

STATE OF MICHIGAN
COURT OF APPEALS

ELMWOOD TOWNSHIP,
Plaintiff-Appellee,

UNPUBLISHED
March 8, 2007

v

No. 272870
Tuscola Circuit Court
LC No. 05-023019-CK

WILLIAM E. MILLER,
Defendant-Appellant,

and

JEANETTE MILLER,
Defendant.

Before: Servitto, P.J., and Talbot and Schuette, JJ.

PER CURIAM.

Defendant William E. Miller¹ appeals as of right from the trial court's order granting summary disposition to plaintiff under MCR 2.116(I)(2) in this action for injunctive relief to comply with the township's blight ordinance. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

This case arose out of the placement and occupancy of a mobile home on defendants' property in Elmwood Township. At the time this lawsuit commenced, defendants were residing in a 14- by 76-foot mobile home on their property without a certificate of occupancy as mandated by the township's zoning ordinance. However, defendants were provided temporary permits and, eventually, they received a certificate of occupancy for this mobile home. Plaintiff concedes that the 14- by 76-foot mobile home is in compliance with the township's zoning ordinance and is no longer at issue.

¹ Defendant William E. Miller is the only named appellant because he and defendant Jeanette Miller are now divorced and she deeded the property to him.

Defendants also had a 12- by 60-foot mobile home on the same property. This smaller structure was placed on the property in 2003. At that time, a zoning compliance permit was issued for the structure based on defendants' representation that the structure would be their residence. Plaintiff later discovered that the 12- by 60-foot home was not a HUD-approved mobile home and, therefore, it was in violation of the township's zoning ordinance prohibiting such units. Defendants asserted that the 12- by 60-foot mobile home was stripped of all sinks, stools, tubs and plumbing because it was intended to be a storage facility, not a residence. Defendants contended that, because it was intended as a storage facility, the mobile home was in compliance with the township's zoning ordinance.

On June 15, 2005, plaintiff passed a blight ordinance that took effect on July 15, 2005. The new ordinance defined "blight" in part as "[t]he outdoor storage of mobile homes (other than those actually used and occupied for dwelling purposes), truck bodies, bus bodies, or semi-trailers, either as vacant units or storage units," and its stated purpose was "to protect the public health, safety and general welfare by eliminating blight within Elmwood Township" Accordingly, plaintiff argued that the 12- by 60-foot mobile home violated the township's blight ordinance and had to be removed.

Defendants filed a motion for summary disposition, asserting that the recently enacted blight ordinance could not be enforced against them because it was an ex post facto ordinance. Defendants also asserted that the blight ordinance did not apply to their 12- by 60-foot mobile home since it had been legally located on the premises before the ordinance was enacted, and the zoning act provided for continued use of such nonconforming structures.

The trial court denied defendants' motion and, instead, granted summary disposition in favor of plaintiff pursuant to MCR 2.116(I)(2). Relying on *Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466; 191 NW2d 506 (1971), the trial court concluded that the blight ordinance was enforceable against defendants. In *Casco*, this Court analyzed a soil removal ordinance purported to be a zoning ordinance that required the defendant to obtain a permit. *Id.* at 467-469. This Court concluded that the soil removal ordinance was a regulatory ordinance, not a zoning ordinance, because it was in the nature of protecting the public health, safety and general welfare of the persons and property of the township. *Id.* at 470. This Court further held that a regulatory ordinance was not subject to a prior nonconforming use provision, which makes zoning ordinances subject to the rights of those having nonconforming uses at the time an ordinance takes effect. *Id.* at 470-471. Accordingly, although the defendant used its property to remove sand before the enactment of the ordinance, the defendant was required to obtain a permit for further removal. *Id.* at 467-469, 471.

On appeal, defendant argues that the trial court should have permitted him to amend his responsive pleading to challenge plaintiff's recently enacted blight ordinance as it applied to his particular circumstances. MCR 2.116(I)(5) requires a trial court hearing a motion for summary disposition under MCR 2.116(C)(10) to "give the parties an opportunity to amend their pleadings as provided by MCR 2.118, unless the evidence then before the court shows that amendment would not be justified." However, defendant never moved to amend his pleadings at any time. Because defendant never moved to amend, we have no decision regarding amendment to review. *Radtke v Everett*, 442 Mich 368, 397-398; 501 NW2d 155 (1993); *Collucci v Eklund*, 240 Mich App 654, 661 n 3; 613 NW2d 402 (2000). Moreover, this issue has not been preserved for

appellate review since it is raised for the first time on appeal. *Polkton Charter Twp v Pellegroni*, 265 Mich App 88, 95; 693 NW2d 170 (2005).

In any event, the amendment of defendant's pleadings would have been futile in light of the holding of *Casco*, *supra*, and its progeny. See e.g., *Natural Aggregates Corp v Twp of Brighton Twp*, 213 Mich App 287, 301; 539 NW2d 761 (1995); *Norton Shores v Carr*, 81 Mich App 715, 724; 265 NW2d 802 (1978); *Renne v Waterford Twp*, 73 Mich App 685, 690; 252 NW2d 842 (1977).

Affirmed.

/s/ Deborah A. Servitto

/s/ Michael J. Talbot

/s/ Bill Schuette