

Court of Appeals, State of Michigan

ORDER

Miller Foundation v Big Marsh Intercounty Drain Drainage Bd

Docket No. 306272

LC No. 11-001758-CE

E. Thomas Fitzgerald
Presiding Judge

Patrick M. Meter

Mark T. Boonstra
Judges

The Court orders that the motion for reconsideration is GRANTED, and this Court's opinion issued March 26, 2013 is hereby VACATED. A new opinion is attached to this order.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

Jul 30 2013

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MILLER FOUNDATION and JOHN HOSKING,
Plaintiff-Appellees,

UNPUBLISHED
March 26, 2013

v

BIG MARSH INTERCOUNTY DRAIN
DRAINAGE BOARD, KARL F. HAUSLER,
PATRICIA CROWLEY, PH.D., and LARRY
CORTRIGHT,

No. 306272
Calhoun Circuit Court
LC No. 2011-001758-CE

Defendant-Appellants.

Before: FITZGERALD, P.J., and METER and BOONSTRA, JJ.

PER CURIAM.

Defendants appeal as of right from an order of the circuit court granting plaintiffs' request for declaratory and injunctive relief. Plaintiffs filed a complaint seeking to enjoin defendants from proceeding on a petition for maintenance, improvements, and consolidation in regard to the Big Marsh Intercounty Drain, asserting that the petition was invalid. By stipulation of the parties, the issue was submitted to the trial court for summary disposition. The trial court concluded that the petition was invalid and therefore granted the relief requested by plaintiffs. For the reasons stated in this opinion, we affirm.

I. UNDERLYING FACTS AND PROCEEDINGS

This case involves a dispute under the Michigan Drain Code, MCL 280.1 *et seq.* Specifically at issue is MCL 280.327, which authorizes a county road commission to make a petition to the county drain commission to "lay out and designate a drainage district, locate and establish a drain, clean out, widen, deepen, straighten or extend an established drain" if it "becomes necessary for the construction or maintenance of any highway to take the surplus water across adjacent lands" In September 2009, Kevin Henning signed a petition on behalf of the Calhoun County Road Commission entitled, "Petition for Clearing Out, Relocating, Widening, Deepening, Straightening, Tiling, Extending, Relocating Along a Highway or Adding a Branch or Branches, for an Intercounty Drain or Drains or any Portion Thereof and Consolidating with other Drains as Necessary." The petition provides, in part:

The undersigned petitioner hereby petitions for the clearing out, relocating, widening, deepening, straightening, tiling, extending, relocating along

a highway or adding a branch or branches as may be required, of the drain known and designated as the Big Marsh Intercounty Drain, located and established in the Township of Emmett & Leroy and City of Battle Creek in the County of Calhoun, and the Township of Charleston in the County of Kalamazoo, State of Michigan.

Henning forwarded the petition to Larry Cortright, the Calhoun County Water Resources Commissioner, who in turn forwarded it to the Michigan Department of Agriculture. Upon receiving the petition, the Department of Agriculture formed the Big Marsh Intercounty Drain Drainage Board (Drainage Board) for the purpose of holding a practicability hearing. The Drainage Board consisted of Karl Hauser, acting on behalf of the Department of Agriculture; Patricia Crowley, Ph.D., the Kalamazoo County Drain Commissioner; and Cortright.

The practicability hearing was held on February 24, 2010, during which the Drainage Board considered the petition, the sufficiency of the signature thereto, and the practicability of the proposed drainage project. At the conclusion of the hearing, the Drainage Board voted to proceed with the project, finding that “the proposed drain is practical.”

Following the determination of practicability, the Drainage Board hired Civil Engineers, Inc., to survey the proposed drainage project and make a report regarding the proposed project. The final report was issued May 6, 2011. The engineer’s report describes the project as follows:

The Big Marsh Intercounty Drain Board (Board) is currently considering improvements to the Big Marsh Intercounty Drain, the Fuller Drain, and Minges Brook (which is currently not a county drain). The proposed project being considered would consolidate the Fuller Drain and Minges Brook into the Big Marsh Intercounty Drain, the project is named the Minges Brook/Big Marsh Improvements.

The report makes seven recommendations, with a total estimated cost of \$5,710,000.

After the engineer’s report was issued, a hearing for a determination of necessity was scheduled, during which the Drainage Board was to make a determination regarding whether the proposed project was necessary for the good of public health, convenience, or welfare. However, before the hearing, plaintiffs filed a complaint for declaratory and injunctive relief against defendants. Plaintiffs requested a declaratory judgment declaring that the underlying petition was inadequate to invoke the jurisdiction of defendant Drainage Board. Further, plaintiffs requested that the court issue an order enjoining defendants from taking any further action on the petition.

On June 6, 2011, the trial court issued a temporary restraining order and ordered defendants to show cause why a preliminary and permanent injunction should not issue. A show-cause hearing was held on July 18, 2011, during which the parties stipulated that the case involved purely legal issues and no further evidence was needed. The parties agreed to submit the matter to the trial court for summary disposition.

On August 18, 2011, the trial court issued a set of findings. The court found that the underlying petition was invalid because the Calhoun County Road Commission was not a proper petitioner. Specifically, the court found that the road commission was not a proper petitioner

because the majority of roads within the proposed project were not under the commission's jurisdiction. The court found that "[t]he vast scope of this proposed drain project far exceeds any issue of water drainage from roads under the authority of the road commissioners." Further, the court found that the petition was invalid because it sought consolidation, which is not authorized under MCL 280.327. Finally, the court found that Henning had no authority to file the petition on behalf of the road commission. Therefore, the court concluded that plaintiffs' request for injunctive and declaratory relief should be granted. The court instructed plaintiffs' counsel to prepare an appropriate judgment for entry. Plaintiffs submitted a proposed judgment under MCR 2.602(B)(3), which trial court entered.

I. JURISDICTIONAL CHALLENGE

Defendants first argue that the trial court lacked jurisdiction because plaintiffs' asserted injuries are hypothetical and contingent on future events. Whether the trial court has subject-matter jurisdiction is a question of law that this Court reviews de novo. *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 49-50; 620 NW2d 546 (2000).

MCR 2.605(A)(1) provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." "The existence of an 'actual controversy' is a condition precedent to invocation of declaratory relief." *Shavers v Attorney General*, 402 Mich 554, 588; 267 NW2d 72 (1978); see also *Genesis Ctr, PLC v Comm'r of Financial & Ins Servs*, 246 Mich App 531, 544; 633 NW2d 834 (2001) (providing that without an actual controversy, a circuit court lacks subject-matter jurisdiction to enter a declaratory judgment). "What is essential to an actual controversy is that [the] plaintiff plead and prove facts which indicate an adverse interest necessitating a sharpening of the issues raised. The plaintiff must allege and prove an actual justiciable controversy." *Fieger v Comm'r of Ins*, 174 Mich App 467, 470-471; 427 NW2d 271 (1988) (citation omitted).

Plaintiffs do have an interest in the proposed project. Plaintiffs own land adjacent to Minges Brook, and the engineer's report calls for consolidation of Minges Brook into the Big Marsh Intercounty Drain and for other pertinent improvements. The report further states that "[b]ecause Minges Brook is not designated as a county drain[,] . . . there are currently no easements." Therefore, if Minges Brook is determined necessary to the project, plaintiffs' land could be subject to a taking for an easement. Defendant argue, however, that no such determination has been made, noting that plaintiffs filed their complaint before the hearing addressing a determination of necessity. Accordingly, defendants essentially argue that the claim is not ripe for review. We disagree.

At issue is whether defendants have any jurisdiction or authority to consider the proposed project, including whether Minges Brook should be consolidated into the Big Marsh Intercounty Drain. Plaintiffs assert that the underlying petition is insufficient to confer jurisdiction upon the Water Resources Commissioner because it lacks the requisite signatures. In other words, the justiciable controversy is the adequacy of the petition. In *Twp of Elba v Gratiot Co Drain Comm'r*, 294 Mich App 310, 341; 812 NW2d 771 (2011), lv granted 491 Mich 924 (2012), this Court stated that "[w]ithout the requisite number of signatures attached to the . . . Drain petition, the Drain Commissioner had no authority or jurisdiction to act, and the proceedings establishing

the . . . Consolidated Drainage District were void.” In this case, if the petition does not contain the requisite signatures, then the Calhoun County Water Resources Commissioner had no authority to act, and all the proceedings would be void. See *id.* Therefore, contrary to defendants’ argument, an actual controversy existed, and declaratory action was appropriate.

Defendants also argue that plaintiffs should have brought their complaint pursuant to MCL 280.161, which provides, in relevant part:

The proceedings in establishing any drain and levying taxes therefor shall be subject to review on certiorari as herein provided. A writ of certiorari for any error occurring before or in the final order of determination shall be issued within 10 days after a copy of such final order is filed in the office of the drain commissioner

This Court addressed a similar argument in *Elba Twp*, 294 Mich App at 339, where we explained that “[a]lthough minor errors and irregularities must be challenged by means of certiorari, equity will still provide a remedy when the drain commissioner acts without jurisdiction and there is no adequate remedy at law.” Here, plaintiffs’ complaint raised a jurisdictional issue and challenged the validity of the proceedings below. This was not a mere technical defect or irregularity that could be corrected through certiorari. *Id.* at 339-340. As noted above, all the proceedings are void if the petition lacks the required signatures. *Id.* at 341. Therefore, plaintiffs properly pleaded a cause of action in equity.

II. PROPER PETITIONER

Defendants next argue that the trial court erred when it concluded that the Calhoun County Road Commission was not a proper petitioner under the Drain Code. Resolution of this issue involves interpretation of the code, which is a question of law that we review de novo. See *Detroit v Ambassador Bridge Co*, 481 Mich 29, 35; 748 NW2d 221 (2008).

Chapter 13 of the Drain Code allows a county road commission to make an application or petition to the drain commissioner under certain circumstances. Specifically, MCL 280.327 provides, in relevant part:

In case it becomes necessary for the construction or maintenance of any highway to take the surplus water across adjacent lands, the state, county or township highway commissioner or county road commissioners may make under his or their name of office an application or petition to the drain commissioner of the county in which such highway is situated to lay out and designate a drainage district, locate and establish a drain, clean out, widen, deepen, straighten or extend an established drain. Such application or petition shall conform to the law regulating applications or petitions for the laying out and designating a drainage district, locating and establishing of drains, and cleaning out, widening, deepening, straightening and extending established drains, and shall require no other signature than his own as highway commissioner or county road commissioners. Such application or petition shall have the same force and effect, and be subject in other respects to the same laws and regulations that govern other

such applications or petitions and shall confer the same jurisdiction and authority on the county drain commissioner to lay out and designate a drainage district, locate and establish a drain, or clean out, widen, deepen, straighten or extend an established drain

The trial court found that the Calhoun County Road Commission was not a proper petitioner because the majority of roads within the proposed project were not under the commission's jurisdiction. Defendants argue that it is irrelevant that the majority of the roads within the proposed Big Marsh Intercounty Drainage Project are not under the control of the Calhoun County Road Commission because MCL 280.327 does not include an express requirement that the petitioning body have control or jurisdiction over the highway. This argument is unpersuasive.

The Drain Code allows a county road commission to make a petition to the extent "it becomes necessary for the construction or maintenance of any highway to take the surplus water across adjacent lands" MCL 280.327. MCL 220.1 provides, in relevant part, that "the counties, townships, cities, villages and districts of this state shall possess the authority herein prescribed for the building, repairing and preservation of bridges and culverts; the *draining of highways*, cutting of weeds and brush in the improvement of highways and the duties of state, county, township, city, village and district highway officials shall be as defined in this act." (Emphasis added.) MCL 224.19(1) describes the authority of a board of county road commissioners:

The board of county road commissioners may grade, *drain*, construct, gravel, shale, or macadamize *a road under its control*, make an improvement in the road, and may extend and enlarge an improvement. The board may construct bridges and culverts on the line of the road, and repair and maintain roads, bridges, and culverts. [Emphasis added.]

It is evident, when reading the statutes collectively, that a county road commission only has authority to implement drainage projects with respect to roads under its control. If a highway is not under the control of the county road commission, then the petition must be filed by the appropriate authority having control, e.g., the state or the township highway commission.

Further, even if we assume that a county road commission's authority extends to all roads, not just those under its control, the underlying petition is still invalid. First, the proposed project calls for both maintenance of the Big Marsh Intercounty Drain and consolidation with other existing drains. MCL 280.327, however, only permits a county road commission to petition to "locate and establish a drain, clean out, widen, deepen, straighten or extend an established drain." Consolidation is not a permitted activity under MCL 280.327, and defendants concede that the petition cannot result in consolidation.

Second, § 327 only allows a county road commission to make a petition to the extent "it becomes necessary for the construction or maintenance of any highway to take the surplus water across adjacent lands" MCL 280.326 further provides that "[n]othing in the provisions of the preceding sections shall be construed as giving to the county road commission power to lay out and construct drains having any other purpose than the drainage of highways." A review of

the engineer's report demonstrates that the proposed project goes beyond the drainage of highways.

Third, the petition is invalid because the proposed project involves an intercounty drain, and § 327 only authorizes a county road commission to make “an application or petition to the drain commissioner of *the county* in which such highway is situated” (Emphasis added.) This language indicates that § 327 only applies where the subject highway is wholly located within a single county. Absent from § 327 and the remainder of Chapter 13 is a specific reference to petitions for intercounty drains. The distinction between “drains” and “intercounty drains” is significant because other portions of the Drain Code specifically refer to intercounty drains and impose different requirements when an intercounty drain is involved. For example, MCL 280.191 imposes certain signature requirements on a petition seeking maintenance and improvements with regard to an existing drain. However, if the drain is an intercounty drain, MCL 280.192 applies and different signature requirements are imposed. Similarly, with respect to consolidation, MCL 280.441 and MCL 280.441a contain somewhat different wording for intra-county and intercounty drainage districts, respectively.

Under the rules of statutory interpretation, the specific language of § 327 and the lack of a reference to intercounty drains in Chapter 13 indicates that petitions by county road commissions are limited to those involving intra-county drains. See *Rosner v Michigan Mut Ins Co*, 189 Mich App 229; 471 NW2d 923 (1991) (“[t]he Legislature is presumed to have intended the meaning it plainly expressed”), and *Polkton Twp v Pellegrom*, 265 Mich App 88, 103; 693 NW2d 170 (2005) (“[t]he omission of a provision in one part of a statute that is included in another should be construed as intentional”).¹

III. NECESSARY PARTY

Plaintiff next argues that the trial court lacked jurisdiction because the Calhoun County Road Commission was a necessary party to the action.² As noted, whether a court has subject-matter jurisdiction to decide a case is a question of law that this Court reviews de novo. *Citizens for Common Sense in Gov't*, 243 Mich App at 49-50.

¹ Such a reading is reasonable considering that a county road commission has no jurisdiction or authority over roads outside the county.

² The issue raised in defendants' statement of questions presented in their brief on appeal is whether the managing director of the Calhoun County Road Commission was authorized to sign and submit the petition. Defendants' argument, however, goes to the jurisdiction of the circuit court and whether the road commission was a necessary party. Ordinarily, no issue will be considered that is not set forth in the statement of questions presented. *People v Anderson*, 284 Mich App 11, 16; 772 NW2d 792 (2009). However, because defendants' argument relates to the jurisdiction of the circuit court, we will address it. See *Paulson v Secretary of State*, 154 Mich App 626, 630-631; 398 NW2d 477 (1986).

Defendants' argument mixes the concepts of subject-matter jurisdiction and necessary joinder. In Michigan, circuit courts are courts of general jurisdiction, vested with "original jurisdiction to hear and determine all civil claims," unless precluded by the constitution or statutes. MCL 600.605; MCL 600.601; Const 1963, art 6, §§ 1, 13. MCR 2.605(A)(1) provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." As previously stated, the actual controversy in this case was the adequacy of the underlying petition.

MCR 2.205(A) provides that "persons having such interests in the subject matter of an action that their presence in the action is essential to permit the court to render complete relief must be made parties" As the entity that submitted the petition, the road commission may have had an "interest[] in the subject matter of [the] action" *Id.* However, its presence was not necessary for a determination concerning whether the petition was valid. Nor was the presence of the road commission essential for any other reason. The relief sought was against the actions of the drainage board and its members, not the road commission. Moreover, it is unclear what relief the trial court could have granted in relation to the road commission. The road commission submitted the petition, but the water resources commission and the Drainage Board were the parties that acted on the petition. Therefore, the road commission was not a necessary party.³

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ Patrick M. Meter

/s/ Mark T. Boonstra

³ In a statement of supplemental authority filed on appeal, defendants argue that *Maple Grove Twp v Misteguay Creek Intercounty Drain Bd*, 298 Mich App 200; ___ NW2d ___ (2012), supports reversal in the present case. We disagree, because that case involved materially different statutes and issues.