

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WISCONSIN CIRCUIT COURT ROCK COUNTY

* * * * *

PATRICIA ULRICH, et al.,

Plaintiff,

vs.

Case No. 2011CV1847

WISCONSIN'S ROCK RIVER

LEISURE ESTATES,

Defendant.

COPY

* * * * *

PROCEEDINGS: Status Conference
DATE: February 25, 2013

COURT: The Honorable Daniel T. Dillon
 Circuit Court Judge, Presiding

APPEARANCES: Harry Charles O'Leary, Attorney at Law,
 Appearing on behalf of the plaintiff,
 And plaintiff in person;

 Timothy H. Lindau, Attorney at Law,
 Appearing on behalf of the defendant.

REPORTER: Linda M. Blum

1 THE COURT: Mrs. Reporter, this is Case No. 11
2 CV 1847, it's in the matter of Patricia Ulrich and number
3 of other named defendants, excuse me, plaintiffs versus
4 Wisconsin Rock River Leisure Estates. Can we have the
5 appearance for the plaintiffs?

6 MR. O'LEARY: Attorney Harry O'Leary appearing
7 on behalf of the plaintiff.

8 MR. LINDAU: Attorney Tim Lindau appearing on
9 behalf of the defendant, Rock River Leisure Estates.

10 THE COURT: We have a couple motions pending
11 today. There's a motion to withdraw, and we, on behalf
12 of, filed by Mr. O'Leary involving plaintiffs Gaffey,
13 Tirjer, Beltran, and then there's a motion for partial
14 summary judgment. Is anybody else appearing on the
15 motion to withdraw?

16 MR. O'LEARY: No, Your Honor. I know Ms.
17 Gaffey is here in the courtroom, but Tirjer and Mr.
18 Beltran are not here.

19 THE COURT: Is there anybody in opposition to
20 the motion to withdraw? Ms. Gaffey is here?

21 MR. O'LEARY: She's here, yes, Your Honor.

22 THE COURT: Where is Ms. Gaffey? Ms. Gaffey,
23 do you object to Mr. O'Leary withdrawing as counsel?

24 MS. GAFFEY: No.

25 THE COURT: No one appears in opposition?

1 These parties apparently are going to be representing
2 themselves, if they wish, and that motion to withdraw
3 without objection is granted, no objection?

4 MR. LINDAU: No objection, Your Honor.

5 THE COURT: I'm looking for an order, Mr.
6 O'Leary.

7 MR. O'LEARY: I didn't prepare one, Your Honor.

8 THE COURT: Why don't you send me one?

9 MR. O'LEARY: Yeah.

10 THE COURT: In the order just indicate that
11 the individuals then were representing themselves will be
12 notified as to further proceedings by either opposing
13 counsel or the court as the case may be, if notices are
14 required at whatever mailing address you use?

15 MR. O'LEARY: Yes.

16 THE COURT: Then they'll continue to be kept
17 in the loop. They'll have to respond, they will avoid
18 the additional costs as well as the unnecessary step of
19 having individuals personally served. Okay.

20 Now we have a motion for partial summary
21 judgment, and the date of the motion was February 18th.
22 We're a little thin on your notice time for motion for
23 summary judgment.

24 MR. O'LEARY: I understand that, Your Honor.

25 THE COURT: Perhaps it will be addressed if

1 Mr. Lindau will waive the time. Basically it looks like
2 Mr. O'Leary is trying to smoke out whether the defendants
3 are now taking the position as to whether certain named
4 individuals in the affidavit, Mr. O'Leary, should be the
5 subject of further proceedings. Have you made any
6 decisions?

7 MR. LINDAU: Your Honor, I appreciate attorney
8 O'Leary's attempt to sort of narrow down the process, and
9 I think we can get there, I'm just not sure we can get
10 there today, Your Honor.

11 The framework that we're currently sitting in
12 is we, as an association, have identified people that are
13 living there in our opinion and based upon the
14 information that we have living there as year-round
15 residents, meaning they have no other place. We've
16 submitted that list to attorney O'Leary and we have
17 discussed what to do with regard to those individuals,
18 and I don't know that there's huge dispute as to whether
19 they are living there year round.

20 The individuals that attorney O'Leary included
21 in his motion on partial summary judgment includes some
22 that we are willing to dismiss here today, and it
23 includes others that we are not willing to dismiss here
24 today because in between the permanent living on the
25 grounds permanently year-round and six months, or

1 whatever the case may be, there's an array of things in
2 between and facts and circumstances that are unique to
3 each of the defendants, and so we are unwilling to
4 dismiss some of them. However, we do have information
5 and knowledge sufficient on a number of them that suggest
6 that they are not living there year-round and are not
7 living there permanently as far as the board is
8 concerned, so we would be willing to dismiss those
9 individuals today.

10 However, with regard to the other plaintiffs
11 and that listed by attorney O'Leary, we would ask that
12 the court deny the summary judgment with regard to them
13 and allow us to move forward in litigating our counter
14 claim.

15 THE COURT: Well, I'm not going to deny it,
16 nor am I going to grant it. I'll give you a chance to
17 respond. I think the way to go here, Mr. O'Leary, what I
18 think he's looking for is to, and this is one way to do
19 it, obviously we could have tried to get it straightened
20 around on pretrial, but what Mr. O'Leary is asking for is
21 an order from the court asking me to make a finding of
22 fact by inference that the association has identified
23 certain parties plaintiff as not living year-round and I
24 don't know if they are listed in the courtroom here, Ms.
25 Ulrich, Mr. Ross Benton, and Mr. And Mrs. Gaddie,

1 G-A-D-D-I-E, Mr. And Mrs. Strang, Mr. And Mrs. Lee, I'm
2 not, maybe not Mr. And Mrs., but those are the names of
3 the party Steven and Linda Schultz, Mr. Rupprecht, Mr.
4 And Mrs. Sarto, Mr. Zeck, Mr. Kremer, Mr. And Mrs. Curry,
5 Mr. Aviles, Krist Enger, Mr. Bomben, Mr. Pahl, P-A-H-L,
6 Mr. Oplawski, and Mr. Mathews.

7 They're all listed, and then there's other
8 individuals who by inference if they're not listed on
9 that list then the association is contending that they're
10 year round.

11 Let's assume that this is a sufficient
12 affidavit basically asking you to respond. And for
13 summary judgment you should have 20 days to respond. If
14 you want more than that to respond I'll give you that,
15 give you 30 days to respond, but what I'm going to ask
16 you to do is to respond by counter affidavit to this
17 motion so Mr. O'Leary knows who's in and who's out.

18 Now if you feel that you can't respond because
19 that decision falls within the facts that have to be
20 determined in the future, or maybe is attorney work
21 product, or you have some other reason that you can't
22 answer the question, I'm still going to ask you to file a
23 counter affidavit that says that much, does that comport
24 with what you have in mind?

25 MR. LINDAU: That would be okay, Your Honor.

1 And I'm hopeful that actually attorney O'Leary and I can,
2 I would prefer that attorney O'Leary withdraw the motion,
3 then that, of course, is up to him because I think he's
4 going to have probably some interest in withdrawing with
5 some other parties which determines whether we're going
6 to litigate further on this.

7 THE COURT: Let me stop you. I've never seen a
8 lawyer who didn't really prefer that the other side
9 withdraw their motion.

10 MR. LINDAU: True.

11 THE COURT: But I think that would make sense
12 if I give you an order to do something in betwixt and in
13 between.

14 MR. LINDAU: Give a time line, we have
15 something we can work off of. I would ask for longer
16 than 20 days, Your Honor.

17 THE COURT: I think we can work something out.
18 I don't know if it makes any difference to Mr. O'Leary if
19 he gets a summary motion addressed provided he gets a
20 statement from the plaintiff as to the individuals
21 against whom the plaintiff intends to proceed. That's
22 really what you're looking for, right?

23 MR. O'LEARY: It is, Your Honor. And I don't
24 have any problem with the court continuing it. Obviously
25 I know I'm outside of rules with regards to the response

1 time.

2 THE COURT: I can see why you did this. You
3 tried to do some legal carpentry work to get the issue
4 before court.

5 MR. O'LEARY: But I may be filing another
6 motion with regard to withdraw.

7 THE COURT: I'm going to ask the plaintiff to
8 make your pleadings against the parties, the plaintiff,
9 technically you are the plaintiff but now you are the
10 counter claiming party seeking enforcement of these
11 covenants, and by you I'm talking to you, Mr. Lindau, so
12 in that context I'm going to direct that you make your
13 pleadings more definite and certain to advise the court
14 and all of the parties against whom you are proceeding
15 specifically who it is that you're seeking to enforce the
16 covenants against.

17 And then Mr. O'Leary can get there, he can send
18 it out by email or however he chooses to communicate
19 information to his clients. In other words, let's start
20 to sift through and winnow who is left and I'll give you
21 a reasonable period of time to respond. If this would
22 have been a pretrial conference, which we'll make it at
23 this point, I'd do the same thing. How much time do you
24 need?

25 MR. LINDAU: Your Honor, are you contemplating,

1 you indicated make my pleadings more reasonable and
2 certain, are you contemplating with regard to amended
3 complaint?

4 THE COURT: No.

5 MR. LINDAU: Amended counter claim, or just an
6 affidavit, or some documents stating here's what we
7 believe with regard to these plaintiffs and here's what
8 we regard with these plaintiffs?

9 THE COURT: Well the latter, actually it's an
10 order to make your pleadings more definite and certain
11 and you can do that any way you want, just spells out
12 what you have in mind.

13 MR. LINDAU: Okay. Your Honor, I think 30 days
14 is appropriate.

15 THE COURT: All right. So then we'll expect
16 to hear from you by, let's make it the end of the last
17 week in March, by the 29th of March. We won't schedule
18 another appearance, we'll just send a notice to court
19 with respect to where you stand with respect to the
20 ongoing proceedings.

21 Now, I think I said the last time we were
22 together that I know I've said it before, but I think
23 that that case is ripe for mediation. Maybe you've
24 mediated it. I don't know who is left to go to
25 mediation, but it's a civil action, I have the power to

1 order everybody to go to mediation. What do you have in
2 minds as far as that's concerned?

3 MR. O'LEARY: Your Honor, Mr. Lindau, from my
4 perspective with regards to mediation is are they a
5 permanent resident or aren't they a permanent resident.
6 The defendants in this case wanted to go the next step
7 and have other elements thrown into that as far as fees
8 and things of that nature. In that respect none of my
9 clients are going to be willing to do that, so that's
10 where I was stuck.

11 We were prepared to have the court make a
12 decision with regard to are they a permanent resident or
13 aren't they, and that's the court, it's a declaratory
14 judgment, it's either they are or they aren't based on
15 the covenants.

16 THE COURT: Actually it's a trial. People are
17 going to have to testify.

18 MR. O'LEARY: Right. I understand that, Your
19 Honor, but I guess I'd like to have the chance to see
20 what Mr. Lindau says as far as who they believe are
21 permanent residents because other, from my perspective I
22 think a shotgun approach is frivolous in nature to a
23 certain degree.

24 THE COURT: I'm not pulling trump today. I
25 don't intend to force your hand if you want to see what

1 he has to say.

2 MR. O'LEARY: I'd like to do that because I
3 might be withdrawing from other perspectives, as I
4 mentioned, so be that as it may, if we can wait until the
5 29th and find out who they believe are involved, and I'll
6 prepare my motion to withdraw for at least the other
7 three plaintiffs.

8 MR. LINDAU: Your Honor, I think similarly
9 we've been through this all, as the court has, attorney
10 O'Leary and I have been in our previous case involving
11 enforcement of the covenants with regard to Mr. And Mrs.
12 Sarto were also parties to this action. I guess I don't
13 see this ending as any differently than what that did
14 with regard to a summary judgment motion. So that's
15 ultimately where I see it going with a vast majority of
16 them going, Your Honor, but --

17 THE COURT: You're going to need some
18 affidavits in support of your summary judgment, and I'll
19 tell you what I'm thinking. I'm thinking I'm going to
20 have to try every one of these cases, maybe you can short
21 circuit it on summary judgment, but I haven't seen enough
22 to let me draw that conclusion.

23 MR. LINDAU: Once we've done some discovery.
24 But --

25 THE COURT: Let's just see how it goes.

1 MR. LINDAU: Sure. Sounds good.

2 THE COURT: I know you have a game plan but we
3 don't --

4 MR. O'LEARY: The only other thing, Your Honor,
5 after putting up with this for two years or thereabouts,
6 I see sinister motives thrown in those letters of
7 counsel, and they're using the terminology year-round now
8 with regard to terminology. It's in the covenants
9 permanent residence, I would like to know who they
10 believe are permanent residents, not even year-round
11 residents. I don't even know where that comes into play.
12 It's a common sense, but it's the permanent residence
13 language that's in the covenants.

14 MR. LINDAU: You --

15 THE COURT: You don't need to respond to that,
16 although the decision that I wrote on this case is only
17 six pages long, if you break out the case law that's
18 referred to in the dictionaries that are referred to, and
19 the comment to the Wisconsin civil jury instruction which
20 is used by analogy on the definition of residents of
21 members of a household, you get a pretty good idea how,
22 and permanent resident, domicile, the terms with respect
23 to what defines, who qualifies and who doesn't under the
24 terms of this, these restrictive covenants, is going to
25 have to meet the definition that I set in that decision.

1 If you don't like it, appeal it.

2 MR. O'LEARY: No, Your Honor.

3 THE COURT: I'm not just saying that to you,
4 I'm saying that to anybody. And I would welcome the
5 wisdom of the Court of Appeals to try to straighten it
6 out, it is not clear. And as Mr. O'Leary pointed out
7 over and over again in his argument, the definition of
8 resident is a moveable, the semantics, in other words,
9 the meaning of that word changes and moves around
10 depending on the circumstances and whose saying they are
11 a resident, whether you want to vote, whether you want to
12 file income taxes, where you get your driver's license
13 and all of that stuff, can all be a little different and
14 in the definition here, seems to me, you can go into any
15 of those things. And bottom line is whether you are
16 permanent resident, part of the bottom line is are you
17 living anywhere else, is there anyplace else that is a
18 more primary residence. Domicile, that's the place where
19 in default of anything else that's where I call home,
20 domicile when this was drafted back in the '70s or
21 whenever it was, the language that used might have been
22 state-of-the-art language, but since then things have
23 changed, and we have this kind of antiquated structural
24 language that was used in one of these, not the first in
25 the country but certainly the first wave in the United

1 States, of these kinds of residential developments. And
2 there's been a lot of scraps throughout the country from
3 various states on all kinds of reasons that have come up
4 over exactly or something similar to what we're talking
5 about here. There hasn't been a single decision that I
6 was satisfied with in all my research that says well,
7 there it is, and have to use that. I had to go to all
8 these different sources to determine what resident,
9 including the juvenile code, so I'm sure when Mr. Lindau
10 says permanent resident he knows what I said in this
11 decision. And you got to live up to the letter of the
12 law in this decision, and even if the parties haven't
13 appealed up until now I can see why they didn't, even
14 though I said go ahead and appeal. It is easy for me to
15 say, I don't have to file the appeal because you might be
16 waiting for these individuals cases to come down, okay,
17 those are my facts, those are your facts, and the facts
18 are all going to be different, and this set of facts over
19 here and the neighbor right next door might have a better
20 appealable case and the one next to him or her.

21 It's tough to appeal. You have to start trying
22 a few of these cases, then take them on. And so long as
23 the posture is it's all or nothing, you're going to have
24 a tough time mediating a settlement. I know it's a
25 difficult case to get to the point of resolution. Some

1 people are going to want to know for sure where they
2 stand because if they're 60/40 right now, or 51/49 right
3 now, they might say all I have to do is spend a little
4 more time over here or over there and this isn't going to
5 be a problem and they're not going to go forward with
6 litigation. Other folks basically have made this their
7 full-time residence, they've got a different evaluation,
8 they have to consider, and I realize everybody is
9 different so we're not going to force anybody to go to
10 trial, but neither is the case going to go away on its
11 own unless somebody gets settled I can't really, Mr.
12 O'Leary says a shotgun doesn't work, and by that I think
13 you mean how can you send all of these people to
14 mediation at the same time, they all have individual
15 issues, I gather that, and I wouldn't be able to send
16 them all to mediation, they have to go one by one, and
17 Mr. Lindau at some point would say that isn't going to
18 work.

19 Anyway, the offer is still here. If you get
20 narrowed down a little more, if you want mediation I'll
21 order it. Although in civil actions I normally require
22 mediation at this point, I'm not doing it in this case
23 for reasons I've just mentioned.

24 So let's go around one more time, you know what
25 your marching orders are.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. LINDAU: I do, Your Honor.

THE COURT: Mr. O'Leary, I've granted your motion on the withdrawal. And instead of granting your motion for summary judgment I made the order I have with respect to Mr. Lindau to respond. Do you need anything else?

MR. O'LEARY: No, Your Honor.

THE COURT: How about you, Mr. Lindau?

MR. LINDAU: No, Your Honor.

THE COURT: Okay. Thanks for coming in.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF WISCONSIN)
SS.)
COUNTY OF ROCK)

I, LINDA M. BLUM, Official Court Reporter,
hereby certify that I reported in Stenographic shorthand
the proceedings had before the Court on this 25th day of
February, 2013, and that the foregoing transcript is a
true and correct copy of the said Stenographic notes
thereof.

Dated this 10th day of May, 2013.

LINDA M. BLUM - - - - -
Official Court Reporter

The foregoing certification of this transcript does not
apply to any reproduction of the same by any means unless
under the direct control and/or direction of the
certifying reporter.