STATE OF MICHIGAN

COURT OF APPEALS

HARRY JAVENS and JOYCE JAVENS,

Plaintiffs-Appellants,

v

RUEL MCPHERSON and CITY OF HAZEL PARK,

Defendants-Appellees.

UNPUBLISHED
December 20, 1996

No. 184776
Oakland County
LC No. 94-481252-AS

Before: Hood, P.J., and Neff and M. A. Chrzanowski,* JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition to defendants pursuant to MCR 2.116(C)(8) in this constitutional and legal challenge to one of defendant Hazel Park's ordinances. We affirm.

I

Plaintiffs first argue that summary disposition was improper because plaintiffs correctly asserted in their complaint that the challenged ordinance violated their right to procedural due process under US Const, Am XIV, and Const 1963, art 1, § 17. We disagree.

City ordinances, like statutes, are clothed with every presumption of validity. *Detroit v Qualls*, 434 Mich 340, 364; 454 NW2d 374 (1990). The touchstone of validity is the reasonableness of the ordinance. *Cryderrman v Birmingham*, 171 Mich App 15, 22; 429 NW2d 625 (1988). The party challenging the ordinance bears the burden of proving affirmatively that the ordinance is unreasonable, and thus constitutionally invalid. *Qualls, supra*, at 364.

We review de novo the trial court's determination that the ordinance was constitutionally sound.[1] *Scots Ventures, Inc v Hayes Twp*, 212 Mich App 530, 532; 537 NW2d 610 (1995). Here, plaintiffs have not proven affirmatively that the ordinance is unconstitutional. While plaintiffs have

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

presented protected property rights, namely the right to pursue a cause of action, *Williams v Grossman*, 409 Mich 67, 103; 293 NW2d 315 (1980), and the right to make legitimate use of their property, *People v McKendrick*, 188 Mich App 128, 136; 468 NW2d 903 (1991), they have not shown that the procedures attendant upon the deprivation of these rights were constitutionally insufficient. *Jordan v Jarvis*, 200 Mich App 445, 448-449; 505 NW2d 279 (1993). Plaintiffs also have not shown that they are unable obtain a rental or a landlord license and thus gain access to the district court to sue for unpaid rent and repossession. Further, plaintiffs are not left without an opportunity to defend themselves and to be heard. *Id.* at 449. The ordinance specifically provides that all code violations, which provide grounds for deprivation of rental licenses and landlord licenses, may be appealed to the City Code Commission.

Plaintiffs also ignore the fact that a property owner's right to full and free use and enjoyment of his property is subject to reasonable regulation by the state in the legitimate exercise of its police power. *McKendrick, supra*, at 137. Cities may enact provisions for the protection of the safety, health, morals, prosperity, comfort, convenience and welfare of the public, so long as they do not run contrary to the constitution or any general statute. MCL 117.3(j); MSA 5.2073(j). Ordinances having for their purpose the stabilization of the use and value of property and the attraction of desirable citizenship and fostering its permanency are among the legitimate goals of such provisions. *McKendrick, supra*, at 138. These state interests are strong enough to support the legitimacy of the ordinance's code violation procedures.

The trial court did not err in granting defendants' motion for summary disposition on this ground because it correctly held that the ordinance did not deny plaintiffs their right to procedural due process.

II

Plaintiffs' second issue on appeal is that the trial court erred in granting defendants' motion for summary disposition because plaintiffs correctly asserted in their complaint that the challenged ordinance is preempted by or in conflict with the summary procedure provisions of the Revised Judicature Act, MCL 600.101 *et seq.*; MSA 27A.101, *et seq*. and the enforcement provisions of the Housing Act, MCL 125.523, *et seq.*; MSA 5.2891(3), *et seq*. We disagree.

A municipality may not enact an ordinance if (1) the ordinance directly conflicts with the state statutory scheme, or (2) the state statutory scheme preempts the ordinance by occupying the field of regulation that the municipality seeks to enter, to the exclusion of the ordinance, even where there is no direct conflict between the two schemes of regulation. *John's Corvette Care, Inc v Dearborn*, 204 Mich App 616, 618; 516 NW2d 527 (1994). Preemption may be established (1) where state law is expressly preemptive; (2) by examination of the legislative history; (3) by the pervasiveness of the state regulatory scheme, although this factor alone is not generally sufficient to infer preemption; or (4) where the nature of the subject matter regulated demands exclusive state regulation to achieve the uniformity necessary to serve the state's purpose or interest. *Id.*

A

Plaintiffs first contend that the ordinance conflicts with or is preempted by those sections of the Revised Judicature Act that establish the jurisdiction of the state's district courts over landlord/tenant summary proceedings. MCL 600.5704; MSA 27A.5704, MCL 600.5714; MSA 27A.5714. We disagree. The purpose of the ordinance is not to alter the jurisdiction of the district court in landlord/tenant proceedings, but to ensure proper maintenance and prevent deterioration of housing units. The ordinance does not address the power of the district court; it merely states that landlords must have a landlord license to be entitled to payment of rent or to evict tenants. The state is not seeking to regulate this area through the Revised Judicature Act. Presumably, if landlords have the necessary license, they may sue in the district court for unpaid rent and repossession as provided by MCL 600.5704; MSA 27A.5704, MCL 600.5714; MSA 27A.5714.

B

Plaintiffs next contend that the ordinance is preempted by the enforcement provisions of the Housing Act, MCL 125.523; MSA 5.2891(3) to MCL 125.541c; MSA 5.2891(21c), because this portion of the Housing Act allows landlords to sue in the district court for unpaid rent and repossession even when their rental units pose a public hazard. Plaintiffs also contend that Hazel Park exceeded its powers under the Home Rule City Act, MCL 117.1, *et seq.*; MSA 5.2071, *et seq.*, in enacting the remedy limit portion of the ordinance that blocks unlicensed landlords from suing in the district court for unpaid rent and repossession. Again, we disagree.

While plaintiffs correctly assert that the Home Rule City Act does not contain an express grant of authority allowing home rule cities to prohibit what the state permits, *Grand Haven v Grocer's Cooperative Dairy Co,* 330 Mich 694, 698; 48 NW2d 362 (1951), plaintiffs overlook two important provisions of the Housing Act that provide home rule cities with authority to regulate the procedures a city may follow in cases of hazardous building violations. First, MCL 125.543; MSA 5.2891(23) provides that no Michigan city, village, or township is required to adopt the Housing Act. Hazel Park has chosen not to adopt the Housing Act to regulate building violations within its borders, and instead uses the National Property Maintenance Code adopted by the Building Officials & Code Administrators International, Inc. (the "BOCA Code"). Moreover, MCL 125.534(8); MSA 5.2891(14)(8) expressly provides that the act "does not preempt, preclude, or interfere with the authority of a municipality to protect the health, safety, and general welfare of the public through ordinance, charter, or other means." Thus, the ordinance does not directly conflict with the state statutory scheme.

C

Next, plaintiffs contend that the ordinance's provision creating a nuisance per se in any rental unit found in violation of the city code, which in turn leads to a denial of a landlord license, conflicts with and is preempted by the Housing Act, which allows a building to be declared a nuisance per se only when dangerous to the public. Plaintiffs also argue that Hazel Park incorrectly relied on MCL 125.587; MSA 5.2937 in creating its nuisance per se provision, because the ordinance is meant to govern housing violations, not zoning violations. We disagree.

The ordinance provides that it is deficiencies in the rental unit, and not the landlord's failure to obtain a landlord license, that lead to the declaration of a nuisance per se. The ordinance sets out strict requirements that a rental unit must meet in order to qualify for a rental unit license, including compliance with Hazel Park's housing, construction, zoning, and property maintenance codes. In addition, the ordinance allows conditional rental unit licenses to be issued when "no violations are in existence which would preclude habitation or threaten the health, safety or welfare of the occupants or community." These provisions indicate that Hazel Park intended its ordinance to parallel MCL 125.486; MSA 5.2858, the provision of the Housing Act defining nuisances per se. The mere fact that the ordinance authorizes the imposition of a greater penalty than does a state statute does not invalidate the ordinance, especially where the city is not bound to follow the ordinance. *Kalita v Detroit*, 57 Mich App 696, 705; 226 NW2d 699 (1975).

Plaintiffs have failed to establish that the ordinance is preempted by or in conflict with state law, and the trial court did not err in granting defendants' motion for summary disposition on the ground that plaintiffs failed to state a claim on which relief could be granted.

III

Plaintiffs' third argument is that the trial court erred in granting defendants' motion for summary disposition because plaintiffs correctly asserted in their complaint that the ordinance violates the separation of powers clause of Const 1963, art 3, § 2. The ordinance, plaintiffs argue, represents an attempt by a legislative body, the Hazel Park City Council, to interfere with and limit the power and jurisdiction of a judicial body, the 43rd District Court, by preventing unlicensed landlords from pursuing actions for unpaid rent and repossession. We disagree.

It is well settled that the separation of powers doctrine mandates the preservation of the legislative, executive and judicial branches of government as entities distinct from one another. *Wayne Co Prosecutor v Wayne Co Bd of Comm'rs,* 93 Mich App 114, 121; 286 NW2d 62 (1979). However, some overlapping of functions between the branches of government is permissible provided the area of one branch's exercise of another branch's power is very limited and specific. It is only where the whole power of one branch is exercised by the same hands that possess the whole power of another branch that the separation of powers clause is violated. *Berrien Co Probate Judges v Michigan AFSCME Council 25*, 217 Mich App 205, 210; 550 NW2d 859 (1996).

The ordinance at issue here does not violate the separation of powers clause because it does not represent an attempt by the Hazel Park City Council to exercise the "whole power" granted to the district court. In passing the ordinance, the Council was not trying to regulate all procedure or jurisdiction in the court, or to try to perform the functions of the court; rather, it was merely limiting the access of one class of persons in an attempt to protect the health, safety and welfare of its citizens. Hazel Park has both a legitimate interest in protecting the health, safety and welfare of its citizens and the power to enact ordinances to do so. *Moore v City of Detroit*, 146 Mich App 448, 462; 382 NW2d 482 (1985).

Plaintiffs have failed to establish that the ordinance violates the separation of powers clause. Therefore, the trial court did not err in granting defendants' motion for summary disposition on this ground.

IV

Plaintiffs' final issue on appeal is that summary disposition was improper because plaintiffs correctly claimed in their complaint that the ordinance was invalid because Hazel Park, in establishing the membership qualifications for its construction code appeals board, circumvented the requirements of the BOCA Code. We disagree.

Neither the trial court nor the parties, either below or on appeal, has specified a constitutional ground for the proposition that Hazel Park either could or could not amend the construction code appeals board membership requirements of the BOCA Code, except for due process arguments mentioned in passing by plaintiffs in their complaint and their brief on appeal. We find that Hazel Park's amendment of the membership requirements of the appeals board does not deprive plaintiffs of their right to due process.

No municipality may enact an ordinance that amends, repeals, or dispenses with the minimum requirements of the Housing Act. MCL 125.408; MSA 5.2778. However, municipalities may not only exempt themselves from the State Construction Code by adopting a nationally recognized code, but also approve amendments to such codes by ordinance. MCL 125.1508(1); MSA 5.2949(8)(1). Moreover, the membership requirements imposed by Hazel Park are more stringent than those promulgated by the State Construction Code, MCL 125.1514(1); MSA 5.2949(14)(1), one of the provisions of the State Construction Code from which a municipality may not exempt itself. MCL 125.1508(7); MSA 5.2949(8)(7).

Because Hazel Park did not act unconstitutionally or in violation of state law in amending the membership requirements for its construction code appeals board, the trial court correctly granted defendant's motion for summary disposition on this ground.

Affirmed.

/s/ Harold Hood
/s/ Janet T. Neff
/s/ Mary A. Chrzanowski

[1] The trial court ruled that the ordinance was constitutionally sound in its order denying plaintiffs' motion for declaratory judgment, not in its grant of defendants' motion for summary disposition. However, defendants based their motion for summary disposition in part on the trial court's denial of plaintiff's motion for declaratory judgment.