STATE OF MICHIGAN

COURT OF APPEALS

PITTSFIELD CHARTER TOWNSHIP,

Plaintiff-Appellee,

v

SCOTT D. GORDON, JESSE GORDON, and ANITRA GORDON,

Defendants-Appellants.

UNPUBLISHED
October 11, 1996

No. 185528
LC No. 92-43985 CE

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

In this action to enforce a zoning ordinance, defendants appeal as of right the order of the circuit court enjoining them from, among other things, operating a business from their property. We affirm.

Despite defendants' many arguments to the contrary, our review of the record indicates that the circuit court properly granted plaintiff's motion for summary disposition pursuant to MCR 2.116(C)(10). First, defendants contend that the circuit court failed to consider certain evidence when ruling on plaintiff's motion. However, the circuit court considered all documents appearing in the record. While defendants refer to additional documents, these are not contained in the record and the circuit court docketing statement gives no indication that these additional documents were ever filed. Therefore, we find no error, and, further, for purposes of this appeal we will consider only those documents appearing in the record. MCR 7.210(A)(1); *Wiand v Wiand*, 178 Mich App 137, 143; 443 NW2d 464 (1989).

Second, defendants raise various arguments that, in substance, attack the trial court's handling of plaintiff's request for admissions. Our review of the record discloses no document that could even arguably be construed as defendants' response to plaintiff's request for admissions, which is the same conclusion reached by the circuit court. Upon a party's failure to answer or object to a request for

* Circuit judge, sitting on the Court of Appeals by assignment.

admissions, the court may deem the matters admitted and conclusively established. MCR 2.312(B)(1), (D)(1). Once admitted, the matters admitted must be considered when deciding a motion for summary disposition brought pursuant to MCR 2.116(C)(10). MCR 2.116(G)(5). Here, because there is no evidence that defendants' responded to plaintiff's request for admissions, the circuit acted appropriately when it deemed defendants to have admitted the matters to which requests had been made and relied on these admissions when ruling on the motion for summary disposition. See *Employers Mutual Casualty Co v Petroleum Equipment Inc*, 190 Mich App 57, 62; 475 NW2d 418 (1991). We find no error.

Third, defendants assert that the court erred in granting plaintiff's motion for summary disposition where discovery had not yet been completed. While it is true that summary disposition may be premature where granted before discovery is complete, *Jordan v Jarvis*, 200 Mich App 445, 452; 505 NW2d 279 (1993), defendants' failure to respond to plaintiff's thorough request for admissions obviated the need for extended discovery – defendants admitted everything necessary for plaintiff to prevail. Though defendants did submit some documentary evidence in an attempt to defeat plaintiff's motion, one may not submit evidence that contradicts a matter deemed admitted pursuant to MCR 2.312. See *Woodrow v Johns*, 61 Mich App 255, 259; 232 NW2d 688 (1975). Again, we find no error.

Fourth, defendants argue that the circuit court erred in granting summary disposition where defendants raised issues of material fact with respect to their affirmative defense of discriminatory enforcement. However, one must submit evidence to raise an issue of material fact; one may not simply rest upon denials unsupported by evidence. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991). Here, to prevail against plaintiff's motion for summary disposition, defendants were burdened with presenting evidence that plaintiff knew about and tolerated similar zoning ordinance violations. *Morris G Laramie & Sons v Gridley*, 326 Mich 410, 414; 40 NW2d 205 (1949). Plaintiff presented none. While plaintiff presented some evidence of dubious admissibility concerning similar ongoing zoning violations, plaintiff presented an affidavit indicating that, with two exceptions, plaintiff did not know of the alleged violations, and that enforcement proceedings had been initiated with respect to the two violations of which plaintiff was aware. Thus, there was no evidence, whether admissible or not, supporting plaintiff's contention of discriminatory enforcement. No error occurred.

In summary, our de novo review, *Borman v State Farm Fire & Casualty Co*, 198 Mich App 675, 678; 499 NW2d 419 (1993), aff'd 446 Mich 482 (1994), of the circuit court's grant of summary disposition reveals no errors. To the extent that this opinion addresses the broad themes of defendants' arguments on appeal but does not expressly address every argument falling within those larger themes, we have considered each allegation but find those not mentioned herein to be without merit and to add nothing to our review. Accordingly, we affirm order granting summary disposition in favor of plaintiff.

Defendants also assert that the circuit court erred by denying their demand for jury trial. In light of our conclusion that the circuit court did not err in granting plaintiff's motion for summary disposition, defendants' contention is moot, and we decline to address it.

Finally, plaintiff seeks sanctions against defendants pursuant to MCR 7.216(C)(1)(a) and (b) for the filing of a vexatious appeal. An appeal is not vexatious merely because the appeal resulted from a frivolous claim or defense below, but the appeal or the appellate proceedings themselves must be vexatious. *DeWald v Isola (After Remand)*, 188 Mich App 697, 700; 470 NW2d 505 (1991). An appeal is vexatious if it was taken to hinder or to delay, or when there is no reasonable basis for believing that a meritorious issue exists. *Richardson v DAIIE*, 180 Mich App 704, 709; 447 NW2d 791 (1989).

Here, contrary to plaintiff's argument to the contrary, we find no evidence that defendants sought to improperly delay or impermissibly hinder plaintiff's enforcement of the zoning ordinance. However, after carefully reviewing the record, we conclude that defendants had no reasonable basis to believe that they had a meritorious appellate issue concerning their failure to answer plaintiff's request for admissions. The court rules plainly state that requests for admission must be answered or the matters will be deemed admitted. MCR 2.312(B)(1), (D)(1). The lower court found that the defendants had failed to respond to plaintiff's request for admissions, a conclusion supported by the record. Nothing in the record or in defendants' brief on appeal supports their assertion that they answered plaintiff's request for admissions or that the circuit court agreed to accept an untimely response to plaintiff's request. Under these facts, defendants had no reasonable basis for believing that they had a meritorious appeal. See *Greenough v Greenough*, 354 Mich 508, 517-518; 93 NW2d 391 (1958).

This case is remanded to the circuit court to determine the amount to which plaintiff is entitled, including attorney fees and other expenses associated with this vexatious appeal.

Affirmed and remanded. We do not retain jurisdiction.

/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt

I concur in result only.

/s/ Michael J. Kelly