STATE OF MICHIGAN

COURT OF APPEALS

ESTATE DEVELOPERS II, INC.,

Plaintiff-Appellant,

v

TOWNSHIP OF ARGENTINE and ARGENTINE TOWNSHIP BOARD OF TRUSTEES,

Defendants-Appellees.

UNPUBLISHED
November 26, 1996

No. 180620
LC No. 93-022521-CH

CHARLES KORPACK and KATHERINE KORPACK, a/k/a CHARLES KORPAK and KATHERINE KORPAK,

Plaintiffs-Appellants,

v

TOWNSHIP OF ARGENTINE and ARGENTINE TOWNSHIP BOARD OF TRUSTEES,

Defendants-Appellees.

No. 180791
LC No. 93-022521-CH

Before: Saad, P.J., and Griffin and M. H. Cherry,* JJ.

PER CURIAM.

In this consolidated case, plaintiffs, Estate Developers II, Inc., and Charles and Katherine Korpack, separately appeal as of right from the trial court's order granting judgment for defendants following a bench trial. We affirm.

---

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

I

On December 28, 1988, Charles and Katherine Korpack purchased 293 acres of land in Argentine Township. Eighty of these acres are the subject of this litigation. In 1990, Mr. Korpack obtained an Argentine Township zoning map which revealed that the entire eighty-acre tract at issue was zoned for residential multiple, or "RM" use. The official zoning description provided that "[a]ll that part of the NW 1/4 and SW 1/4 of Sec. 25 lying southeasterly of Silver Lake Road and North [sic] of Glen Hatt and east of Lobdell Road" was zoned for residential multiple use.[1]

The Korpacks then entered into an option contract to sell the eighty acres to a real estate developer, provided that the developer could obtain township officials' permission to construct a mobile home park on the property. In January 1991, the developer presented a preliminary site plan to the Argentine Township Board of Trustees, which denied the plan. On February 25, 1991, Mr. Korpack attended another Township Board of Trustees meeting, at which the board stated that the existing zoning map did not accurately reflect the true zoning status of the eighty acre parcel. The board interpreted the zoning description to extend the Glen Hatt Road line across the eighty acres. Thus, only the portion of the eighty acres located north of this line was zoned for residential multiple use, and the rest of the land was zoned for single-family residential use. The board's amendment to the zoning map had the effect of reducing the area of the eighty acres that defendants believed to be zoned "RM" by approximately one-third. However, the zoning description of the property was not changed, but merely clarified.

The Korpacks then entered into an option contract with Estate Developers II, Inc., to sell the eighty acres, provided that Estate Developers could obtain sufficient sewer capacity to service a mobile home development on the entire eighty acres and that the "zoning dispute" concerning the property could be resolved. Estate Developers developed a preliminary site plan for the mobile home park and received the required approvals from the Genesee County Road Commission, the Genesee County Health Department, and the Genesee County Drain Commissioner. However, the Argentine Township Planning Commission denied the plan on May 5, 1993, citing that some of its reasons for the denial were "[n]o sewer capacity, a zoning conflict, traffic, burden on the schools, [and] water tables." The Argentine Township Board of Trustees subsequently ratified the planning commission's decision to deny Estate Developer's preliminary site plan and cited, among other considerations, the township's lack of sewer capacity for such a development and the fact that the eighty acres zoning designation did not allow for the construction of a mobile home park on the entire parcel.

Plaintiffs then filed their "Complaint for Declaratory Relief, Preliminary Injunction, Permanent Injunction, and Damages" and pleaded five different grounds of recovery. In Count I, plaintiffs alleged that the eighty acres of land were zoned "RM" and that defendants illegally rezoned the portion of the lot located south of the Glen Hatt Road line. Plaintiffs also alleged that there were adequate sewer tap-ins available for a 307-unit mobile home park to be built on the eighty acres. Plaintiffs thus requested the trial court to declare the eighty acres as zoned "RM" and to direct defendants to award all sewer tap-ins on a first-come/first-serve basis. In Count IV, plaintiffs sought damages and attorneys fees pursuant to 42 USC 1983 on the basis that defendants' actions constituted a taking of their land in

violation of their Fifth and Fourteenth Amendment due process rights. Lastly, plaintiffs alleged in Count V that the "rezoning" of the eighty acres and the denial of sewer tap-ins constituted an impermissible taking of their property in violation of the Fifth Amendment of the United States Constitution and Article 10 of the Michigan Constitution.

II

Plaintiffs first argue that the trial court erred in granting their motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10) as to counts IV and V of their complaints. We disagree.

A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone; all well-pleaded factual allegations are taken as true, as well as any reasonable inferences or conclusions that can be drawn from the allegations. *Simko v Blake*, 448 Mich 648, 654; 532 NW2d 842 (1995); *Marcelletti v Bathani*, 198 Mich App 655, 658; 500 NW2d 124 (1993). The motion should be granted only where the claim is so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992); *Peters v Dep't of Corrections*, 215 Mich App 485, 487; 546 NW2d 668 (1996).

A motion for summary disposition pursuant to MCR 2.116(C)(10) tests the factual support for a claim. *Porter v Royal Oak*, 214 Mich App 478, 484; 542 NW2d 905 (1995); *Panich v Iron Wood Products Corp*, 179 Mich App 136, 139; 445 NW2d 795 (1989). In deciding such a motion, the trial court must consider the pleadings, depositions, affidavits, admissions, and other documentary evidence, MCR 2.115(G)(5), and must give the nonmoving party the benefit of every reasonable doubt. *Radtke v Everett*, 442 Mich 368, 373; 501 NW2d 155 (1993); *Porter*, *supra* at 484. Although the court should be liberal in finding genuine issues of material fact, summary disposition is appropriate when the party opposing the motion fails to provide evidence to establish a material factual dispute. *McCart v J Walter Thompson USA, Inc*, 437 Mich 109, 115; 469 NW2d 284 (1991); *Mascarenas v Union Carbide Corp*, 196 Mich App 240, 243; 492 NW2d 512 (1992).

A § 1983 action may be brought to recover civil damages for a Fourteenth Amendment substantive due process "takings" claim, *Electro-Tech, Inc v Campbell Co*, 433 Mich 57, 76-79; 445 NW2d 61 (1989), in which a party seeks to prove that a zoning ordinance diminishes property value so much that the ordinance amounts to a taking by eminent domain without due process of law. *Pearson v Grand Blanc*, 961 F2d 1211, 1215-1216 (1992). Likewise, a plaintiff may bring a § 1983 suit on substantive due process grounds to challenge an application of a zoning ordinance that is arbitrary and capricious, having no substantial relation to the public health, safety, morals, or general welfare. *Id.*; *Electro-Tech*, *supra* at 76-77. However, plaintiff must obtain a final decision regarding the application of the zoning ordinance to his property before he may raise these due process issues. *Id.* at 87-89.

In the present case, there is no record evidence that plaintiffs sought a variance of the applicable zoning ordinance before bringing their § 1983 action. See *Id.* at 82. Further, the plan defendants rejected was a preliminary site plan that was considered unacceptable for several specific reasons.

Plaintiff may not challenge defendants' rejection of this plan until either they or the developers submit a final site plan that addresses each basis on which the preliminary plan was rejected. Because plaintiffs failed to seek a variance or submit a final site plan, the suit is unripe and summary disposition on these counts in favor of defendants was proper.

Likewise, the trial court correctly dismissed the § 1983 claims that plaintiffs based on defendants' denial of sewer tap-ins. Defendants never had an opportunity to review a final site plan for Estate Developers' proposed mobile home park. Because defendants rejected a mere preliminary construction proposal on many bases, this Court has no way of determining how and to what extent, if any, defendants' failure to grant Estate Developers' request for sewer taps adversely affected plaintiffs' constitutional rights.

Furthermore, the trial court did not err in dismissing plaintiffs' Count V, which pleaded regulatory takings claims under both the federal and state constitutions. See US Const, Am V; Const 1963, art 10, § 2. In regulatory takings cases, plaintiff must establish that a final administrative decision has been made in relation to the disputed governmental action and his property. *Lake Angelo Associates v White Lake Twp*, 198 Mich App 65, 71-72; 498 NW2d 1 (1993). Based on their pleadings and documentary evidence submitted to the trial court, plaintiffs cannot successfully bring a takings claim to challenge the zoning ordinance as applied to the Korpacks' property because they cannot show that defendants made a final decision regarding the use of the property. Specifically, they did not establish that they sought a zoning variance that was denied. As to the sewer tap-ins issue, plaintiffs were constrained to plead that Estate Developers had submitted a final site proposal and that it had been denied because adequate sewer tap-ins were unavailable. As they stand, plaintiffs' pleadings and documentary evidence merely show that Estate Developers submitted a preliminary site plan which defendants denied for a plethora of reasons. Hence, it is impossible for this Court to accurately gauge whether and to what extent the denial of sewer tap-ins adversely affected plaintiffs' constitutional rights.

Moreover, in a regulatory takings case, to determine whether plaintiffs were denied all economically viable use of their land, a comparison of the "before" and "after" property values must be made. See *Volkema v Dep't of Natural Resources*, 214 Mich App 66, 71; 542 NW2d 282 (1995). Without evidence of the actual before and after value of the Korpacks' land, the trial court was unable to determine if there had actually been a regulatory taking of the property as recognized under the state and federal constitutions. In light of these considerations, the trial court was correct in granting defendants' motion for summary disposition.

III

Next, plaintiffs contend that the trial court abused its discretion by denying plaintiff's leave to amend their pleadings to add claims alleging a violation of their rights under Article I, § 17 of the Michigan Constitution. We disagree.

We review a trial court's denial of leave to amend pleadings for an abuse of discretion. *International Brotherhood of Electrical Workers, Local Union No 58 v McNulty*, 214 Mich App

437, 448; 543 NW2d 25 (1995). In certain circumstances, however, MCR 2.116(I)(5) requires the trial court to give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence before the trial court shows that amendment would not be justified. *Weymers v Khera*, 210 Mich App 231, 240; 533 NW2d 334 (1995). Futility is one reason why amendment is not justified. *Id.*

An amendment is futile when, ignoring the substantive merits of the claim, it is legally insufficient on its face. *McNees v Cedar Springs Stamping Co*, 184 Mich App 101, 103; 457 NW2d 68 (1990). Whether the facts alleged by the party proposing amendment are sufficient to state a claim is a question of law. *Id.* at 104. This Court decides questions of law de novo. *Cardinal Mooney High School v Michigan High School Athletic Ass'n*, 437 Mich 75, 80; 467 NW2d 21 (1991). Whether the facts are as the party proposing amendment claims them to be is a question reserved for the trier of fact. *McNees*, *supra*.

We hold that the trial court properly denied plaintiffs' motion to amend their pleadings to add claims for violation of their state substantive due process rights. Contrary to plaintiffs claim, the Michigan Constitution provides no greater due process rights than guaranteed by the United States Constitution. *Gora v Ferndale (On Remand)*, 217 Mich App 295, 301; 551 NW2d 454 (1996). Thus, since the trial court had already granted summary disposition for defendants on plaintiffs' federal due process arguments, the trial court correctly denied plaintiffs' motion to add state due process claims. The sought-after amendment was also futile because the due process claims would not have been ripe for judicial resolution. Indeed, defendants never made a final determination regarding the permitted uses of the land in question. *Lake Angelo Associates*, *supra* at 73.

IV

Finally, plaintiffs argue that the trial court erred in considering paragraph 31B of Count I of their complaint as a claim for mandamus relief and granting defendants' motion for involuntary dismissal on this basis. We disagree.

Where a party couches a complaint as an action for declaratory judgment, but asks for a type of relief that would force the court to direct state officials to perform an allegedly statutorily mandated duty, the trial court may permissibly look to the true nature of the relief requested and analyze the claim under mandamus principles. See *Ferency*, *supra* at 685-686. Mandamus is an extraordinary remedy and is appropriate only when there is no other remedy, legal or equitable, that might achieve the same result. *Tuscola Co Abstract Co, Inc v Tuscola Co Register of Deeds*, 206 Mich App 508, 510; 522 NW2d 686 (1994). Issuance of a writ of mandamus is only proper where (1) the plaintiff has a clear legal right to performance of the specific duty sought to be compelled, (2) the defendant has the clear legal duty to perform such act, and (3) the act is ministerial, involving no exercise of discretion or judgment. *Id.* at 510-511. Whether the trial court was correct in finding that plaintiffs' claim was actually a mandamus action is a question of law. See *Ferency v Secretary of State*, 139 Mich App 677, 683; 362 NW2d 743 (1984). Questions of law are reviewed de novo on appeal. *Cardinal Mooney High School*, *supra*.

Here, paragraph 31B of plaintiffs' complaint states:

> WHEREFORE, Plaintiffs pray that this Honorable Court enter a Declaratory Judgment as follows:
>
> * * *
>
> B. That Defendants shall not award, reserve, or save any sewer tap-ins, and all sewer tap-ins be granted on a first-come/first-serve basis . . . .

After examining this portion of plaintiffs' complaint, the trial court stated:

> B, that defendant shall not award, reserve or save any sewer tap-ins, and all sewer tap-ins should be granted on a first come, first serve basis. That to me is the subject again of relief sought in Counts Two and/or Three which is in effect a disguised request for mandamus which the Court declines to grant for the reasons previously stated.

The trial court refused to grant plaintiffs' request for mandamus relief because it could not find any clear legal duty on the part of defendants to issue sewer tap-ins to plaintiffs, nor any clear legal right to sewer tap-ins on plaintiffs' part. Additionally, the trial court stated that plaintiffs had failed to exhaust their administrative remedies by reapplying to defendants for a lesser number of sewer tap-ins.

Because paragraph 31B of plaintiffs' complaint clearly requested the trial court to force Argentine Township officials to perform an allegedly mandatory duty, the trial court was correct in viewing this portion of plaintiffs' suit as a mandamus action. Plaintiffs do not address whether, in light of mandamus principles, dismissal of this Count was proper. However, we note that plaintiffs' failure to pursue other available administrative remedies was a proper basis on which to dismiss plaintiffs' mandamus action, since plaintiffs were unable to show that no other equitable or legal remedies were available to them. Accordingly, we affirm the trial court's grant of involuntary dismissal in favor of defendants as to plaintiffs' claim for mandamus relief.

Affirmed.

/s/ Henry William Saad
/s/ Richard Allen Griffin
/s/ Michael H. Cherry

[1] There was some ambiguity between the zoning map and the zoning description of the property. Glen Hatt Road ran perpendicular to and actually ended at the western boundary line of the eighty-acre portion of the Korpacks' land. Hence, if the Glen Hatt Road line were extended across the eighty acres, only that portion of the land lying north of this line would be zoned for residential multiple use.

The portion of the eighty acres located south of the line would be zoned for single-family residential use, as was most of the land surrounding the eighty acres at issue.