

STATE OF MICHIGAN
COURT OF APPEALS

CITY OF CORUNNA,

Plaintiff-Appellant,

v

DEPARTMENT OF ENVIRONMENTAL
QUALITY,

Defendant-Appellee.

UNPUBLISHED
October 21, 2014

No. 316841
Shiawassee Circuit Court
LC No. 10-001242-CZ

Before: SAAD, P.J., and O’CONNELL and MURRAY, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court’s order granting summary disposition to defendant under MCR 2.116(C)(10) and ordering plaintiff to pay certain costs. We affirm.

This case involves a dispute over ownership of Corunna Dam, which was built in the early 1840s on the Shiawassee River.¹ As plaintiff poetically stated in its second renewed motion for summary disposition, “This case . . . has been long and winding, much like the Shiawassee River itself.” However, as fully discussed below, plaintiff’s arguments on appeal do not hold water. Accordingly, we affirm.

The facts are not in dispute. Plaintiff owns the real property adjacent to the Corunna Dam on the west side of the river. Plaintiff acquired title to the property in 1979 by warranty deed from Jake and Gertrude Wapner. In December 2009, defendant issued a dam safety order to plaintiff under MCL 324.31518(7),² informing plaintiff that defendant had determined the dam was in poor structural condition. The dam safety order stated that plaintiff must take action to address the threat of dam failure, and that plaintiff must provide a schedule and plan to address the deficiencies in the dam.

¹ Construction of Corunna Dam was authorized by the Legislature in Public Act 56 of 1840. See also D.W. Ensign & Co., *History of Shiawassee and Clinton Counties* (Philadelphia: J.B. Lippincott & Co. 1880), pp 168, 171.

² MCL 324.31501 *et. seq.*, is Part 315 of the Natural Resources and Environmental Protection Act (NREPA).

In August 2010, plaintiff filed a petition with defendant for a contested case hearing to challenge the dam safety order. The hearing referee denied the petition because it was filed more than 60 days after the dam safety order was issued. In September 2010, plaintiff filed an amended petition, asserting that its request for a hearing was timely because it did not directly challenge the dam safety order, but rather challenged defendant's subsequent conduct. The hearing referee again dismissed the petition.

In October 2010, plaintiff filed a complaint in the circuit court to enjoin defendant from taking action against plaintiff. Plaintiff asserted that it was neither the owner of nor responsible for the dam. Following extensive title research by both parties, plaintiff filed a motion for summary disposition under MCR 2.116(C)(9), stating that title research did not resolve the dam ownership. The circuit court denied this motion.

Between June 2012 and April 2013, the parties filed various summary disposition motions, presenting arguments regarding whether plaintiff owned the Corunna Dam for purposes of MCL 324.31504(5).³ In May 2013, the circuit court granted summary disposition in favor of defendant. Among other things, the court determined that plaintiff, as a riparian owner, owned the dam.

Plaintiff filed a motion for a stay of enforcement pending appeal. The court granted plaintiff's motion and ordered plaintiff to pay defendant \$9,612 as costs incurred by defendant for the fulfillment of the dam safety order.

On appeal, plaintiff contends that the circuit court erred by failing to recognize that defendant had not followed the proper procedures for issuing a dam safety order. Specifically, plaintiff asserts that defendant was required to provide plaintiff a hearing before issuing the order. This issue was not decided by the circuit court, but plaintiff did raise this issue in its post-hearing memorandum of law. The issue presents solely a legal question: whether Part 315 required defendant to hold a hearing before issuing a dam safety order. Accordingly, we may review the issue. See *Hines v Volkswagen of America, Inc*, 265 Mich App 432, 444; 695 NW2d 84 (2005).

The issue requires the court to interpret statutory language. "Statutory construction presents a question of law, which this Court reviews de novo." *Alvan Motor Freight, Inc v Dep't of Treasury*, 281 Mich App 35, 37; 761 NW2d 269 (2008). "This Court also reviews de novo a lower court's grant or denial of summary disposition." *Id.* at 37-38.

MCL 324.31518(1) provides that "an owner shall submit to the department inspection reports prepared by a licensed professional engineer that evaluate the condition of the dam." MCL 324.31518(7) provides, "If, based on the findings and recommendations of the inspection report and an inspection by the department, the department finds that a condition exists which

³ " 'Owner' means a person who owns, leases, controls, operates, maintains, manages, or proposes to construct a dam." MCL 324.31504(5)

endangers a dam, it shall order the owner to take actions that the department considers necessary to alleviate the danger.”

Plaintiff contends that §§ 31519 and 31521 provide the procedure for issuing such orders. Section 31519 provides a procedure for “limiting dam operations” and “removal of dams,” and provides, “Prior to finalizing an order under this section, the department shall provide an owner an opportunity for a hearing pursuant to the administrative procedures act [APA] of 1969.” MCL 324.31519(3). Section 31521 provides a procedure for issuing “emergency orders” when “a dam is in imminent danger of failure,” and requires the department to provide the owner an opportunity for a hearing under the APA within 15 days “[u]pon the issuance of an emergency order.” MCL 324.31521(1), (3).

The plain language of MCL 324.31518 provides that the department not only may issue a dam safety order, but must do so under certain circumstances. The department “shall order the owner to take actions that the department considers necessary” if the department determines that a “condition exists which endangers the dam.” MCL 324.31518(7). “[T]he word ‘shall’ constitutes a mandatory directive.” *Stand Up for Democracy v Secretary of State*, 492 Mich 588, 639; 822 NW2d 159 (2012). Section 31518 does not expressly require the department to provide an opportunity for a hearing prior to issuing an order.

Section 31526(1) provides as follows:

A person aggrieved by any action or inaction of the department under this part or rules promulgated under this part may request a hearing on the matter involved. The hearing shall be conducted by the department in accordance with the provisions for contested cases in the administrative procedures act of 1969.

This section clearly does not call for a hearing to be held before the department takes action, but rather provides an aggrieved party with the opportunity to contest the action or inaction in an administrative hearing. Accordingly, defendant was not required to hold a hearing before issuing the dam safety order.

Plaintiff next argues that the circuit court erred when it held that plaintiff was an owner of Corunna Dam. We find no error in the circuit court’s holding. There is no dispute that the 1979 warranty deed from the Wapners to plaintiff purports to convey to plaintiff a parcel of land on the west side of the Shiawassee River. Plaintiff now challenges the validity of its own deed, arguing that there was a break in the chain of title that precluded the Wapners from conveying a valid ownership interest. However, as defendant points out, the Michigan marketable record title act (MRTA) prohibits plaintiff from asserting that there was a break in the chain of title. MCL 565.101 states as follows:

Any person, having the legal capacity to own land in this state, who has an unbroken chain of title of record to any interest in land for 20 years for mineral interests and 40 years for other interests, shall at the end of the applicable period be considered to have a marketable record title to that interest

MCL 565.102 further provides the following:

A person is considered to have an unbroken chain of title to an interest in land as provided in section 1 when the official public records disclose either of the following:

(a) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in that person, with nothing appearing of record purporting to divest that person of the purported interest.

(b) A conveyance or other title transaction not less than 20 years in the past for mineral interests and 40 years for other interests, which conveyance or other title transaction purports to create the interest in some other person and other conveyances or title transactions of record by which the purported interest has become vested in the person first referred to in this section, with nothing appearing of record purporting to divest the person first referred to in this section of the purported interest.

MCL 565.106 adds the following:

This act shall be construed to effect the legislative purpose of simplifying and facilitating land title transactions by allowing persons dealing with the record title owner, as defined in this act, to rely on the record title covering a period of not more than 20 years for mineral interests and 40 years for other interests prior to the date of such dealing and to that end to extinguish all claims that affect or may affect the interest dealt with, the existence of which claims arises out of or depends upon any act, transaction, event, or omission antedating the 20-year period for mineral interests and the 40-year period for other interests, unless within the 20-year period for mineral interests or the 40-year period for other interests a notice of claim as provided in section 3 has been filed for record. The claims extinguished by this act are any and all interests of any nature whatever, however denominated, and whether the claims are asserted by a person sui juris or under disability, whether the person is within or outside the state, and whether the person is natural or corporate, or private or governmental.

In this case, there is no evidence in the lower court record of any deed or instrument in the public record “purporting to divest” the Wapners’ interest in the land from October 29, 1970 (40 years before the complaint was filed), until the deed from the Wapners to plaintiff in 1979. Likewise, there is nothing in the record purporting to divest plaintiff of its interest from 1979 onward. Therefore, under the MRTA, plaintiff holds record title to the land.

Even apart from the MRTA, plaintiff is the owner of Corunna Dam because any alleged break in the chain of title stems from an erroneous understanding of Michigan real property law. A deed conveying a riparian parcel automatically conveys the bottomlands to the thread of the stream unless the deed states otherwise. *Heeringa v Petroelje*, 279 Mich App 444, 450; 760 NW2d 538 (2008). Additionally, “ ‘Any erection which can lawfully be made in the water within those lines belongs to the riparian estate. And the complete control of the use of such land covered with water is in the riparian owner’ ” *Id.* at 451, quoting *Ryan v Brown*, 18

Mich 196, 207 (1869). Accordingly, a deed that is silent regarding the transfer of riparian rights, including the ownership rights to “any erection” on the riparian estate, nonetheless transfers those rights.

Plaintiff’s argument that the State reserved an ownership interest in the dam in the 1840s is meritless. The legislative privilege granted the builders the right to construct and operate the dam. Although the legislation expressly reserved the right of the State to withdraw the privilege, this does not mean that the state held an ownership interest in the dam. The legislative approval for a private party to construct a dam did not include any assertion of a state ownership interest in the dam.

Plaintiff also argues that riparian rights to the bottomlands of a navigable stream did not exist in Michigan in 1840. Plaintiff contends that these rights were created by the Michigan Supreme Court in *Lorman v Benson*, 8 Mich 18 (1860). This argument is meritless. *Lorman* did not, as plaintiff contends, create riparian rights by “judicial fiat.” Rather, *Lorman* stated that the common-law rule the United States imported from England was that a riparian owner holds title to the bottomlands of a navigable river out to the center thread. *Lorman*, 8 Mich at 31. *Lorman* held that as a matter of common law riparian owners hold title to the bottomlands. *Id.* Accordingly, as a riparian owner of the west side of the river adjacent to Corunna Dam, plaintiff owns Corunna Dam to the center thread.⁴

Lastly, plaintiff argues that it was denied due process when the circuit court ordered it to pay defendant \$9,621 in costs incurred by defendant for the fulfillment of the emergency safety order. The constitutional issue whether the court afforded plaintiff adequate due process is not preserved because it was not raised, considered, or decided below. *Hines*, 265 Mich App at 443-444. Unpreserved issues are reviewed for plain error. *Richard v Schneiderman & Sherman, PC (On Remand)*, 297 Mich App 271, 273; 824 NW2d 573 (2012). “Plain error occurs at the trial court level if (1) an error occurred (2) that was clear or obvious and (3) prejudiced the party, meaning it affected the outcome of the lower court proceedings.” *Id.* (citation and internal quotation marks omitted).

“Due process in civil cases generally requires notice of the nature of the proceedings, an opportunity to be heard in a meaningful time and manner, and an impartial decisionmaker.” *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995).

Plaintiff states that the circuit court’s award of costs was sua sponte, and that plaintiff did not have adequate notice or an opportunity to be heard. However, the record shows that the award of costs for the emergency repair was the well-signaled consequence of the court’s denial of plaintiff’s motion to extend the August 14, 2012 order, which contained the following language: “The Court reserves the unfettered authority to distribute incurred costs in fulfilling the requirements of the July 25, 2012 Emergency Order in the future if ownership is determined

⁴ Plaintiff’s theory that dam ownership should be treated like an easement also fails. An easement is not an ownership right, but rather a right to use real property belonging to another. *Cameron*, § 6.1.

by this Court to be with [plaintiff].” Accordingly, plaintiff was on notice that it would have to pay if the circuit court ruled in defendant’s favor on the ownership issue.

Plaintiff did not object to the award at the hearing and did not raise any objection following the court’s order. The court did not violate plaintiff’s due process.

Affirmed.

/s/ Henry William Saad

/s/ Peter D. O’Connell

/s/ Christopher M. Murray