

STATE OF WISCONSIN CIRCUIT COURT ADAMS COUNTY

CHARLES D. PHEIFFER,

Plaintiff,

v.

Case No: 2017-CV-145

FRIENDSHIP LAKE PROTECTION AND
REHABILITATION DISTRICT,

Defendant.

**DEFENDANT’S BRIEF IN OPPOSITION TO PLAINTIFF’S PETITION FOR
TEMPORARY RESTRAINING ORDER AND TEMPORARY INJUNCTION**

Plaintiff’s request for a temporary restraining order and injunction is not authorized in condemnation proceedings under Wis. Stat. § 32.05, and Plaintiff’s legal challenges to Defendant’s right to condemn are without merit. For the reasons set forth below, Plaintiff’s petition for a temporary restraining order and injunction should be denied, and Defendant should be allowed to continue with the condemnation process.

BACKGROUND

The Friendship Dam (the “Dam”), which is currently owned by Plaintiff, creates Friendship Lake, an approximately 125-acre lake located in Adams County. Defendant Friendship Lake District¹ (the “District”) is a public inland lake protection and rehabilitation district created pursuant to Wis. Stat. Ch. 33. The District was created by Adams County on March 17, 1992, and was created “with the power of a municipal corporation for the purposes of carrying out Chapter 33” of the state statutes. Pursuant to Wis. Stat. § 33.22, the District is

¹The proper legal name of Defendant is the “Friendship Lake District.” The Summons and Complaint incorrectly identify Defendant as the “Friendship Lake Protection and Rehabilitation District.”

responsible for the protection and rehabilitation of Friendship Lake and may acquire property for that purpose.

For the past several years, Plaintiff has kept the level of Friendship Lake artificially low. According to public statements made by Plaintiff to the District, this was done for safety reasons given the repairs that the Department of Natural Resources (“DNR”) has ordered Plaintiff to make pursuant to the DNR July 7, 2016, Order (the “DNR Order”). Plaintiff and the District had discussed a possible sale of the Dam, but these discussions were unsuccessful. Following the discussions regarding a possible sale of the Dam, on September 3, 2016, the District membership voted to authorize an appraisal of the Dam for purposes of assessing whether the District should acquire the Dam and make the repairs required by the DNR Order. The goal of the District was to identify the fair market value for the Dam and proceed accordingly. Following receipt of the appraisal, the District voted on May 27, 2017, to acquire the Dam through condemnation. The District issued a Relocation Order for the Dam on May 27, 2017, and a copy of the Relocation Order and the appraisal were served on Plaintiff on June 1, 2017. The District then attempted to negotiate an agreed upon price for the Dam with Plaintiff, but Plaintiff did not respond to the District’s requests. Therefore, on September 1, 2017, the District issued a Jurisdictional Offer for the Dam at the appraised value of \$110,000. The Jurisdictional Offer was served on Plaintiff on September 6, 2017.

ARGUMENT

Plaintiff filed this action to try to prevent the District from exercising its lawful power of eminent domain under Wis. Stat. Ch. 32. However, Chapter 32 sets forth the exclusive procedure for condemnation actions, *see Warehouse II, LLC v. State Dep’t. of Transportation*, 2006 WI 62, ¶ 8, 291 Wis. 2d 80, 715 N.W.2d 213, and nothing in Chapter 32 authorizes an

injunction to prevent condemnation proceedings. If Plaintiff wishes to challenge the District's right to condemn the Dam, then he must follow the requirements of Wis. Stat. § 32.05(5), and that section does not allow the Court to enjoin the District from continuing the condemnation process. Even assuming that an injunction is available, Plaintiff cannot show irreparable harm or a likelihood of success on the merits. Therefore, the Court should deny Plaintiff's petition and vacate the temporary restraining order.

I. Overview of Condemnation Process

Before addressing the merits of Plaintiff's arguments, it is necessary to first set forth how the condemnation process works under Section 32.05. Section 32.05 is the exclusive procedure for condemnation of property for, among other things, "watercourses or water transmission and distribution facilities." Wis. Stat. § 32.05 (intro). "A watercourse consists of bed, banks, and water; yet the water need not flow continually." *Fryer v. Warne*, 29 Wis. 511, 515 (1872). The Dam, which includes the flowage rights necessary to create Friendship Lake, fits this definition of a watercourse, and the acquisition of the Dam must proceed under Section 32.05.² While Plaintiff filed this action before all steps in the process have been completed, the District has complied with the requirements of Section 32.05 throughout the condemnation of the Dam.

The first step in the condemnation process is for the condemning authority to issue a Relocation Order outlining the project for which the property is being acquired, including a map or plat and the property interests required. Wis. Stat. § 32.05(1)(a). After providing the owner of the property with a copy of a full narrative appraisal, and informing the owner of his right to

²Plaintiff is correct that the Jurisdictional Offer does not include the flowage rights associated with the Dam in the legal description. This is a technical error in the legal description, and the appraisal provided to Plaintiff clearly indicates that the flowage rights were included in the fair market value for the Dam. Due to this technical error, the District intends to issue an amended Jurisdictional Offer which contains the correct legal description. *See Warehouse II*, 291 Wis. 2d 80, ¶¶ 11-13.

obtain his own appraisal under Wis. Stat. § 32.05(2), the condemning authority must “attempt to negotiate personally with the owner” for the purchase price of the property. Wis. Stat. § 32.05(2a). If negotiations fail, then the condemning authority shall serve the owner with a Jurisdictional Offer setting forth, among other things, the amount of compensation offered, the description of the property being acquired, the purpose for which the property is being acquired, and the owner’s rights to appeal the amount of compensation or challenge the right to acquire the property. Wis. Stat. § 32.05(3). Within 14 days of serving the Jurisdictional Offer, the condemning authority must record a Lis Pendens, with a copy of the Jurisdictional Offer, with the register of deeds office.

Under Section 32.05, if the owner does not accept the Jurisdictional Offer within 20 days from receipt of the offer, then the condemning authority may issue an award of compensation, also known as an “Award of Damages.” Wis. Stat. § 32.05(7). The award must be in writing and served on all owners of the property. Wis. Stat. §§ 32.05(7)(a) and (b). The condemning authority must pay the amount of the award to the landowner directly or deposit the amount with the clerk of circuit court of the county for the benefit of the owner of the property. Wis. Stat. § 32.05(7)(d). Once the award has been paid, a copy of the award must also be recorded with the register of deeds office in the county in which the property is located. Wis. Stat. § 32.05(7)(c). Once these steps have been accomplished, then title to the property transfers from the owner to the condemning authority. *Id.* The date on which the award is recorded is the “date of taking.”

While this procedure is taking place, the owner may, within 40 days of service of the Jurisdictional Offer, commence an action to challenge the right to condemn the property. Wis. Stat. § 32.05(5). This is also known as a “right to take action” and is independent of the condemnation process. As discussed below, the filing of a right to take action does not prevent

the condemning authority from moving forward with the acquisition of the property. In addition to the right to take action, the owner may, within two years after the date of taking, appeal from the award of compensation by filing an action in circuit court. Wis. Stat. § 32.05(9). However, the only issue that may be raised in such an appeal is the amount of the award. Wis. Stat. § 32.05(9)(a).

II. Section 32.05(5) Does Not Prevent the District From Continuing the Condemnation Process.

As mentioned above, Plaintiff may bring two types of challenges to the District's acquisition of the Dam. First, Plaintiff may bring a right to take action under Wis. Stat. § 32.05(5). Second, Plaintiff may challenge the amount of just compensation under Wis. Stat. § 32.05(9). The state Supreme Court has made clear that these are two separate proceedings, and that they occur simultaneously. *Falkner v. N. States Power Co.*, 75 Wis. 2d 116, 120-21, 248 N.W.2d 885 (1977).³ Because Chapter 32 is the exclusive procedure for condemnation, Section 32.05(5) is the exclusive means by which Plaintiff may challenge the District's right to condemn the Dam. Indeed, the plain language of Section 32.05(5) states that it "shall be the *only* manner in which any issue other than the amount of just compensation, or other than proceedings to perfect title . . . may be raised pertaining to the condemnation of the property described in the jurisdictional offer." Wis. Stat. § 32.05(5) (emphasis added). As a result of this language, the only manner in which Plaintiff may contest the right of the District to condemn the Dam is through Section 32.05(5).

However, while Plaintiff may challenge the District's right to condemn the Dam under Section 32.05(5), such a challenge may not "prevent the [District] from proceeding with

³The Court in *Falkner* was interpreting Wis. Stat. § 32.06, however, that section and § 32.05 contain identical language, and the same conclusion applies. Compare Wis. Stat. § 35.05(5) with Wis. Stat. § 32.06(5).

condemnation during the pendency of the action to contest the right to condemn.” *Id.* In other words, the filing of a right to take action does not prevent the District from taking title to the Dam. Nothing in Section 32.05(5) allows Plaintiff to obtain the relief it has requested, and to allow an injunction to be issued now is contrary to the plain language of the statute. This is precisely the type of situation that the state Supreme Court addressed in *Waller v. Am. Transmission Co., LLC*, 2013 WI 77, 350 Wis. 2d 242, 833 N.W.2d 764. There, the Court stressed that a right to take action does not prevent a condemning authority from proceeding with condemnation. *Waller*, 350 Wis. 2d 242, ¶ 92. Because of this parallel-track structure of Section 32.05(5), “a motion for injunctive relief to halt a condemnation proceeding . . . *is counterproductive and contrary to the intent and spirit of the statutes.*” *Id.* (emphasis added). Thus, based on the plain language of the statute, and the clear case law, Plaintiff is not entitled to injunctive relief at this time.

III. Even Assuming Plaintiff is Entitled to Injunctive Relief, He Does Not Meet the Standard.

In order to be entitled to injunctive relief, Plaintiff must show: (1) that he is likely to suffer irreparable harm if an injunction is not issued; (2) that he has no other adequate remedy at law; (3) that an injunction is necessary to preserve the status quo; and (4) that he has a reasonable probability of success on the merits. *Milwaukee Deputy Sheriffs’ Ass’n v. Milwaukee Cty.*, 2016 WI App 56, ¶ 20, 370 Wis. 2d 644, 883 N.W.2d 154. “Injunctions, whether temporary or permanent, are not to be issued lightly. The cause must be substantial.” *Sch. Dist. of Slinger v. Wis. Interscholastic Ath. Ass’n*, 210 Wis. 2d 365, 370, 563 N.W.2d 585 (Ct. App. 1997). Plaintiff cannot meet this high standard. He has not identified any irreparable harm if the District is allowed to proceed with condemnation, and he has not shown a reasonable probability of success on the merits of his claims.

A. There is no irreparable harm to Plaintiff.

As a preliminary matter, Plaintiff's brief on this matter is conclusory at best. Plaintiff asserts that he will suffer irreparable harm, but he does not identify what harm that will be. The fact of the matter is that if he were to succeed on his right to take action, the Dam would simply be transferred back to him. The District is not seeking to demolish the Dam or remove the power generating equipment from it. Rather, the District is acquiring the Dam for the purpose of repairing the Dam and operating it for the protection of Friendship Lake. The only possible "harm" that would occur is that Plaintiff would lose some income from the sale of electricity generated by the Dam while it is in the District's possession. This is not irreparable harm, but mere damages that can be paid in the event Plaintiff succeeds in his right to take action. Thus, Plaintiff will not suffer irreparable harm, and he has an adequate remedy under the procedures of Chapter 32.

Similarly, Plaintiff has not identified any valid reason why an injunction is necessary to maintain the status quo. Plaintiff's only stated reason is identical to his irreparable harm argument, and that he would lose his current contract for the hydro-electric power if the District takes possession of the Dam. Again, this is a measure of damages, not irreparable harm, and Plaintiff has not explained how maintaining the "status quo" is necessary in this case.

B. The District has the power to condemn and Plaintiff cannot prove a likelihood of success on the merits.

Next, Plaintiff has not demonstrated any reasonable likelihood of success on the merits of his claim. Plaintiff seems to suggest that the District may only condemn property if it exercises the powers of a town sanitary district pursuant to Wis. Stat. § 33.22(3). Plaintiff misunderstands the powers of the District and the power of condemnation. It is true that a town sanitary district has the power to condemn under Wis. Stat. § 66.077(5)(h), but that is not the extent of its

powers. The purpose of a town sanitary district is to construct and install water mains, sanitary sewers, storm water sewers, and other improvements “necessary for the promotion of the public health.” Wis. Stat. § 60.77(4). The application of such a system to a lake protection district is obvious as it would allow the district to better control storm water runoff and other potential sources of water contamination. However, simply because the District does not have the powers of a town sanitary district does not mean that the District lacks the power of condemnation.

The power of condemnation is an “attribute of sovereignty,” which the legislature may delegate. *Falkner*, 75 Wis. 2d at 128, 131. The list of entities to which the legislature has delegated the power of condemnation is contained in Wis. Stat. § 32.02, and includes, among others, “any public board or commission, for any lawful purpose.” This is a broad grant of authority, and the District is clearly a public board or commission, with the power to “sue and be sued, make contracts, accept gifts, purchase, lease, devise or otherwise acquire, hold, maintain or dispose of property, disburse money, contract debt and do any other acts necessary to carry out a program of lake protection and rehabilitation.” Wis. Stat. § 33.22(1). The District may also levy taxes, and impose special assessments on property within the District. Wis. Stat. §§ 33.31 and 33.32. Further, Adams County, when it created the District, authorized the District to have the “power of a municipal corporation for the purposes of carrying out Chapter 33.” There is no doubt that a municipality (i.e., a village or city) has the power of condemnation.

Based on the structure of the District, and its legal powers to tax and spend, it is clearly a “public board or commission” to which the legislature delegated the power of condemnation.⁴ As a result, the District possesses the power to acquire the Dam through condemnation. Because

⁴If the legislature had intended to exclude lake districts from the phrase “any public board or commission,” then it could have easily done so. In fact, the legislature specifically excluded mosquito control commissions and local professional football stadium district boards from Wis. Stat. § 32.02(1).

the District has this power, Plaintiff cannot demonstrate a “reasonable likelihood of success” in his right to take action.

C. The other litigation regarding the DNR Order is irrelevant to the condemnation proceeding.

Finally, there is a separate action involving Plaintiff, the Village of Friendship, and the DNR, in which Plaintiff and the Village are challenging the DNR Order regarding repair of the Dam. Plaintiff asserts that it would be “inappropriate for this court to have before it the ownership issue in the [sic] action when it is already being litigated in another action before this Court. It is inequitable to make Plaintiff pay for the litigation costs of fighting that issue on several different fronts at once.” Plaintiff does not explain how this fact fits in with the question of whether an injunction is appropriate. However, it is necessary for the Court to understand that this separate litigation is currently stayed, and there has been no significant action in the matter for approximately one year. The reason for the stay is twofold: (1) Plaintiff retained an engineering firm to conduct a dam safety inspection, which was one of the requirements of the DNR Order; and (2) there were efforts being made to transfer the Dam to a new owner. (Hahn Aff.) The potential new owner in this instance is the District. Thus, it appears that Plaintiff used the fact that he and the District were in negotiations to transfer the Dam to stay litigation of the DNR Order. Now, he is attempting to use that litigation to procure an injunction here. Plaintiff cannot have it both ways, and the fact of the other litigation should have no bearing here.

CONCLUSION

The plain language of Wis. Stat. § 32.05 creates the exclusive procedure for the condemnation of the water courses in the State of Wisconsin. That exclusive procedure includes an opportunity to challenge the condemning authority’s right to take the property being acquired. Wis. Stat. § 32.05(5). However, under no circumstances does such a challenge prevent the

condemning authority from continuing with the condemnation process. As a result, an injunction is contrary to the purpose of the statute, and Plaintiff's request for an injunction must be denied.

Even assuming that an injunction were available, Plaintiff has not shown irreparable harm or a reasonable likelihood of success on the merits. Any harm that would occur can be addressed through monetary damages, and the statutes clearly give the District the power to condemn the Dam.

For these reasons, the District respectfully requests that the Court deny Plaintiff's request for relief and vacate the temporary restraining order.

Dated this 27th day of September, 2017.

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