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STATE OF NORTH DAKOTA

In the Supreme Court
State of North Dakota

No. 20150349

City of Fargo,

Plaintiff-Appellee,

v.

William Rakowski,

Defendant-Appellant.

Appeal from the Judgment entered on November 10, 2015, and the earlier Order on Competing Motions for Summary Judgment dated June 25, 2015, Cass County District Court,

Case No. 09-2014-CV-03440

The Honorable Douglas Herman, Presiding

BRIEF OF APPELLEE

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I. STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in determining that the City of Fargo had the authority to assess a $100 fee for the third re-inspection of William Rakowski's rental property.

[¶2] Whether the district court erred in determining that the fee schedule adopted by the City of Fargo for the second and subsequent re-inspections of rental properties did not constitute a bill of attainder.

[¶3] Whether the district court erred in determining that the City of Fargo inspector did not need to obtain a search warrant before re-inspecting William Rakowski's rental property.

[¶4] Whether the district court erred in determining that the City of Fargo's present action is not barred by double jeopardy or the doctrine of res judicata.

[¶5] Whether the district court erred in dismissing any purported 42 U.S.C. § 1983 claim brought by William Rakowski against the City of Fargo.

II. STATEMENT OF THE CASE

[¶6] William Rakowski ("Rakowski") is the owner and operator of a rental property located at 511 20th Street North, Fargo, North Dakota (the "Rental Property"). (App. 52). On November 11, 2011, John Mrozla ("Mrozla"), a city inspector for the City of Fargo (the "City") conducted an initial inspection of the Rental Property. (App. 23, 52-53). During this initial inspection, Mrozla found multiple violations of the City Property Code. (App. 23). Mrozla conducted re-inspections of the Rental Property on December 12, 2011, December 29, 2011, January 23, 2012 and February 27, 2012. (App. 23, 53). At

each of these re-inspections, Mrozla continued to find violations of the Property Code. (App. 23).

[¶7] The City initially sought a $100 re-inspection fee for the respective re-inspections. (App. 5, 53). Thereafter, due to clerical mistakes, the City only sought a single $100 re-inspection fee for the re-inspection which took place on January 23, 2012. (App. 26, 53). Rakowski failed to pay the City the re-inspection fees and the City retained a collection agency to attempt to recover the amount owed by Rakowski. (App. 53). The collection agency was unsuccessful. (App. 53). The City then filed a small claims court action on October 9, 2014, against Rakowski, seeking to recover the amount owed for inspection fees and finance charges for the Rental Property. (App. 5). On December 9, 2014, Rakowski removed the small claims action to the district court and filed an Answer. (App. 6-16).

[¶8] On May 6, 2015, the City moved for summary judgment. (App. 17-21). On June 12, 2015, Rakowski moved for summary judgment which incorporated by reference Rakowski's brief in response to the City's motion for summary judgment. (App. 36-50). On June 25, 2015, Judge Herman issued an Order on Competing Motions for Summary Judgment, granting the City's Motion for Summary Judgment as to the Rental Property. (App. 52-60). Judgment was entered on November 10, 2015, and the Notice of Entry of Judgment is dated November 12, 2015. (App. 65-66). Rakowski filed a notice of appeal dated December 4, 2015, which appeals the Judgement of the district court and the Order on Competing Motions for Summary Judgment. (App. 67-69). The City respectfully requests this Court affirm the Court's Judgment and Order on Competing Motions for Summary Judgment.

III. STATEMENT OF THE FACTS

[¶9] Rakowski is the owner and operator of the Rental Property located at 511 20th Street North in Fargo, North Dakota. (App. 52). On November 11, 2011, Mrozla conducted an initial inspection of the Rental Property. (App. 23). Mrozla found numerous violations of the Property Code. (App. 53). Specifically, Mrozla found that the garage was deteriorated, the siding on the home was poor, two egress window wells were collapsing and one had a broken window. (App. 53). Mrozla provided notice to Rakowski of the issues with the Rental Property and the date of the re-inspection for the Rental Property. (App. 23). Thereafter, Mrozla re-inspected the Rental Property on December 12, 2011, December 29, 2011, January 23, 2012 and February 27, 2012. (App. 23, 53). For each re-inspection, Mrozla provided notice to Rakowski of the issues with the Rental Property and the dates for the next re-inspection. (App. 23).

[¶10] On March 21, 2012, the City charged Rakowski with violating the Property Code for his failure to bring the Rental Property into compliance with the Property Code between February 27, 2012, and March 21, 2012. See Case No. FA-2012-CR-01269. On July 25, 2012, Rakowski plead guilty to the infraction in municipal court. Id. The municipal court imposed a $500 fine, $400 of which was suspended, on the condition that Rakowski make certain repairs and improvements to the Rental Property. Id.

[¶11] In regard to the re-inspections, the City initially invoiced Rakowski for three re-inspections. (App. 53). Specifically, on January 26, 2012, the City sent Rakowski an invoice for a $100 re-inspection fee regarding the January 23, 2012, inspection of the Rental Property. (App. 26). Thereafter, due to clerical issues, the City only sought the $100 re-inspection fee for the January 23, 2012, inspection. (App. 23).

[¶12] On October 9, 2014, after Rakowski had failed to pay the re-inspection fees, the City brought a small claims action against Rakowski. (App. 5). On December 9, 2014, Rakowski removed the small claims action to the district court and filed an Answer[1]. (App. 6-16). The parties thereafter filed cross-motions for summary judgment. (App. 17-21, 36-50). On June 25, 2015, Judge Herman issued an Order on Competing Motions for Summary Judgment, granting the City's Motion for Summary Judgment as to the Rental Property. (App. 52-60). Judgment was entered on November 10, 2015, which provided judgment in favor of the City for $110 which consisted of the $100 re-inspection fee and $10 in costs and disbursements. (App. 65). Rakowski then filed a notice of appeal in which Rakowski appeals the Judgment and Order on Competing Motions for Summary Judgment. (App. 67-69). The City respectfully requests this Court affirm the Court's Judgment and Order on Competing Motions for Summary Judgment.

IV. STATEMENT OF THE STANDARD OF REVIEW

[¶13] Whether the district court granted summary judgment is a question of law which is reviewed de novo on the entire record. Green v. Mid Dakota Clinic, 2004 ND 12, ¶ 5, 673 N.W.2d 257. This Court has outlined the relevant standards governing summary

[1] On March 13, 2015, Rakowski electronically served requests for admission on Jodi Ann Bass ("Ms. Bass"). (App. 35). Ms. Bass is a former assistant city attorney for the City. However, by March 13, 2015, Ms. Bass had left her employment with the City and no longer worked for the City or received emails at her City email address. It is unclear whether Ms. Bass consented in writing to receive electronic service of discovery requests from Rakowski as is required by N.D. R. Civ. P. 5(b)(3)(F). Nevertheless, it is the City's best belief that the requests for admission were never served upon anyone that was working with the City at the time of service or more specifically, working on this matter. Due to the City not having any knowledge of the requests for admission, the City did not respond to the requests for admission. Moreover, numerous requests for admissions are plainly inappropriate under N.D. R. Civ. P. 36 as they call for legal conclusions. (App. 32-34).

judgment in Hasper v. Center Mut. Ins. Co., 2006 ND 220, ¶ 5, 723 N.W.2d 409 (citations omitted):

> Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law.

[¶14] A party opposing summary judgment cannot "merely rely on the pleadings, briefs, or unsupported and conclusory allegations." Beckler v. Bismarck Public School Dist., 2006 ND 58, ¶ 7, 711 N.W.2d 172. "Factual assertions in a brief do not raise an issue of material fact" sufficient to satisfy the burden of the opposing party. Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 615. This Court has stated:

> The resisting party must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact.

Schmitt v. MeritCare Health System, 2013 ND 136, ¶ 8, 834 N.W.2d 627 (citation omitted).

[¶15] Summary judgment must be entered "against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim" on which they will have the burden of proof at trial. Johnson v. Bronson, 2013 ND 78, ¶ 9, 830 N.W.2d 595. "When no pertinent evidence of an essential element is presented to the trial

court in resistance to a motion for summary judgment, it is presumed no such evidence exists." Hysjulien v. Hill Top Home of Comfort, Inc., 2013 ND 38, ¶ 12, 827 N.W.2d 533.

V. LAW AND ARGUMENT

A. The District Court Correctly Determined that the City Has the Power and Authority to Charge Rakowski a $100 fee for the Third Re-Inspection of the Rental Property.

[¶16] The crux of this appeal is whether the City may charge a fee of $100 for the second and any subsequent re-inspections of rental properties within its jurisdictional limits in order to ensure that the rental properties comply with the Property Code. Rakowski argues the City cannot because there is no contract between Rakowski and the City and because doing so would constitute an improper tax. The district court was correctly unpersuaded by Rakowski's arguments. (App. 56-58).

[¶17] This Court has held that it is undisputed that a city has general authority to regulate public health, sanitation, and safety through enactment of a building code. City of Grand Forks v. Lamb, 2005 ND 103, ¶ 25, 697 N.W.2d 362; see also N.D.C.C. § 40-05-01(1) (providing that a municipality may adopt a building code). "Once it is determined that a city has the general authority to regulate a certain subject matter, the burden is upon the party challenging an ordinance to demonstrate how the authority was exceeded." Ennis v. City of Ray, 1999 ND 104, ¶ 8, 595 N.W.2d 305 (citation omitted). "The ordinance is presumed valid, and a court will not declare the ordinance invalid unless it is 'clearly arbitrary, unreasonable and without relation to the public health, safety, morals, or public welfare.'" Id.

[¶18] "When a municipality has general authority to regulate a particular subject matter, the manner and means of exercising those powers, where not specifically

prescribed by the legislature, are left to the discretion of the municipality authorities. Id. "Leaving the manner of exercising municipal powers to the discretion of municipal authorities 'implies a range of reasonableness within which a municipality's exercise of discretion will not be interfered with or upset by the judiciary.'" Id.

[¶19] The City has adopted the International Property Maintenance Code which is incorporated into Chapter 31 of the Fargo Municipal Code. See Fargo Municipal Code § 31-0101. International Property Maitnenance Code section 103.5 leaves it to municipality to insert an appropraite fee schedule for activities and services performed by the municpaility in carrying out its responsibilites. As such, in June of 2010, the City amended the Property Code to provide a fee schedule[2]. See Fargo Municipal Code § 31-0102. The City adopted the following fee schedule for the inspection of rental properties:

A. Initial Inspection. – No charge

B. First Re-Inspection. – No charge

C. Second Re-Inspection. – As to the second re-inspection a fee of $100

D. Third Re-Inspection. – As to the third re-inspection, a fee of $100

E. Fourth and continuing Re-Inspections. – As to the fourth and any subsequent re-inspections, a fee of $100

Fargo Municipal Code § 31-0102.

[2] The Property Code was amended by the Fargo City Commission on June 14, 2010. A copy of the Fargo City Commission Agenda for that date can be found at: http://www.cityoffargo.com/attachments/6630daf5-a691-4abf-b94f-ffadfa4806dc/June14ConsentAgenda.pdf (page 67). A copy of the minutes for that meeting can be found at: http://files.cityoffargo.com/content/7ba53de64542a3babb654581a68fc32566971e69/web100614.pdf.

[¶20] In short, the City provides a free initial inspection for all rental properties in the City. If any violations of the Property Code are found, the City also provides the first re-inspection at no cost. If a second re-inspection is required, however, the City charges a fee of $100. Any subsequent re-inspections of the rental property also carry a $100 fee.

[¶21] The district court correctly concluded that the $100 fee imposed by the Property Code for second and subsequent re-inspections of rental properties was not arbitrary, unreasonable, and without relation to public health, safety, morals, or public welfare. (App. 56). As the district court stated, "the fee relates to the necessity of ensuring that property owners are offering properties to renters that are safe and habitable." (App. 56). Further the fee is primarily designed to cover the City's time and expense for repeated re-inspections due to a property owner's failure to comply with the Property Code (App. 56-57). The district court also correctly concluded that the $100 fee was not unreasonable. (App. 56); see Lamb, 2005 ND 103, ¶¶ 23-25, 697 N.W.2d 362 (holding a $500 fee for each violation of a building code falls within the range of reasonableness accorded to a municipality).

[¶22] Rakowski argues that the City cannot charge the $100 fee upon him because there is no contract between the City and himself. However, North Dakota Century Code § 40-05.1-06(2) provides that the City has the power to levy and collect taxes, excises, fees and charges for "benefits conferred, for its public and proprietary functions, activities, operations, undertakings, and improvements." N.D.C.C. § 40-05.1-06(2); see also N.D.C.C. § 40-05.1-06(7) (providing that the City has the power to adopt and amend ordinances to carry out its governmental and proprietary powers and to provide for public health safety,

morals, and welfare, and penalties for a violation thereof). Rakowski argues that N.D.C.C. § 40-05.1-06(2) does not apply because the City is imposing the fee only upon him as a targeted landowner and not uniformly applying the fee to the same class of property throughout Fargo. There is no evidence in the record to support such allegations. The Property Code plainly treats all rental properties in the City alike. There can be no dispute that all rental properties in the City which require a second re-inspection (or more) are subject to a $100 fee.

[¶23] Moreover, as stated by the district court, this Court has previously held that a contract is not necessary for a municipality to recover fees for ordinances relating to public health, safety, and welfare. Ennis v. City of Ray, 1999 ND 104, ¶ 19, 595 N.W.2d 305 (holding that no contract was necessary between a city and a landowner for the municipality to charge garbage removal fees even if the landowner did not want or use the services). Rakowski attempts to distinguish Ennis by arguing that the $100 fee in the present case is "singularly imposed against a targeted landowner" and as such "is not the equivalent of a system-wide garbage assessment against every landowner[.]" App. Br., ¶ 61. Rakowski again ignores the fact that the Property Code applies equally to all rental properties in the City of Fargo. The Property Code does not singularly call out Rakowski's Rental Property but instead treats all rental properties alike.

[¶24] Finally, Rakowski also argues that the $100 fee for second and subsequent re-inspections is an improper tax. However, as the district court correctly concluded, the fees in this matter are not a form of taxation, but instead are an allowable method for recovery for the City's time and expense for repeated re-inspections due to a property owner's failure to comply with the Property Code. (App. 56-57). The $100 fee for a

second and subsequent re-inspections in the present matter is more analogous to overload charges assessed to overweight trucks than they are to a tax. See State ex rel. Backes v. A Motor Vehicle Described as a Pawling and Harnishefeger 655, 37 1/2 Ton Crane with 100 Foot Boom, Serial #16789, 492 N.W.2d 595, 598 (N.D. 1992) (providing that overload charges are not fines or taxes, but rather civil fees, when the primary purpose of the charge is to compensate the state for its expense); see also Rusk v. City of Milwaukee, 2007 WI App 7, ¶¶ 9-15, 298 Wis.2d 407, 727 N.W.2d 358 (holding that re-inspection fees for properties were regulatory in nature and were not a tax). Here, the primary purpose of the fee is to compensate the City for its expense in having to re-inspect rental properties.

[¶25] For all of these reasons, the City respectfully requests the Court find that the district court correctly determined that the City has the power and authority to assess a $100 fee upon Rakowski for the re-inspection of the Rental Property on January 23, 2012.

B. The District Court Correctly Determined that the Fee Schedule did not Constitute a Bill of Attainder.

[¶26] Rakowski argues that the fee schedule adopted by the City providing that the City shall assess a $100 fee on a property owner for the second or subsequent re-inspection of their rental property constitutes a bill of attainder. The district court correctly concluded that the fee schedule did not constitute a bill of attainder because the fee schedule was not a form of punishment. (App. 58).

[¶27] A bill of attainder is "a law that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." State v. Irwin, 2010 ND 132, ¶ 10, 785 N.W.2d 245 (citing Nixon v.

Adm'r of General Servs., 433 U.S. 425, 468 (1977)). "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons." Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 86 (1961).

[¶28] Here, the Property Code, and specifically the fee schedule, does not single out a particular person but rather applies to all owners of rental properties in the City. See WMX Technologies, Inc. v. Gasconade County Mo., 105 F.3d 1195, 1202 (8th Cir. 1997) (holding that a solid waste ordinance did not constitute a bill of attainder despite a waste management company being the only entity that operated a landfill in the municipality). Further, "[l]egislatures may act to curb behavior which they regard as harmful to the public welfare, whether the conduct is found to be engaged in by many persons or by one." Id. (citing Communist Party of the United States, 367 U.S. at 88). The City inspects rental properties to ensure that they are in compliance with the Property Code and hence safe for tenants to reside in. The City provides a free inspection and free first re-inspection for rental properties. If the property owner has failed to bring the rental property into compliance by the first re-inspection, the City charges a $100 fee for a second or subsequent re-inspection. The $100 fee is meant to cover the City's expense in conducting a second or subsequent re-inspection of the rental property due to the failure of the property owner to bring the rental property into compliance with the Property Code. This type of regulation is plainly appropriate and does not constitute a bill of attainder.

[¶29] Furthermore, in order to constitute a bill of attainder, the ordinance must be punitive in nature. See WMX Technologies, Inc., 105 F.3d at 1202. "There are three necessary inquiries regarding whether the ordinance inflicts forbidden punishment: an historical test, a functional test, and a motivational test." Id. "Historically, bills of attainder were used to impose punishment upon designated individuals or groups in the form of: death, imprisonment, banishment, punitive confiscation of property, and bars to participation in specific employments or vocations." Id. The present fee schedule which entails the City assessing a fee of $100 for a second and subsequent re-inspection of a rental property does not meet the historical test for punishment for bills of attainder.

[¶30] Similarly, the fee schedule is not functionally punitive because when viewed in terms of type and severity of burdens imposed, the fee schedule reasonably can be said to further nonpunitive legislative purposes. Id. (citing Nixon, 433 U.S. at 475-476). As stated above, the fee schedule serves nonpunitive legislative purposes of (1) covering the City's time and expense in conducting a second and subsequent re-inspection of rental properties due solely to the property owner's failure to bring the rental property into compliance with the Property Code; and (2) as an incentive for the property owner to bring the rental property into compliance with the code.

[¶31] Finally, the ordinance is also not punitive under the motivational test. There is no evidence that the City was motivated by a desire to "punish" Rakowski when it passed the ordinance containing the fee schedule in June of 2010. For all of these reasons, the City respectfully requests this Court find that the district court correctly concluded that the fee schedule does not constitute a bill of attainder.

C. The District Court Correctly Determined that the City Inspector Did Not Need to Obtain a Search Warrant to Inspect the Rental Property.

[¶32] Rakowski argues that the inspection and re-inspections of the Rental Property violated his constitutional rights because the city inspector did not obtain a search warrant in order to search the premises. The district court correctly concluded that the city inspector did not need to obtain a search warrant in this matter. (App. 57-58).

[¶33] First, "[a] search does not occur unless the government violates an individual's reasonable expectation of privacy." State v. Nguyen, 2013 ND 252, ¶ 8, 841 N.W.2d 676. An individual's reasonable expectation of privacy has two requirements: (1) the person has exhibited an actual expectation of privacy, and (2), that the expectation be one that society is prepared to recognize as reasonable. Id.

[¶34] A landlord does not have a reasonable expectation of privacy in a rental property. See City of Vincennes v. Emmons, 841 N.E.2d 155, 159-160 (Ind. 2006). In Emmons, the Indiana Supreme Court held that a landlord, in almost all inspections of a rental property, does not have a constitutional claim of any sort. Id. at 160. The court found that while tenants and even commercial tenants may have an expectation of privacy in a rental unit, a landlord does not. Id. at 161. Further, the court was unpersuaded by the landlords' argument that they were concerned that if a violation of the applicable property code was found during an inspection that they would be subject to fines. Id. The court stated "[i]f the only thing a landlord has to fear from a housing code inspection is the discovery of code violations, the landlord has no cognizable privacy interests in keeping the violations hidden from authorities." Id. Here, just as in Emmons,

the only thing Rakowski had to fear with the inspection and re-inspections was the discovery of violations of the Property Code.

[¶35] Furthermore, as the district court stated, the Property Code contains a provision which provides:

> 104.3 Right of Entry.
>
> Where it is necessary to make an inspection to enforce the provisions of this code, or whenever the code official has reasonable cause to believe that there exists in a structure or upon a premises a condition in violation of this code, the code official is authorized to enter the structure or premises at reasonable times to inspect or perform the duties imposed by this code, provided that if such structure or premises is occupied the code official shall present credentials to the occupant and request entry. If such structure or premises is unoccupied, the code official shall first make a reasonable effort to locate the owner or other person having charge or control of the structure or premises and request entry. <u>If entry is refused, the code official shall have recourse to the remedies provided by law to secure entry</u>.

Property Code § 104.3 (emphasis added).

[¶36] In short, the Property Code provides that the City may have an inspector enter a premises when it is necessary to make an inspection and if entry is refused, the city inspector has any recourse to the remedies provided by law to secure entry. In North Dakota, these remedies would include the ability to obtain an administrative search warrant pursuant to N.D.C.C. § 29-29.1-01.

[¶37] In this matter, the city inspector provided advance notice of any issues with the Rental Property and notice of the dates for the re-inspections. (App. 23). There is no evidence in the record that Rakowski ever refused entry to the city inspector. Had Rakowski refused entry, the city inspector would have obtained an administrative search warrant and/or any other remedies provided by law to secure entry.

[¶38] The overwhelming majority, if not all, of the courts which have considered similar ordinances to the City's Property Code have upheld them. See Mann v. Calumet City, Ill., 588 F.3d 949, 951 (7th Cir. 2009) (providing string cite of cases upholding similar ordinances). In Mann, the city's building code was the 2006 version of the International Property Maintenance Code. Id. at 953. The building code allowed a city inspector to enter a house before it could be sold to inspect the house to ensure that it complied with the property code. Id. at 952. If the property owner refused entry, the city had the ability to obtain a warrant to inspect the property. Id. at 953. The Seventh Circuit Court of Appeals upheld the building code and stated " ordinances such as this one are common and have withstood constitutional attack in all cases that we know of in which the ordinance avoided invalidation under the Fourth Amendment by requiring that the city's inspectors obtain a warrant to inspect a house over the owner's objection." Id. at 951. In the present matter, the City has also adopted the International Property Maintenance Code and the City also requires the city inspector to obtain a warrant or other remedy as provided by law for secure entry if the owner refuses to allow entry of the premises[3].

[¶39] In sum, the City submits that under the facts of this case, Rakowski does not have any reasonable expectation of privacy in the Rental Property and therefore is not

[3] Rakowski relies on Camara v. Municipal Court of City and County of San Francisco, 387 U.S. 523 (1967) for his argument that the City needed a search warrant to inspect the Rental Property. However, Camara concerned a tenant refusing entry to a city inspector to inspect a premises in which the tenant was living. Id. at 525-526. The present matter concerns a landlord, not a tenant, and one who did not refuse entry and had advanced notice of the re-inspection. Further, in Camara, the Court stated: "Moreover, most citizens allow inspections of their property without a warrant. Thus, as a practical matter and in light of the Fourth Amendment's requirement that a warrant specify the property to be searched, it seems likely that warrants should normally be sought only after entry is refused …" Id. at 539-540.

entitled to the protections of the Fourth Amendment. However, assuming arguendo that Rakowski does have a reasonable expectation of privacy, the City requests this Court follow the example of numerous other courts which have upheld similar or identical ordinances to the City's Property Code.

D. The District Court Correctly Determined that the City's Action was not Barred by Double Jeopardy or the Doctrine of Res Judicata.

[¶40] Rakowski argues that the City's present action to collect the $100 fee for the re-inspection of his rental property is barred by double jeopardy and the doctrine of res judicata because he has previously pled guilty in Fargo Municipal Court for violations of the Property Code. However, for all the reasons set forth below, the district court correctly concluded that double jeopardy and res judicata do not bar the City's present claim for the $100 re-inspection fee. (App. 59).

[¶41] Rakowski was charged in Fargo Municipal Court with failing to comply with a notice of violation and order from a code official and failure to make the required corrections as required by the Property Code. See Case No. FA-2012-CR-01269. The dates of violation alleged in the City of Fargo's Information were from February 27, 2012, through March 21, 2012. Id. Rakowski pled guilty to this offense, which is an infraction. Id. Rakowski received a $500 fine in Fargo Municipal Court, $400 of which was suspended on the condition that Rakowski make certain repairs and improvements to the Rental Property. Id.

[¶42] The date of the re-inspection for which the City is attempting to collect re-inspection fees is January 23, 2012, which plainly does not fall between the dates of February 27, 2012, and March 21, 2012. Rakowski's argument that the City is attempting to re-litigate claims has no basis in fact because the date of re-inspection at issue in this

case does not fall within the 24-day period of violations alleged in Rakowski's criminal case.

[¶43] Furthermore, even if the assessment of rental inspection fees is related to the infraction to which Rakowski pled guilty, neither double jeopardy nor res judicata apply because the assessment of the rental inspection fees is civil in nature. The fee structure is in place to compensate the City for the time and expense related to city inspectors who are forced to make repeated re-inspections of rental properties when the property owners are unwilling or unable to ensure that their rental properties meet safety requirements established by the Property Code.

[¶44] "It is well established double jeopardy protects against successive prosecutions and punishments for the same criminal offense." State v. Hammer, 2010 ND 152, ¶ 23, 787 N.W.2d 716 (quoting State v. O'Rourke, 544 N.W.2d 384, 386 (N.D. 1996). The nature of the criminal infraction and civil fees is evident in the different procedural histories for the two separate matters.

[¶45] The City charged Rakowski with failing to comply with a notice of violation and order from a code official and failing to make the required corrections as required by the Property Code. See Case No. FA-2012-CR-01269. The City charged Rakowski by way of an information and a criminal summons was served on Rakowski on April 12, 2012. Id. Rakowski and his attorney appeared in Fargo Municipal Court on July 25, 2015, and Rakowski pled guilty to violating the Fargo Municipal Code. Id. As this was an infraction, the municipal judge had discretion to fine Rakowski up to $1,000.

[¶46] The history regarding the civil re-inspection fees is decidedly different. Rakowski was provided notice of the re-inspection fees when the City of Fargo sent

Rakowski an invoice via U.S. mail. (App. 26). No charging documents exist for these civil fees. The City initiated an action for the collection of the fees by filing a civil action in small claims court. (App. 5).

[¶47] Furthermore, Rakowski fails to make a valid argument that the assessment of re-inspection fees is some type of judicial determination by a lawyer or non-lawyer. The city inspector did not act in a judicial capacity when he recorded the date of re-inspection of Rakowski's property on January 23, 2012. Neither the city inspector nor anyone else acting for the City exercised any discretion in determining the amount of fees to be collected for re-inspection on January 23, 2012. Recording a re-inspection date and sending Rakowski an invoice for re-inspection fees required no interpretation of law. The amount of fees to be collected is set by the Property Code.

[¶48] The doctrine of res judicata also does not bar the City's present action. "Res judicata, or claim preclusion, prevents relitigation of claims that were raised, or could have been raised, in prior actions between the same parties or their privies." Holkesvig v. Welte, 2012 ND 142 ¶5, 818 N.W.2d 760, (quoting Ungar v. N.D. State Univ., 2006 ND 185 ¶ 10, 721 N.W.2d 16). As stated above, the City initiated a small claims action in an attempt to collect fees "for activities and services performed" by the city inspector in the course of the city inspector's duties. As stated above, the attempted collection of re-inspection fees is a claim that is separate from the criminal action to which Rakowski pled guilty for violating one of the City's municipal ordinances. No claims were relitigated, as one matter involved the collection of civil fees from a re-inspection on January 23, 2012, and the other matter involved the criminal prosecution of

an infraction-level offense regarding violations that occurred from February 27, 2012, through March 21, 2012.

E. The District Court Correctly Dismissed Any Purported § 1983 claim.

[¶49] Rakowski argues that he filed a proper counterclaim against the City for relief under 42 U.S.C. § 1983. However, the district court correctly noted that Rakowski never filed a counterclaim for a § 1983 action against the City of Fargo. (App. 54).

[¶50] Rakowski has never filed an actual counterlcaim against the City. The only responsive pleading filed by Rakowski was the "Defendant's removal to District Court & Answer." (App. 6-16). Rakowski relies on a single paragraph in his Answer as sufficiently pleading a counterclaim for a § 1983 action against the City. This paragraph provides that the "actions of the City of Fargo cause Defendant to be deprived of rights, privileges, or immunities secured by the Constitution and laws, so that the City of Fargo shall be liable to Defendant under 42 U.S.C. § 1983, and related statutory concepts." (App. 15). In the wherefore clause of his Answer, Rakowski then requested attorney fees pursuant to the North Dakota Century Code and 42 U.S.C. § 1988.

[¶51] The City submits that a single paragraph in the Answer does not constitute a counterclaim pursuant to North Dakota Rule of Civil Procedure 8. The City was not put on notice that Rakowski was asserting an actual counterclaim against the City pursuant to 42 U.S.C. § 1983. If the City had been put on notice, it would have filed an answer to the counterclaim. Simply put, a one paragraph general statement that the City is liable to Rakowski under 42 U.S.C. § 1983 without anything more in an Answer to a complaint is not sufficient to put the City on notice of an alleged counterclaim against it.

[¶52] Nevertheless, even if Rakowski did sufficiently bring a counterclaim against the City asserting a claim under § 1983, the district court properly dismissed the purported § 1983 action[4]. The § 1983 action is presumably based on the numerous assertions addressed above concerning the City allegedly violating Rakowski's civil rights. As there is no merit to any of Rakowski's claims, any counterclaim against the City pursuant to § 1983 was properly dismissed by the district court.

VI. CONCLUSION

[¶53] The City respectfully requests this Court affirm the district court's Judgment and Order on Competing Motions for Summary Judgment.

Dated this 16th day of February, 2016.

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[4] See City of Fargo v. Malme, 2008 ND 172, 756 N.W.2d 197 (refusing to award attorney fees under U.S.C. § 1988 because it was improper to turn an administrative appeal into a federal civil rights lawsuit and because there was no evidence that Malme's civil rights were violated). Id. at ¶ 6. Similarly, here, it is improper to attempt to turn a small claims collection action into a federal civil rights lawsuit and there is no evidence that Rakowski's civil rights were violated.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Appellee in the above matter, and as the authors of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 6,060.

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AFFIDAVIT OF SERVICE BY ELECTRONIC MAIL

Supreme Court No. 20150349

City of Fargo,

Plaintiff-Appellee,

v.

William Rakowski,

Defendant-Appellant.

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF CASS)

The undersigned, being first duly sworn, deposes and says that she served the attached:

BRIEF OF APPELLEE

on February 16, 2016, by email as follows, to-wit:

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To the best of affiant's knowledge, the email address above given is the actual email address of the party intended to be so served. The above documents were emailed in accordance with the provisions of the North Dakota Rules of Civil Procedure.

/s/ Pamela Burman
Pamela Burman

Subscribed and sworn to before me this 16th day of February, 2016.

/s/ Robyn L. Tande
Notary Public, Robyn L. Tande
Cass County, North Dakota
My Commission Expires: 10.09.2018