinances/ord010.pdf

[7] DANE COUNTY, WIS., CODE § Section 75.19(6)(b) states:

> Every lot or parcel shall front or abut a public street. Conventional lots shall maintain a minimum frontage of 66 feet to facilitate the possible development of a public right-of-way that could service additional lots. Cul-de-sac lots shall provide a minimum of 30 feet of frontage on a public street.

problem was created by DSG when it swapped property with its neighbor after the appraisal was prepared and before the Town began negotiations with Gehl on the value of the property. Consequently, the Town argues, DSG should not be allowed to take advantage of the limitations imposed by these ordinances when the problems DSG raises are of its own doing. The Town also argues that DSG lacks standing to challenge the condemnation on grounds that the project would violate Dane County ordinances. Only Dane County can make this objection, according to the Town. We agree with the Town's arguments.

¶26 We observe that, to the extent that the size of this lot may be a problem, it is plainly a problem of DSG's own making. It is undisputed that the 1.5-acre lot at issue did not exist when the Town had the proposed condemnation project appraised. Shortly thereafter, however, DSG swapped property with a neighbor who owned adjoining land, thereby eliminating the access easement the Town had provided DSG, creating the possibility that if the condemnation project was successful, it would create an illegal 1.5-acre parcel. The clear evidence is that DSG was fully aware of the property the Town wished to condemn for the Hauge Church project, but swapped the parcel with its neighbor anyway just before negotiations were to commence. A reasonable inference from this transaction at this time in the condemnation process is that DSG was aware that through this land swap, the condemnation would result in creating a lot that did not comply with the minimum size lot ordinance. The equities of the case call for relief to the Town by not holding the Town to the alleged problem of creating a lot in an agricultural-exclusive zoned area that is less than 35 acres.

¶27 In any event, we agree with the Town that DSG lacks standing to challenge the Town's creation of a lot of less than 35 acres in violation of Dane County ordinances. It is for Dane County to raise the challenge DSG makes here,

not DSG. DSG does not cite to any part of the Dane County zoning ordinances that permits a private citizen to enforce the minimum lot size ordinance, and we are not aware of such an ordinance.

6. Evidence of Bad Faith by the Town

¶28 DSG contends that sufficient material and disputed facts exist warranting a trial on its claim that the Town acted in bad faith in seeking to condemn DSG's property for the Hauge Log Church Historic Park District. DSG argues that the Town's actions in acquiring DSG's land for the purpose of creating the historic park district "is a mere pretext" for its true purpose in acquiring the property, namely, "to buy its way out of [DSG's] regulatory taking and inverse condemnation claims." We disagree.

¶29 Judicial review of a condemnor's determination that condemnation was necessary for a public purpose is narrowly limited to two questions: whether the condemnor has reasonable grounds for condemning the owner's property or whether its decision constituted fraud, bad faith or an abuse of discretion. *See* ***Mitton v. DOT***, 184 Wis. 2d 738, 745, 516 N.W.2d 709 (1994); *see also* ***Falkner v. Northern States Power Co.***, 75 Wis. 2d 116, 135, 248 N.W.2d 885 (1977). It is assumed that the condemnor's exercise of its eminent domain powers is necessary to the accomplishment of a public purpose if any reasonable ground exists to support its determination. ***Herro v. Natural Resources Bd.***, 53 Wis. 2d 157, 168, 192 N.W.2d 104 (1971); ***Falkner***, 75 Wis. 2d at 135. DSG does not directly argue that the Town's condemnation of its property was not necessary for a public purpose. DSG's only contention is that sufficient material facts exist of the Town's bad faith in condemning the subject property. To survive summary

judgment, DSG must make a "convincing showing" of bad faith. ***Klump v. Cybulski***, 274 Wis. 604, 612, 81 N.W.2d 42 (1957).

¶30 DSG contends the following factual omissions support its contention that the Town acted in bad faith in seeking to condemn DSG's property: the record contains no evidence that the Town's Land Use Plan contemplated the creation of parks within the township; the Town did not conduct any pre-taking planning; and the Town had no parks commission, nor a park or open space plan to create a park in 2001, the year DSG filed its regulatory taking and inverse condemnation claims against the Town. DSG notes that the Town did not express its intention to create the historic park district until a few weeks after the circuit court in Dane County Case No. 2001CV1652 ruled that DSG's regulatory taking and inverse condemnation claims against the Town would be tried.[8] DSG invokes a Pennsylvania condemnation case where the Pennsylvania supreme court considered relevant the fact that the condemnor had not engaged in significant pre-taking planning before taking the property at issue, ***Middletown Twp. v. Lands of Stone***, 939 A.2d 331 (Pa. 2007). However, DSG fails to explain or analyze why the absence of facts reflecting the Town's plan for a historic district park in the present case demonstrate that the Town acted in bad faith here. We do not consider this argument further.

¶31 DSG relies on other alleged facts in arguing that the Town's purpose to create the historic district park was pretextual. DSG cites the Town's

[8] The circuit court eventually granted summary judgment against DSG on its takings and inverse condemnation claims. This court upheld the summary judgment order against DSG, and the supreme court has denied DSG's petition for review of our decision. ***State ex rel. Gehl v. Town Board of Perry***, No. 2007AP1067, unpublished slip op. (WI App Mar. 12, 2009), *review denied* (WI Dec. 14, 2009).

procedural missteps in its first attempt to condemn part of DSG's property. For example, DSG refers to its claim that the Town failed to comply with the appraisal requirements of WIS. STAT. §§ 32.05(2) or 32.06(2) by neglecting to negotiate personally with David Gehl and other plaintiffs before serving the jurisdictional offer. DSG argues that the Town was aware of these jurisdictional defects when it vigorously opposed DSG's motion to enjoin the Town from proceeding before the condemnation commission, and that the Town knew that it would have to concede to the jurisdictional defects in its answer. DSG contends that these facts could lead a reasonable jury to find that the Town's true purpose in condemning DSG's land was to acquire title to the property just long enough to move for dismissal of the takings and inverse condemnation claims in Dane County Case No. 2001CV1652 on mootness grounds.

¶32 Viewing the evidence in the light most favorable to DSG, we fail to see how these facts support its contention that the Town acted in bad faith. With respect to the Town's procedural missteps with the first jurisdictional offer, no reasonable jury could infer that the Town was acting in bad faith. The only reasonable inference to be drawn from these facts, without more, is that the Town inexplicably failed to follow the statutory procedural requirements. To the extent that DSG argues from these facts that the Town's attorney, an expert in eminent domain law, knew that the Town was not comporting itself in compliance with the statutory procedural requirements, DSG has not drawn the requisite nexus between this fact and its allegation that the Town acted in bad faith. Moreover, DSG does not cite to any part of the record in support of its contention that the Town's attorney knew that the Town had not proceeded in compliance with the condemnation statutes when the Town challenged DSG's motion for an injunction or when the Town filed its answer.

¶33 One significant problem with DSG's bad faith theory is that, under the condemnation statutes applicable to this case, the Town's success before the condemnation commission would not affect DSG's regulatory takings and inverse condemnation action. That is, there is a statutory procedure available to DSG to prevent the Town from taking title to its property after the commission issued the condemnation award. Under WIS. STAT. § 32.06(10),[9] if DSG was not satisfied with the commission's award, it could appeal the award to the circuit court to prevent the Town from taking title to DSG's property. In any event, DSG's right to take action was an entirely separate proceeding from the condemnation action. As DSG is aware, a right to take action brought under § 32.06(5) challenges a condemnor's right to take an owner's property. If DSG were to succeed in the right to take action, the Town would not have been able to take title to DSG's property, regardless of the Town's success in the condemnation proceeding. [10]

[9] WISCONSIN STAT. § 32.06(10) reads as follows:

> APPEAL TO CIRCUIT COURT. Within 60 days after the date of filing of the commission's award either condemnor or owner may appeal to the circuit court by giving notice of appeal to the opposite party and to the clerk of the circuit court as provided in s. 32.05(10). The clerk shall thereupon enter the appeal as an action pending in said court with the condemnee as plaintiff and the condemnor as defendant. It shall thereupon proceed as an action in said court subject to all the provisions of law relating to actions brought therein, but the only issues to be tried shall be questions of title, if any, as provided by ss. 32.11 and 32.12 and the amount of just compensation to be paid by condemnor, and it shall have precedence over all other actions not then on trial. It shall be tried by jury unless waived by both plaintiff and defendant. The amount of the jurisdictional offer or of the commission's award shall not be disclosed to the jury during such trial.

[10] DSG's attorney conceded this point at the November 17, 2008 continued hearing on the Town's motion for summary judgment.

Thus, DSG's theory that the Town filed the condemnation action for the purpose of buying time to acquire title to DSG's property and then seek dismissal of DSG's statutory takings and inverse condemnation claims belies common sense in light of the statutes governing condemnation proceedings and right to take actions.

¶34 In its final argument on this topic, DSG contends the circuit court made factual findings in the course of granting summary judgment to the Town. Because our review of a summary judgment order is de novo, and we have performed that review, we need not consider this argument.

¶35 In sum, we conclude, viewing the evidence in the light most favorable to DSG, that no material facts are in dispute regarding whether the Town acted in bad faith by seeking condemnation of DSG's property for the Hauge Log Church Historic Park District, and that DSG has not provided any facts to support its bad faith claim.

7. Summary Judgment on DSG's 42 U.S.C. § 1983 Claims

¶36 DSG argues that the Town Board members who voted to condemn DSG's land were barred under WIS. STAT. § 19.59(1)(c)[11] from doing so because

[11] WISCONSIN STAT. § 19.59(1)(c) reads:

> Except as otherwise provided in par. (d), no local public official may:
>
> 1. Take any official action substantially affecting a matter in which the official, a member of his or her immediate family, or an organization with which the official is associated has a substantial financial interest.
>
> 2. Use his or her office or position in a way that produces or assists in the production of a substantial benefit, direct or indirect, for the official, one or more members of the

(continued)

each member had a financial interest in voting for condemnation. This argument stems from DSG's damages claim brought against the board members under 42 U.S.C. § 1983. We rejected this same argument in ***State ex rel. Gehl***, No. 2007AP1067. Because the doctrine of claim preclusion applies to bar this argument, we do not consider it.

CONCLUSION

¶37 For the reasons we have discussed, we conclude that the Town is entitled to summary judgment. We therefore affirm the circuit court's summary judgment order.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.

official's immediate family either separately or together, or an organization with which the official is associated.