STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0811

Timothy O'Keefe,
Appellant,

vs.

Robert Carter, et al.,
Respondents.

Filed December 31, 2012
Affirmed
Johnson, Chief Judge

Chisago County District Court
File No. 13-CV-09-737

Timothy O'Keefe, Harris, Minnesota (pro se appellant)

Paul D. Reuvers, Jason J. Kuboushek, Stephanie A. Angolkar, Iverson Reuvers, Bloomington, Minnesota (for respondents)

Considered and decided by Connolly, Presiding Judge; Johnson, Chief Judge; and Rodenberg, Judge.

U N P U B L I S H E D O P I N I O N

JOHNSON, Chief Judge

One of three members of the Fish Lake Township Board sued the other two board members, the town clerk, and the township under the Open Meeting Law. The district court entered summary judgment for the defendants. We conclude that the district court

properly applied a two-year statute of limitations to the Open Meeting Law claim. We also conclude that the district court did not err by ruling on the summary judgment motion without giving appellant more time to conduct discovery or to amend his complaint. And we further conclude that the district court did not err by granting the motion for summary judgment because appellant's Open Meeting Law claim, to the extent it is timely, is based solely on two e-mail messages, that do not constitute a "meeting" under the law. Therefore, we affirm.

FACTS

In March 2006, Timothy O'Keefe was elected to a three-year term on the township board of Fish Lake Township in Chisago County. In June 2009, after losing his bid for re-election, he commenced this lawsuit against the township; his two colleagues on the board, Robert Carter and Robert Cupit; and the town clerk, Andrea Nekowitsch (hereinafter respondents).

In his complaint, O'Keefe alleged three theories of relief. The only theory relevant to this appeal is his claim that respondents violated the Open Meeting Law, Minn. Stat. §§ 13D.01-.08 (2012). O'Keefe's complaint alleged a violation of that law in connection with an April 2006 contract with a nearby city for firefighting services. After respondents moved for summary judgment in December 2011, O'Keefe raised issues concerning two e-mail messages that were exchanged by board members in December 2008. Respondents engaged O'Keefe on the issue of the e-mail messages, and the district court entertained O'Keefe's arguments on that issue. Thus, we deem the allegations

concerning the 2008 e-mail messages to have been litigated by the implied consent of the parties. *See* Minn. R. Civ. P. 15.02.

In March 2012, the district court granted respondents' motion for summary judgment. The district court determined that a two-year statute of limitations applies to O'Keefe's claims under the Open Meeting Law, barring his claim except the allegation concerning the December 2008 e-mail messages. The district court concluded that respondents did not violate the Open Meeting Law with respect to those e-mail messages. O'Keefe appeals.

D E C I S I O N

I. Statute of Limitations

O'Keefe first argues that the district court erred by applying a two-year statute of limitations to his Open Meeting Law claim instead of a six-year statute of limitations. This court applies a *de novo* standard of review to the interpretation and application of statutes of limitations. *State Farm Fire & Cas. v. Aquila Inc.*, 718 N.W.2d 879, 883 (Minn. 2006); *Benigni v. County of St. Louis*, 585 N.W.2d 51, 54 (Minn. 1998).

The Open Meeting Law requires that all meetings of a state or local governmental entity be open to the public. Minn. Stat. § 13D.01, subd. 1. The law applies to "those gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body." *Moberg v. Independent Sch. Dist. No. 281*, 336 N.W.2d 510, 518 (Minn. 1983). A cause of action may be brought by "any person in any

court of competent jurisdiction where the administrative office of the governing body is located." Minn. Stat. § 13D.06, subd. 2.

The Open Meeting Law does not contain a statute of limitations. Thus, we refer to chapter 541 of the Minnesota Statutes, which concerns limitations periods generally. The parties agree that the applicable statute of limitations may be identified by referring to two sections of that chapter. The first statute provides that a six-year limitations period applies to actions "upon a liability created by statute, other than those arising upon a penalty or forfeiture or where a shorter period is provided by section 541.07." Minn. Stat. § 541.05, subd. 1(2) (2012). The second statute provides that a two-year limitations period applies to actions "upon a statute for a penalty or forfeiture." Minn. Stat. § 541.07(2) (2012).

Accordingly, O'Keefe's claims are subject to a two-year limitations period if the Open Meeting Law provides for a penalty or forfeiture. "A statute is considered penal for limitations purposes if it punishes an offense against the public rather than redresses a private wrong." *Estate of Riedel by Mirick v. Life Care Ret. Communities, Inc.*, 505 N.W.2d 78, 82 (Minn. App. 1993) (citing *Freeman v. Q Petroleum Corp.*, 417 N.W.2d 617, 618 (Minn. 1988)). "A statute is 'for a penalty' where liability is imposed as a consequence of a violation of the law, even though the injured party has not suffered 'any real loss.'" *Id.* (quoting *Merchants' Nat'l Bank of Chicago v. Northwestern Mfg. & Car Co.*, 48 Minn. 349, 357, 51 N.W. 117, 118 (1892)).

The Open Meeting Law does not authorize a district court to award compensatory damages to a person who establishes a violation of the law. *See* Minn. Stat. § 13D.06.

Rather, the law expressly provides for three types of remedies. First, "Any person who intentionally violates this chapter shall be subject to personal liability in the form of a civil penalty in an amount not to exceed $300 for a single occurrence, which may not be paid by the public body." *Id.*, subd. 1. Second, a person who has been found to have violated the Open Meeting Law in three or more actions "shall forfeit any further right to serve on such governing body or in any other capacity with such public body for a period of time equal to the term of office such person was then serving." *Id.*, subd. 3(a). Third, a person who has violated the Open Meeting Law may be liable for costs, disbursements, and attorney fees. *Id.*, subd. 4.

The district court determined that the Open Meeting Law "is clearly a statute for a penalty or forfeiture and therefore a cause of action under the Open Meeting Law must be commenced within the two-year statute of limitations." The district court's reasoning is supported by the plain language of the statute, which provides for remedies of "penalty" and "forfeit[ure]." *See id.*, subds. 1, 3(a). The Open Meeting Law clearly "punishes an offense against the public rather than redresses a private wrong," regardless whether a person asserting a claim under the law has "suffered 'any real loss.'" *See Riedel*, 505 N.W.2d at 82 (citations omitted).

O'Keefe practically concedes this conclusion by stating, "It is indeed correct that an aspect of the Open Meeting Law provides for forfeiture of public office and a civil penalty." He nonetheless contends that a six-year limitations period should apply because the purpose of the Open Meeting Law is to allow for an informed public, because two years is too short a period in which to prove three violations and thereby evict a

violator from office, and because a violation of the Open Meeting Law is an offense against the state rather than the public. His first contention is not persuasive and, in fact, undercuts his argument; a well-informed public would want to vindicate a violation of the Open Meeting Law promptly, while the issues discussed at the improperly closed meeting still are meaningful, rather than waiting as long as six years for the commencement of litigation. O'Keefe's third contention is inconsistent with the supreme court's statement that the Open Meeting Law "protect[s] the public's right to full access to the decision-making process of public bodies." *St. Cloud Newspapers, Inc. v. District 742 Comm. Schs.*, 332 N.W.2d 1, 6 (Minn. 1983). None of O'Keefe's contentions overcomes the fact that his claims are made "upon a statute for a penalty or forfeiture." Minn. Stat. § 541.07(2).

Thus, the district court did not err by applying a two-year statute of limitations to O'Keefe's claims under the Open Meeting Law, which bars O'Keefe's claim concerning the April 2006 firefighting contract.

II. Timing of Summary Judgment Ruling

O'Keefe next argues that the district court erred by granting respondents' summary judgment motion prematurely. He appears to contend that he should have been allowed to conduct additional discovery or to otherwise develop arguments concerning spoliation and an *ultra vires* theory. We apply an abuse-of-discretion standard of review to the question whether a district court has erred by granting summary judgment without allowing a party to conduct additional discovery. *Molde v. CitiMortgage, Inc.*, 781 N.W.2d 36, 45 (Minn. App. 2010).

A party may serve and file a motion for summary judgment "at any time after the expiration of 20 days from the service of the summons." Minn. R. Civ. P. 56.01. The rules of civil procedure provide a mechanism by which a party opposing a summary judgment motion may request that the district court deny or continue the motion:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Minn. R. Civ. P. 56.06. An affidavit filed pursuant to rule 56.06 "'must be specific about the evidence expected, the source of discovery necessary to obtain the evidence, and the reasons for the failure to complete discovery to date.'" *Molde*, 781 N.W.2d at 45 (quoting *Alliance for Metro. Stability v. Metropolitan Council*, 671 N.W.2d 905, 919 (Minn. App. 2003)). In considering a non-moving party's request pursuant to rule 56.06, the district court should consider two primary factors: first, whether the non-moving party is "seeking further discovery in the good faith belief that material facts will be uncovered, or . . . merely engaging in a 'fishing expedition,'" and, second, whether the non-moving party has "been diligent in obtaining or seeking discovery" before requesting denial or continuance under rule 56.06. *Rice v. Perl*, 320 N.W.2d 407, 412 (Minn. 1982); *see also Molde*, 781 N.W.2d at 45; *QBE Ins. Corp. v. Twin Homes of French Ridge Homeowners Ass'n*, 778 N.W.2d 393, 400 (Minn. App. 2010).

O'Keefe contends that he should have been allowed to pursue an issue concerning alleged spoliation (which is not described further in his appellate briefs) and an issue

concerning an alleged *ultra vires* action by the township board. O'Keefe first raised these issues in his memorandum opposing respondent's summary judgment motion. But O'Keefe did not submit an affidavit to the district court pursuant to rule 56.06. His failure to do so, by itself, justifies the district court's decision to rule on respondents' summary judgment motion after the hearing. *See Molde*, 781 N.W.2d at 45.

Despite O'Keefe's failure to utilize rule 56.06, the district court considered O'Keefe's request for more time and rejected it. The district court determined that the parties "had ample time to conduct discovery." This determination is supported by the record. More than two and one-half years had elapsed between O'Keefe's commencement of the action and the district court's ruling on respondent's summary judgment motion. The original discovery deadline of February 5, 2010 was extended at least seven times, usually by stipulated orders, ultimately to December 16, 2011. In light of the ample time that O'Keefe had to develop his claims and his failure to specifically identify the issues that required further development, O'Keefe cannot establish that the district court was obligated to defer its ruling on the motion.

Thus, the district court did not err by ruling on respondents' motion for summary judgment after the hearing.

III. December 2008 E-Mail Messages

O'Keefe last argues that the district court erred by entering summary judgment on his claim that respondents violated the Open Meeting Law by communicating with each other in two e-mail messages in December 2008.

A district court must grant a motion for summary judgment if the evidence demonstrates "that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law." Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the non-moving party. *Frieler v. Carlson Mktg. Grp., Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). This court applies a *de novo* standard of review to the district court's legal conclusions on summary judgment, and we view the evidence in the light most favorable to the non-moving party. *RAM Mut. Ins. Co. v. Rohde*, 820 N.W.2d 1, 6 (Minn. 2012).

The Open Meeting Law provides that all meetings of a township board's governing body must be open to the public. Minn. Stat. § 13D.01, subd. 1(b)(5). The supreme court has stated that the law "was enacted to prevent public bodies from dissolving into executive session on important but controversial matters, and to insure that the public has an opportunity both to detect improper influences and to present its views." *Moberg*, 336 N.W.2d at 517.

The e-mail messages on which O'Keefe bases his claim concern the amount of fuel possessed by the township in December 2008. The subject had been discussed at a December 8, 2008 board meeting, at which the board decided, upon O'Keefe's motion, to purchase 500 gallons of fuel, at $2.15 per gallon, for purposes of maintaining roads within the township. On December 30, 2008, Carter sent an e-mail message to O'Keefe and Cupit that concerned the amount of fuel on hand at that time:

> We have approximately 700+ gallons of fuel on hand and will use 120 to 140 gals. per shift. In the next few days and before the next meeting Gary will order more fuel.

> We have about one more load of Dresser chips in the shed. Dresser no longer has sanding mix because of the salt situation. We stocked an extra 3 or 4 loads knowing that it wouldn't be as effective without salt in it. Gary has been able to get some salt from the County, unofficially. Once the roads are clear Gary will be hauling Dresser chips. Those two warm sunny days have turned the roads into glare ice. People will have to drive according to conditions. The alternative would be to put the carbide teeth back on and aggressively go after it. This wouldn't be my first choice because of all the gravel that would be lost. Gary put some stop leak in the truck cooling system and the leak appears to have stopped. There has not been a significant break in the weather to get the truck in for repair.

Approximately 90 minutes later, Cupit responded by sending the following e-mail message to Carter and O'Keefe, with a copy to Nekowitsch: "Thanks for the update. Good plan. We had similar conditions a few years back and got through it adequately with chipping intersections, curves and hills. I'm confident in Gary's judgment." O'Keefe did not respond to either e-mail message.

The district court reasoned that there were no genuine issues of material fact on O'Keefe's claim concerning this exchange of e-mail messages. The district court reasoned as follows: "It would be nonsensical to allow the Plaintiff to proceed on a claim in which he would be just as liable as the Defendants. Furthermore, the subject matter of the email does not appear to contradict or go against the decision at the December 8, 2008 meeting to purchase more fuel."

The district court's first reason for rejecting O'Keefe's claim appears to be based on a lack of standing. That rationale would have been proper under a prior version of the Open Meeting Law. In *Channel 10, Inc. v. Independent Sch. Dist. No. 709*, 298 Minn.

306, 215 N.W.2d 814 (1974), the supreme court noted that the Open Meeting Law was "designed to assure the public's right to be informed" and concluded that the plaintiffs in that case had standing to maintain an action under the law because they were "within the group of persons whom this statute was designed" to benefit. *Id.* at 313, 215 N.W.2d at 821. But the supreme court also noted that the Open Meeting Law did not contain an "express authorization to bring suit." *Id.*, 215 N.W.2d at 820. Since *Channel 10*, the legislature has amended the law by expressly authorizing anyone to maintain an action under the law: "An action to enforce the penalty in subdivision 1 may be brought by *any person* in any court of competent jurisdiction where the administrative office of the governing body is located." Minn. Stat. § 13D.06, subd. 2 (emphasis added). Thus, the legislature has determined that an office-holder such as O'Keefe may maintain an action under the Open Meeting Law, even though he participated in an alleged closed meeting and, thus, is not within the class of persons whom the law was designed to benefit.

O'Keefe contends that there is a question of fact as to whether respondents violated the Open Meeting Law. Respondents contend that O'Keefe must prove that Carter and Cupit had a specific intent to violate the law. Respondents cite no caselaw for this proposition. A review of the legislative history of the Open Meeting Law shows that respondents' assertion is incorrect. Until 2008, the Open Meeting Law prohibited an award of monetary penalties or attorney fees unless "there was a *specific* intent to violate this chapter." Minn. Stat. § 13D.06, subd. 4(d) (2006) (emphasis added). In 2008, however, the legislature deleted the word "specific" from that statute. 2008 Minn. Laws

ch. 335, § 2. The 2008 amendment, which applies to O'Keefe's claim, indicates that the legislature intended to require proof of only general intent.

Even though O'Keefe is not required to prove specific intent, his claim has two other flaws, both of which are fatal.[1] First, O'Keefe cannot establish that the exchange of e-mail messages constitutes a "meeting," as that word is used in the Open Meeting Law. The term "meeting" is not defined within the statute. The term nonetheless may be understood by referring to the purpose of the Open Meeting Law. *See Lee v. Fresenius Med. Care, Inc.*, 741 N.W.2d 117, 123 (Minn. 2007) (noting canon of construing statutes "to effect their essential purpose"). In *Moberg*, the supreme court stated that the Open Meeting Law applies to "gatherings of a quorum or more members of the governing body, or a quorum of a committee, subcommittee, board, department, or commission thereof, at which members discuss, decide, or receive information as a group on issues relating to the official business of that governing body." *Id.* at 518. The *Moberg* opinion appears to assume that the Open Meeting Law applies only to an event at which office-holders are assembled in person. The current version of the Open Meeting Law also applies to meetings in which some office-holders participate remotely via telephone or interactive television. *See* Minn. Stat. §§ 13D.02, .021. The statute concerning telephonic participation requires that members of the body and members of the public be

[1]Neither party raised either issue, but O'Keefe's claim cannot be allowed to go forward if he cannot establish these two basic requirements of a claim alleging a violation of the Open Meeting Law. "[I]t is the responsibility of appellate courts to decide cases in accordance with law, and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities." *State v. Hannuksela*, 452 N.W.2d 668, 673 n.7 (Minn. 1990) (quotation omitted).

able to "hear one another and . . . hear all discussion and testimony." Minn. Stat. § 13D.02, subd. 1(2), 1(3); *see also* Minn. Stat. § 13D.021, subd. 1(2), 1(3) ("hear and see" for interactive television). Thus, it is apparent that the legislature has assumed that a "meeting" occurs only when office-holders communicate orally.

Contrary to the implicit premise of O'Keefe's claim, the Open Meeting Law does not apply to written communications between office-holders. O'Keefe has not cited any Minnesota caselaw that applies the Open Meeting Law to written communications (e-mail or otherwise). We are unaware of any such caselaw. Furthermore, any such caselaw would be inconsistent with *Moberg*, in which the supreme court suggested that distributing written materials to a quorum of a governing body through the mail (*i.e.*, the United States Postal Service) would not be prohibited by the Open Meeting Law. *Moberg*, 336 N.W.2d at 518-19. The distinction between oral communications and written communications is sensible because access to written communications is governed by the Minnesota Government Data Practices Act, Minn. Stat. §§ 13.01-.99 (2012). Thus, O'Keefe cannot prevail on his claim because it is based on written communications, which are not meetings under the Open Meeting Law.

Second, even if O'Keefe could establish that the exchange of e-mail messages may be deemed a "meeting" under the Open Meeting Law, he could not establish that the particular e-mail messages in this case contained the type of discussion that is required for a "meeting." In *Moberg*, the supreme court adopted a flexible, common-sense test for determining whether a prohibited "meeting" has occurred. The supreme court noted that the purpose of the Open Meeting Law was to prevent secret discussions on "important

but controversial matters." 336 N.W.2d at 517. But the supreme court observed that "[t]here is a point beyond which open discussion requirements may serve to immobilize a body and prevent the resolution of important problems." *Id.* The supreme court advised that, "in formulating a definition of 'meetings' that must be open, the public's right to be informed must be balanced against the public's right to the effective and efficient administration of public bodies." *Id.*

In light of the reasoning in *Moberg*, the discussion that is reflected in the two e-mail messages of December 30, 2008, was not a "meeting" pursuant to the Open Meeting Law. The subject matter of the e-mails was not both "important" and "controversial." *See* 336 N.W.2d at 517. In fact, the decision whether to purchase fuel for the township's road-maintenance equipment was a relatively straightforward operational matter. Furthermore, it does not appear that the board members made any decisions in their exchange of e-mail messages. In the first e-mail message, Carter merely reported that a member of the town's staff, Gary, had already decided to purchase more fuel, and Carter did not ask that the decision be either ratified or reconsidered. In the second e-mail message, Cupit thanked Carter for the "update" and expressed confidence in the decision Gary had made. Moreover, the decision to buy fuel does not appear to be controversial. O'Keefe himself had made a motion to purchase 500 gallons of fuel during the prior board meeting. O'Keefe's motion passed, but it turned out that the 500-gallon purchase was inadequate. O'Keefe fails to explain why the subject discussed in the December 30, 2008 e-mail messages is of more importance to the residents of Fish Lake Township than meets the eye.

Given the facts of this case, and given the need for a proper balance between "the public's right to be informed" and "the public's right to the effective and efficient administration of public bodies," *id.*, we conclude that the discussion reflected in the two e-mail messages at issue is not a "meeting" that is subject to the requirements of the Open Meeting Law. Accordingly, there are no genuine issues of material fact on O'Keefe's claim under the Open Meeting Law.

In sum, the district court did not err by granting respondents' motion for summary judgment.

Affirmed.