

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN**

Susan Doxtator, Arlie Doxtator and
Sarah Wunderlich, as Special
Administrators of the Estate of
Jonathon C. Tubby,

Plaintiffs,

Case No. 19-CV-137

vs.

Erik O'Brien, Andrew Smith,
Todd J. Delain, Heidi Michel,
City of Green Bay, Brown County,
Joseph P. Mleziva, Nathan K.
Winisterfer, Thomas Zeigle,
Bradley A. Dernbach and John Does 1-5,

Defendants.

**DEFENDANTS ERIK O'BRIEN, ANDREW SMITH AND CITY OF GREEN BAY'S
RESPONSE TO BROWN COUNTY DEFENDANTS' MOTION TO DISMISS**

Defendants Erik O'Brien, Andrew Smith and City of Green Bay (collectively "City Defendants"), by their attorneys, Gunta Law Offices, S.C., respond to Brown County Defendants' ("County Defendants") Motion to Dismiss (Dkt. 55) as follows:

PROCEDURAL BACKGROUND

On October 19, 2018 two City of Green Bay Police Officers initiated a traffic stop of a vehicle driven by Jonathan Tubby. (Dkt. 41, ¶ 2) Mr. Tubby was ultimately arrested and transported to the Brown County Jail by Defendant Erik O'Brien. (Id.) The City of Green Bay maintained jurisdictional control over Mr. Tubby during his arrest and subsequent transportation to the County Jail. (Id. ¶¶ 3-4) Upon entering the sally port of the County Jail, an incident occurred in which Mr.

Tubby refused to exit the City squad car. Agents for both the Green Bay Police Department and Brown County Sheriff's Department were on scene, and a plan was devised by the County Defendants to extract Mr. Tubby from the squad car. (Id. ¶¶ 6-7) Mr. Tubby was eventually shot by Defendant O'Brien. City Defendants vehemently deny that any of the actions taken in the sally port of the County Jail created a violation of Mr. Tubby's constitutional protections.

On March 26, 2019 the City filed a Cross Claim pursuant to Fed.R.Civ.P. 13(g) against co-party Defendant Brown County, in order to preserve its state law claim seeking contribution in the form of indemnification against the County, for the purposes of Wis. Stat. §§ 66.0313 and 895.46. (Dkt. 41) The basis for the Cross Claim is laid out in the pleading and will not be reiterated here.

On April 16, 2019 the co-party County Defendants filed a Motion to Dismiss the City Defendants' Cross Claim. (Dkt. 55) The County Defendants contend that the City Defendants failed to comply with the provisions of Wis. Stats. § 893.80(1d)(a) by filing their Cross Claim before receiving a disallowance of claim from the County Defendants. (Id. p. 5) This is not the law.

DISCUSSION

On March 25, 2019, the City Attorney for the City of Green Bay served on the County a Notice of Claim and Notice of Injury under Wis. Stats. §§ 893.80(1d)(a)-(b). On March 26, 2019 the City filed a Cross Claim pursuant to Fed.R.Civ.P. 13(g) against co-party Defendant Brown County, in order to preserve its state law claim seeking contribution in the form of indemnification against the County, for the purposes of Wis. Stat. §§ 66.0313 and 895.46. (Dkt. 41) These procedural tools are separate and distinct. Nothing in the text of Wis. Stat. § 893.80 prohibits the City from filing a Cross Claim preserving their right to seek contribution in the form of indemnification from County.

The County Defendants' Motion to Dismiss the City Defendants' Cross Claim for failure to comply with the statutory requirements of Wis. Stats. §§ 893.80 improperly combines the two issues.

The timing of the service of the Notice of Claim and Notice of Injury in no way impacts the City Defendants' ability to assert a Cross Claim.

I. The Notice Requirement Under Wis. Stat. § 893.80 Does Not Apply To Claims For Contribution Against a Municipality.

The County relies on the language of Wis. Stat. § 893.80 (1d), which states that “no action may be brought or maintained” against a municipal corporation unless the plaintiff has submitted a claim within 120 days of the happening of the event giving rise to the claim. It fails to note that despite the “no action” language, courts have in fact recognized several exceptions to the notice requirements of § 893.80, specifically, the exception that a Notice of Claim under § 893.80 is not required for a claim for contribution. Dixon ex rel. Nikolay v. Wisconsin Health Org. Ins. Corp., 2000 WI 95, ¶ 12, 237 Wis. 2d 149, 155, 612 N.W.2d 721, 72. A cause of action for contribution is separate and distinct from the underlying cause of action. State Farm Mut. Auto. Ins. Co. v. Schara, 56 Wis.2d 262, 264, 201 N.W.2d 758 (1972). It does not accrue with the underlying claim. It is a contingent claim that becomes an enforceable right only when one joint tortfeasor pays more than his or her proportionate share of the damages. Id. at 266, 201 N.W.2d 758.

Accordingly, the City Defendants were not required to provide a Notice of Claim and wait for that Notice to be denied prior to filing their Cross Claim. Regardless, the City Defendants did—as a courtesy—serve a Notice on the County Defendants Clerk prior to filing their Cross Claim.

Although the Notice requirement is not applicable in the City Defendant's Cross Claim for contribution, the County Defendants were on notice of the City Defendants' intention to seek contribution in the form of indemnification. Brown County had actual notice of the City Defendants' intention to seek indemnification under Wis. Stat. § 895.46 on February 15, 2019, based on the City Defendants' Answer and Affirmative Defenses to Plaintiff's Complaint. (Dkt. 16) Furthermore, on

February 27, 2019, counsel for the City Defendants sent correspondence to counsel for the County Defendants indicating the City Defendants' intent to the tender of defense relating to the actions of the City Defendants, that occurred at the direction of the County Defendants, which entitled the City Defendants to indemnification under Wis. Stat. § 895.46. Again on March 6, 2019, the City Defendants asserted their intention to seek contribution in the form of indemnification under Wis. Stat. § 895.46 based on the City Defendants' Affirmative Defenses to Plaintiff's Amended Complaint. (Dkt. 35)

CONCLUSION

Because the City Defendants were not required to file a Notice of Claim under Wis. Stat. § 893.80, the City Defendants respectfully request that Brown County's Motion to Dismiss (Dkt. 55) be denied.

Dated at Wauwatosa, Wisconsin, this 30th day of April, 2019.

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