

STATE OF MICHIGAN
COURT OF APPEALS

DTE ELECTRIC COMPANY, a/k/a DETROIT
EDISON COMPANY,

UNPUBLISHED
December 4, 2014

Plaintiff-Appellee,

v

No. 317976
Oakland Circuit Court
LC No. 2013-132055-CH

JOSEPH CONSTANT,

Defendant-Appellant.

Before: RIORDAN, P.J., and SAAD and TALBOT, JJ.

PER CURIAM.

Defendant appeals as of right the trial court order of dismissal in favor of DTE Electric Company (DTE). In the course of litigation, DTE obtained a preliminary injunction permitting it to enter defendant's property to trim trees and conduct line clearance, then sought voluntary dismissal under MCR 2.504(A)(2). We affirm.¹

I. PRELIMINARY INJUNCTION & DISMISSAL

A. STANDARD OF REVIEW

"This Court reviews a trial court's decision to issue a preliminary injunction for an abuse of discretion." *Oshtemo Charter Twp v Kalamazoo Co Rd Comm*, 288 Mich App 296, 302; 792 NW2d 401 (2010). "An abuse of discretion occurs when the trial court's decision is outside the

¹ Although DTE contends that we lack jurisdiction to hear this case, and the issues are moot, a panel of this Court already denied DTE's motion to dismiss on these grounds. *DTE Electric Co v Joseph Constant*, unpublished order of the Court of Appeals, entered May 8, 2014 (Docket No. 317976). "That decision is now the law of the case. If [plaintiff] disagreed with the motion panel's decision, [it] should have filed a motion for rehearing before that panel or an application for leave to appeal that decision to the Supreme Court." *People v White*, __Mich App__; __NW2d__ (Docket No. 315579, issued October 23, 2014) (slip op at 2) (citation omitted). Furthermore, to the extent that this issue was not appealable as of right, we exercise our discretion in the interests of judicial economy to address this appeal as leave granted.

range of reasonable and principled outcomes.” *Smith v Khouri*, 481 Mich 519, 526; 751 NW2d 472 (2008). “We review the trial court’s decision” regarding a “motion for voluntary dismissal to see whether the decision was without justification.” *Walbridge Aldinger Co v Walcon Corp*, 207 Mich App 566, 570; 525 NW2d 489 (1994).

B. ANALYSIS

In determining whether to issue a preliminary injunction, a trial court must consider four factors: “(1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.” *Hammel v Speaker of House of Representatives*, 297 Mich App 641, 648; 825 NW2d 616, 620 (2012).

With respect to the first factor, the likelihood of success on the merits, the trial court properly found that this factor favored DTE. Defendant contends that DTE did not have an easement to conduct line clearance activities on the west side of his lot. DTE responds that it had a prescriptive easement for that area. DTE’s argument has merit. “An easement by prescription results from the use of the property of another that is open, notorious, adverse, and continuous for a period of 15 years.” *Heydon v MediaOne*, 275 Mich App 267, 270-271; 739 NW2d 373 (2007). DTE has the burden to prove “that the use of the defendant’s property was of such a character and continued for such a length of time that it ripened into a prescriptive easement.” *Mulcahy v Verhines*, 276 Mich App 693, 699; 742 NW2d 393 (2007).

DTE asserts that from at least 1920, the electrical wires to the west of defendant’s property have been in place and that DTE (or its predecessor) accessed the property every five years to trim the trees and maintain their equipment. Thus, DTE would have used defendant’s property openly, notoriously, adversely, and continuously for over 90 years. The trial court properly concluded that DTE was likely to prevail on the merits of its case.

Nor did the trial court err in finding that the second factor—the danger of irreparable harm—favored DTE. DTE demonstrated that there was a risk of irreparable injury to itself and the public if the injunction was not granted. James M. Hammond, a Supervisor of Regional Planning employed by DTE, testified that failing to trim the trees away from the electrical lines could result in fires, falling lines, and disruptions in service. This constitutes danger of irreparable harm.

Moreover, the trial court properly found that the third and fourth factors, the relative harm of the parties and the harm to the public interest, weighed in favor of DTE. There was no evidence that the public interest would be harmed if DTE succeeded in obtaining a preliminary injunction. To the contrary, DTE presented evidence that the public would be placed at great risk if the injunction was *not* issued. As Hammond stated, “it is absolutely necessary to trim trees and maintain equipment on Defendant’s property in order to comply with the State of Michigan requirements for line reliability and safety. The failure to trim trees and maintain the equipment creates a real and present danger of falling lines, potential fires and interruption of electric service.”

Hammond's statements also demonstrate the potential for harm to DTE if an injunction did not issue. Interruptions in service, potential fires, and danger to its customers would be costly and harmful for DTE. It is difficult to determine the harm, if any, defendant would suffer if the injunction was granted. The only harm defendant even arguably alludes to is the damage to trimmed trees in an area that DTE did not have the right to enter. On appeal, defendant fails to provide any argument detailing the financial harm he suffered. Thus, the trial court did not abuse its discretion in determining that the possible harm to DTE and its customers—including the possibility of power outages, falling wires, and safety issues—outweighed a possible harm to defendant.

Defendant presents numerous arguments why DTE did not have the right to access the west side of his property through a prescriptive easement, statute, right of way agreement, or Michigan Public Service Commission regulations. Defendant is seeking a conclusive finding of the rights and liabilities of the parties. However, the issue in the trial court merely was whether to issue the preliminary injunction, which did not require a conclusive finding that DTE prevails in the underlying action. This appeal, which only pertains to review of the preliminary injunction, is not the proper vehicle in which to address defendant's complex and numerous theories regarding the ultimate determination of the parties' rights.²

Defendant further contends that DTE's request for a preliminary injunction and motion for voluntary dismissal violated MCR 2.114(D), which pertains to signing a document well grounded in fact and law. Defendant posits that the legal description of the property in DTE's complaint and several other documents was inaccurate and "a statement of the untruth, misleading, misguiding, false and legally frivolous." Defendant requests dismissal, and sanctions against DTE's attorney.

Although defendant appears to be correct that DTE inaccurately described defendant's property, DTE contends that this legal description was "inadvertently truncated." DTE's actions seem to be nothing more than a clerical mistake, not an attempt to intentionally mislead defendant. Defendant does not contend that he lacked notice regarding to which property DTE was referring. Nor has defendant shown that he incurred any expenses as a result of DTE's mistake. MCR 2.114(D), (E).

Defendant also asserts that Hammond is guilty of perjury, MCL 750.423, because Hammond testified that defendant's property was part of the Bloomfield Highlands subdivision, and thus subject to a right of way agreement. Not only is defendant's argument irrelevant, as this is not a criminal action, but it also lacks merit. The trial court never found that defendant's

² If defendant wished to obtain a judgment on the merits, he was free to file a counterclaim, which he declined to do. We also note that defendant, *in propria persona*, spends the majority of his brief denigrating plaintiff as well as the lower court. He likened opposing counsel to the Nazis and alleged that the trial judge was hypocritical and duplicitous, with the trial court's opinion being "superlative evilness." The trial court also found it necessary to state, on the record, that it was not having defendant followed. Defendant requests an award of "\$1,000 million cash compensation" for his time.

property was part of Bloomfield Highlands subdivision, or that DTE had the right to access all of defendant's property because of a right of way agreement. Rather, the trial court merely assessed in the context of a preliminary injunction whether DTE was entitled to the requested relief.³

II. DUE PROCESS

A. STANDARD OF REVIEW

Lastly, defendant claims that the trial court violated his due process rights because it did not hear his 13 motions pending before ruling on DTE's motion to dismiss. Defendant did not object below when the court elected to hear DTE's motion for voluntary dismissal without tending to defendant's motions. This Court reviews unpreserved claims for plain error affecting substantial rights. *Kern v Blethen-Coluni*, 240 Mich App 333, 336; 612 NW2d 838 (2000). An error affects substantial rights when it is outcome determinative. *FMB-First Mich Bank v Bailey*, 232 Mich App 711, 718; 591 NW2d 676 (1998).

B. ANALYSIS

“[A]t a minimum, due process of law requires that deprivation of life, liberty, or property by adjudication must be preceded by notice and an opportunity to be heard.” *Bonner v City of Brighton*, 495 Mich 209, 235; 848 NW2d 380 (2014). Defendant argues that his due process rights were violated by the court's refusal to hear his “13 motions which were crucial, critical, and necessary to [his] defense of this malicious, fraud-motivated, deceptive, dishonest, and above all Frivolous lawsuit[.]”

Defendant's argument lacks merit for several reasons. First, MCR 2.119(E)(3) provides that “[a] court may, in its discretion, *dispense with or limit oral arguments on motions*[.]” (Emphasis added). Defendant's motions were long, detailed, and verbose. He attached numerous exhibits to many of his motions, providing the trial court with ample information. The court did not err in dispensing with oral argument. Moreover, defendant had the opportunity to be heard regarding his opposition to DTE's motion for voluntary dismissal.

Once the court granted DTE's motion for voluntary dismissal, defendant's motions were moot. Although defendant argues that his motions were necessary to his defense, once DTE's

³ Defendant appears to argue that Hammond made other false statements. Defendant includes blocks of text from lower court documents, allegedly constituting perjury. Again, this is not a criminal case, so the penalties under MCL 750.423 are irrelevant. Nor do we agree with defendant's argument, and he fails to identify in a clear or precise manner what falsehood allegedly occurred. As repeatedly stated, it is not enough “for a party simply to announce a position or assert an error and then leave it up to this Court to discover and rationalize the basis for his claims, or unravel and elaborate for him his arguments, and then search for authority either to sustain or reject his position.” *Wilson v Taylor*, 457 Mich 232, 243; 577 NW2d 100 (1998) (quotations and citations omitted).

complaint was dismissed, there was nothing to defend against. DTE obtained only a preliminary injunction that did not resolve the validity issue regarding the prescriptive easement. If defendant wanted this issue settled, he could have filed a counterclaim or initiated a separate action. He declined to do so. Defendant cannot show a due process violation.

III. CONCLUSION

We find no error in the trial court's order granting the preliminary injunction and voluntary dismissal. We have reviewed all remaining issues and requests for relief and find them to be without merit. We affirm.

/s/ Michael J. Riordan
/s/ Henry William Saad
/s/ Michael J. Talbot