

Case Nos.: A09-1696
A09-1697

STATE OF MINNESOTA
COURT OF APPEALS

Michele Sykes,
Appellant,

v.

City of Rochester,
Respondent.

RESPONDENT'S BRIEF

Pamela L. VanderWiel, No. 305960
Daniel P. Kurtz, No. 387858
EVERETT & VANDERWIEL, PLLP
4120 Lexington Way
Eagan, MN 55123
651-209-9692

Michele Sykes

Pro Se

Attorneys for Respondents

TABLE OF CONTENTS

	<u>Page</u>
Table of Authorities.....	ii
Statement of Case.....	1
Introduction	1
Statement of the Facts	1
I. Special assessment for removal of refuse.....	1
II. Special assessment for weed abatement.....	3
Legal Argument	
I. The district Court properly dismissed Ms. Sykes’ petitions because they were not timely served on the City.	4
II. The district court correctly concluded that mailing the notice of appeal for the refuse assessment within 30 days of the assessment is not sufficient under Minnesota Statutes Section 429.081.....	6
III. The district court properly denied Ms. Sykes’ motion for continuance	8
IV. The record demonstrates that Ms. Sykes had adequate notice of the assessment hearing	9
Conclusion.....	10
Certification of Brief Length.....	12

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Andrusick v. City of Apple Valley</i> , 258 N.W.2d 766 (Minn. 1977)	5, 7
<i>Coons v. St. Paul Companies</i> , 486 N.W.2d 771 (Minn. Ct. App. 1992)	7
<i>Greer v. City of Eagan</i> , 486 N.W.2d 470 (Minn. Ct. App. 1992)	5, 8, 9
<i>Theile v. Stich</i> , 425 N.W.2d 580 (Minn. 1982).....	9
<i>Wessen v. Village of Deephaven</i> , 170 N.W.2d 126 (Minn. 1969)	5, 7
Minn. Stat. § 429.01	9, 10
Minn. Stat. § 429.081	1, 4, 5, 6, 7, 8, 9
Minn. Stat. § 429.101	2, 3, 4
Minn. R. Civ. App. P. 125.03.....	6
Minn. R. Civ. P. 101.01.....	6
Minn. R. Civ. P. 3.01.....	7
Gen. R. 115.03 (b).....	8

STATEMENT OF THE CASE

This is a consolidated appeal from two special assessment appeals filed in Olmsted County District Court, the Honorable Jodi L. Williamson presiding. On July 14, 2009, Judge Williamson granted summary judgment to the Defendant City of Rochester on both matters and Plaintiff Michele Sykes brought a timely appeal.

INTRODUCTION

In 2008, the City of Rochester (“the City”), responding to neighbors’ complaints, removed debris and tall grass and weeds from Ms. Sykes’ yard. The City billed Ms. Sykes a total of approximately \$400 for abatement of these nuisances. When Ms. Sykes did not pay, the City specially assessed her property for these amounts. Ms. Sykes attempted to appeal the special assessments, but did not serve the City with notice within 30 days, as required by Minnesota Statutes Section 429.081. Ms. Sykes’ failure to comply with the requirements of Section 429.081 is a jurisdictional defect and the district court properly dismissed both appeals with prejudice.

STATEMENT OF THE FACTS

I. Special assessment for removal of refuse.

In August 2008, the City billed Ms. Sykes \$315.00 for costs and administrative fees it incurred in removing refuse and other items from her yard after determining them to be a public health and safety hazard pursuant to Sections 35.19 and 35.21 of the Rochester Code of Ordinances. (Respondent’s Appendix at 1-4.) Ms. Sykes did not pay

the bill. (*Id.* 1 at ¶ 2.) The City's Code of Ordinances provides that the City may assess unpaid charges for expenses incurred by the City in abating health or safety hazards under the City's Housing Code, as provided in Minnesota Statute Section 429.101.¹ (*Id.* at 44 (City Ord. § 35.24, Subd. 2.)). Pursuant to this provision, on October 23, 2008, the City Clerk mailed a notice to Ms. Sykes that the City Council would hold a special assessment hearing on November 17, 2008, to consider assessing \$319.23 (the initial charge plus interest) against Ms. Sykes' property. (*Id.* at 5-11.) On November 17, 2008, Ms. Sykes delivered a written objection to the proposed assessment to the City Council. (*Id.* at 12-14.) At the November 17, 2008 hearing, the City Council continued consideration of the assessment against Ms. Sykes' property to December 1, 2008. (*Id.* at 17.) During the December 1, 2008 hearing, the City Council again continued consideration of the assessment against Ms. Sykes' property to December 15, 2008. (*Id.* at 19.) The continuations were duly noticed and recorded in the minutes of the meetings. (*Id.* at 15-21.) At the December 15, 2008 meeting, the City Council approved and adopted the \$319.23 assessment against Ms. Sykes' property. (*Id.* at 22.) On January 15, 2009, the City Clerk received by mail a letter from Plaintiff stating that Plaintiff intended to appeal the \$319.23 assessment. (*Id.* at 24.) On January 27, 2009, the City Clerk received Plaintiff's "Petition for Review of City Council Decision" by mail. (*Id.* at 25-

¹ The provision states in full:

Any expenses incurred by the City in the abatement of a public health or safety hazard under this section shall be the responsibility of the property owner, and if subsequently unpaid, may be assessed against the property as provided in Minnesota Statute 429.101.

31.) Plaintiff's petition requested that the district court review the assessment adopted by the City on December 15, 2008. (*Id.*)

II. Special assessment for weed abatement.

On June 11, 2008, the City billed Ms. Sykes \$75.25 for costs it incurred in mowing tall grass and eradicating weeds from her yard, pursuant to Sections 48.10 to 48.12 of the Rochester Code of Ordinances (the "Tall Grass and Weed Ordinance"). (*Id.* at 45-47.) Ms. Sykes did not pay the bill. (*Id.* 45 at ¶ 2.)

The City's Code of Ordinances provides that the City may assess unpaid charges for expenses incurred by the City under the Tall Grass and Weed Ordinance, as provided in Minnesota Statute Section 429.101. (*Id.* at 101-108.) Pursuant to this provision, on October 23, 2008, the City Clerk mailed a notice to Ms. Sykes that the City Council would hold a special assessment hearing on November 17, 2008 to consider assessing \$76.26 against Ms. Sykes' property (the initial charge plus interest). (*Id.* at 48-49.) On November 17, 2008, Ms. Sykes delivered a written objection to the proposed assessment to the City Council. (*Id.* at 90.) At the November 17, 2008 hearing, the City Council continued consideration of the assessment against Ms. Sykes' property to December 1, 2008. (*Id.* at 93.) The continuation was duly noticed and recorded in the minutes of the meeting. (*Id.* at 91-94.) At the December 1, 2008 meeting, the City Council approved and adopted the \$76.26 assessment against Ms. Sykes' property. (*Id.* at 95.) On January 13, 2009, the City Clerk received Plaintiff's "Petition for Review of City Council Decision" by mail. (*Id.* at 98-100.) The petition requests that the district court review the

assessment adopted by the City on December 1, 2008. The district court's docket indicates that the clerk filed the petition on January 12, 2009. (*Id.* at 109-110.)

LEGAL ARGUMENT

I. The district court properly dismissed Ms. Sykes' petitions because they were not timely served on the City.

The district court properly dismissed Ms. Sykes' petitions because they were not timely served on the City and the court lacked subject matter jurisdiction to consider her appeals. Under Minnesota Statute Section 429.081, a property owner aggrieved by a special assessment adopted by a city may appeal "[w]ithin 30 days after the adoption of the assessment . . . to the district court by serving a notice upon the mayor or clerk of the municipality." Minn. Stat. § 429.081. The special assessments that are the subject of this appeal were adopted under Minn. Stat. § 429.101, which allows a municipality to collect unpaid special charges for "removal or elimination of public health or safety hazards from private property" as a special assessment against the benefited property. *Id.* at § 429.101, Subd. 1(a)(3). Minnesota Statute Section 429.101 provides that appeals from special assessments levied under that section are to be made under Minnesota Statute Section 429.081. *Id.* at § 429.101, Subd. 2 ("429.081 shall apply to assessments made under this section."). Accordingly, in order to be timely, the notices of appeal from the City's assessments in this matter were required to be served within 30 days of the assessments' adoption by the City Council.

A property owner's failure to comply with the requirements of Minnesota Statute Section 429.081 divests the court of subject matter jurisdiction to hear an appeal from a special assessment. "[A]ppeals from assessments are wholly statutory, there being no common-law right to such appeal, and . . . the conditions imposed by the statute must be strictly complied with." *Wessen v. Village of Deephaven*, 170 N.W.2d 126, 128 (Minn. 1969) (dismissing an assessment appeal that was not served within 20 days, which was then the deadline imposed by Minnesota Statute Section 429.081). Adherence to the statute is a jurisdictional prerequisite and therefore if the notice of appeal is not properly and timely served the appeal must be dismissed for lack of subject matter jurisdiction. *Andrusick v. City of Apple Valley*, 258 N.W.2d 766, 767-68 (Minn. 1977) (affirming dismissal of special assessment appeal for lack of subject matter jurisdiction when notice of appeal was served on city clerk on a holiday); *see also Greer v. City of Eagan*, 486 N.W.2d 470, 472-73 (Minn. Ct. App. 1992) (holding that the district court did not obtain subject matter jurisdiction over special assessment appeal because petition was not filed with court within 10-day deadline established by Minnesota Statute Section 429.081).

Ms. Sykes failed to serve a timely notice of appeal in regard to either of the special assessments. The City Council adopted the refuse assessment on December 15, 2008. (Respondent's Appendix at 22.) The City Clerk received the "Petition for Review of City Council Decision" regarding the refuse assessment by mail on January 27, 2009, 13 days past the deadline established under Minnesota Statute Section 429.081. (*Id.* at 25-31.) Prior to that, the City Clerk received a letter from the Plaintiff stating that she intended to

appeal the \$319.23. (*Id.* at 24.) Even if this letter could be considered sufficient notice under Minnesota Statute Section 429.081, that letter was not received by the City Clerk until January 15, 2009, a day after the 30-day deadline had lapsed. (*Id.*)

The notice of appeal on the weed assessment was similarly untimely. The City Council adopted the weed assessment on December 1, 2008. (*Id.* at 95.) The City Clerk received the “Petition for Review of City Council Decision” regarding the weed assessment by mail on January 13, 2009, 13 days after the 30-day deadline had lapsed. (*Id.* at 98-100.) Because Ms. Sykes failed to serve notice of her appeals in a timely manner, the district court’s determination that it lacked subject matter jurisdiction to hear her appeals was correct.

II. The district court correctly concluded that mailing the notice of appeal for the refuse assessment within 30 days of the assessment was not sufficient under Minnesota Statutes Section 429.081.

The district court correctly rejected Ms. Sykes’ argument that her notice of appeal of the refuse assessment was timely served on the City because she mailed the City her letter stating that she intended to appeal the assessment within the 30-day timeframe set forth by Minnesota Statute Section 429.081. Ms. Sykes argued that her letter was timely because Minnesota Rule of Civil Appellate Procedure 125.03 provides that service is complete upon mailing. That rule does not apply here, however, because the Rules of Civil Appellate Procedure only apply to procedure in the Supreme Court and the Court of Appeals. Minn. R. Civ. P. 101.01.

The rule most applicable to this case, at least by analogy, is Minnesota Rule of Civil Procedure 3.01, which applies to the commencement of civil proceedings by service of the summons and complaint. “[W]hen the notice of appeal in an assessment proceeding is properly served and filed, the system is invoked for subsequent proceedings.” *Andrusick*, 258 N.W.2d at 767. As such, the notice of appeal is “civil process.” *Id.* In civil litigation, the pleading to which it is most analogous is the summons and complaint. If any of the Rules of Civil Procedure shed any light on the issue before the Court, it is therefore Rule 3.01.

Under Rule 3.01, a plaintiff does not perfect service upon a defendant when he or she delivers the summons and complaint to the Postal Service. Minn. R. Civ. P. 3.01, Adv. Cmte. Note (1985). Rather, the civil action is commenced “at the date of acknowledgement of service if service is made by mail.” Minn. R. Civ. P. 3.01 (b). Accordingly, when a plaintiff mails a summons and complaint to a defendant within the statute of limitations but the limitations period runs before the acknowledgement is returned, the lawsuit must be dismissed as untimely. *Coons v. St. Paul Companies*, 486 N.W.2d 771 (Minn. Ct. App. 1992). Accordingly, the district court’s determination that mailing a notice of appeal to a Section 429 assessment is insufficient to perfect service is consistent with the Rules of Civil Procedure.

The district court’s decision is also consistent with prior case law and its interpretation of the legislative intent underlying Minnesota Statutes Section 429.081. In *Wessen v. Village of Deephaven*, the Minnesota Supreme Court dismissed an assessment appeal that was not served on the municipality within 20 days, which was then the

deadline imposed by Minnesota Statutes Section 429.081. In doing so, the court opined that the short time-frame provided by the statute “can only be construed as intended to facilitate the orderly operation of municipal government and eliminate unnecessary delays in the prescribed assessment procedure.” 170 N.W.2d at 128. Consistent with that opinion and with the policy it espoused, Minnesota courts have viewed Section 429.081 as requiring *notice* of the appeal to occur within the statutory timeframe. *Id.*; *Greer*, 486 N.W.2d at 472 (“*Wesson* and *Vernco* both suggest that while a notice of appeal need not be personally served upon a municipality as required by section 429.081, the municipality must still have actual notice of the appeal *within the time limits of section 429.081.*” (emphasis in the original)). Mailing the notice within the statutory timeframe did not provide actual notice to the City of the appeal, and the district court properly determined that it did not have subject matter jurisdiction over Ms. Sykes’ appeal of the refuse assessment.

III. The district court properly denied Ms. Sykes’ motion for a continuance.

Ms. Sykes did not serve or file a memorandum in response to the City’s motion for summary judgment regarding either the weeds or refuse assessments, under General Rule 115.03 (b). Instead, on the day before the hearing on the City’s motions, Ms. Sykes served and filed a Motion for a Continuance, stating that she needed to take the deposition of the City Clerk. (Respondent’s Appendix at 112-116.) Ms. Sykes alleged that she had mailed a notice of appeal on the weeds assessment and hand-served the City Clerk on December 31, 2008, on the last day of the 30-day time period. (*Id.*) During the

hearing, counsel for the City argued that even if this were true, a jurisdictional defect remained. (Transcript of Proceedings at 5.) Counsel pointed out that the district court docket showed that the notice of appeal was filed on January 12, 2009. (*Id.*) Minnesota Statutes Section 429.081 requires the notice of appeal to be filed with the district court within ten days of its service. Failure to file the notice of appeal within ten days of its service also divests the courts of jurisdiction to hear a Section 429 appeal. *Greer v. City of Eagan*, 486 N.W.2d 470, 472-73 (Minn. Ct. App. 1992). If Ms. Sykes had served the City with the notice of appeal on December 31 as she alleged, district court records indicated that she filed the appeal two days past the deadline set forth by Section 429.081. The district court properly held that Ms. Sykes' motion for a continuance was futile, and dismissed the weeds assessment appeal.

Ms. Sykes now argues that the district court erred in dismissing her appeal because she actually filed the notice of appeal on January 9, 2009 and that the court's records were incorrect. Ms. Sykes did not raise this issue until after she filed this appeal. She has therefore waived the argument, *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988), and the Court should affirm the dismissal without further consideration.

IV. The record demonstrates that Ms. Sykes had adequate notice of the assessment hearing.

Ms. Sykes' assertion that she was not afforded adequate notice of the assessment hearings is belied by the evidence in the record. At least two weeks prior to the assessment hearing, the owners of property proposed to be assessed are entitled to written notice of the hearing. Minn. Stat. § 429.061, Subd. 1. When an assessment hearing is

adjourned, individual written notice is not necessary. Under the statute, “[n]otice of any adjournment of the hearing shall be adequate if the minutes of the meeting so adjourned show the time and place when and where the hearing is to be continued.” *Id.* at Subd. 2. The City’s records demonstrate that the City provided written notice of the hearing on both assessments. (Respondent’s Appendix 5-11, 48-49.) In response, Ms. Sykes sent the City letters objecting to the assessments. (*Id.* at 12-14.) The City adjourned the hearings, and the record indicates that it gave due notice of the adjourned meetings in its minutes. (*Id.* at 15-21, 91-94.) Ms. Sykes’ argument that she did not receive adequate notice of the hearings is therefore without merit.

CONCLUSION

For the foregoing reasons, the City of Rochester respectfully requests that the Court affirm the district court’s order dismissing both these lawsuits in their entirety.

EVERETT & VANDERWIEL, PLLP

Dated: _____

2/22/10

By Pamela L. VanderWiel

Pamela L. VanderWiel, No. 305960

Daniel P. Kurtz, No. 387858

4120 Lexington Way

Eagan, MN 55123

651-209-9692

Attorneys for Respondent City of Rochester

CASE NUMBERS:

A09-1696

A09-1697

**STATE OF MINNESOTA
IN COURT OF APPEALS**

Michele Sykes,
Appellant,

v.

City of Rochester,
Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a Times New Roman font. The length of this brief is 2,637 words. This brief was prepared using Microsoft Word 2007.

EVERETT & VANDERWIEL, PLLP

Dated: 2/22/10

By Pamela L. VanderWiel

Pamela L. VanderWiel, No. 305960

Daniel P. Kurtz, No. 387858

4120 Lexington Way

Eagan, MN 55123

651-209-9692

Attorneys for Respondent City of Rochester