

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


Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

MILLER FOUNDATION and JOHN HOSKING,
Plaintiff-Appellees,

UNPUBLISHED
July 30, 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.

ON RECONSIDERATION

Defendants appeal as of right from the circuit court’s order granting plaintiffs’ request for declaratory and injunctive relief. On reconsideration and in light of the Supreme Court’s decision in *Elba Twp v Gratiot Co Drain Comm’r*, 493 Mich 265; 831 NW2d 204 (2013) (*Elba Twp II*), we vacate our previous opinion, vacate the trial court’s order granting declaratory and injunctive relief in favor of plaintiffs, and remand to the trial court for entry of an order dismissing plaintiffs’ complaint for want of jurisdiction.

This case involves a dispute under the Michigan Drain Code, MCL 280.1 *et seq.* In September 2009, Kevin Henning, the Managing Director of the Calhoun County Road Commission, 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.” Henning forwarded the petition to the Calhoun County Water Resources Commissioner, who in turn forwarded it to the Michigan Department of Agriculture. The Department of Agriculture then formed the Big Marsh Intercounty Drain Drainage Board (Drainage Board) to meet and hold a practicability hearing on the proposed drainage project.

The practicability hearing was held on February 24, 2010, following which the Drainage Board voted to proceed with the project, finding that “the proposed drain is practical.” The Drainage Board then hired Civil Engineers, Inc., to survey the proposed project. After Civil

Engineers prepared an engineer's report regarding the proposed project, the Drainage Board scheduled a hearing for a determination of necessity. At the hearing, the Drainage Board was to determine whether the proposed project was necessary for the good of public health, convenience, or welfare.

On June 3, 2011, before the necessity hearing, plaintiffs filed a complaint for declaratory and injunctive relief, alleging that the petition was invalid because it, among other things, lacked the proper signatures required under the Drain Code.

On September 26, 2011, the trial court entered judgment in favor of plaintiffs, permanently enjoining defendants from proceeding on the petition. Defendants appealed to this Court, arguing, among other things, that the trial court lacked jurisdiction to hear plaintiffs' complaint. Defendants argued that plaintiffs' claim was not ripe for review because defendants had not yet made a final determination regarding the necessity of the drainage project. Therefore, defendants argued, plaintiffs' injuries were hypothetical and contingent on future events. Defendants also argued 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 . . . , and for any error occurring after such final order of determination, within 10 days after the day of review, or if an appeal has been taken within 10 days after the filing of the report of the board of review. . . . If no certiorari be brought within the time herein prescribed, the drain shall be deemed to have been legally established, and the taxes therefor legally levied, and the legality of said drain and the taxes therefor shall not thereafter be questioned in any suit at law or equity[.]

On March 26, 2013, this Court issued an unpublished opinion affirming the trial court's order granting declaratory and injunctive relief in favor of plaintiffs. *Miller Foundation v Big Marsh Intercounty Drain Drainage Bd*, unpublished opinion per curiam of the Court of Appeals, issued March 26, 2013 (Docket No. 306272). This Court rejected defendants' argument that plaintiffs' claim was not ripe for adjudication, concluding that the justiciable controversy was the adequacy of the underlying petition. *Id.*, slip op at 3-4. This Court further rejected defendants' argument that plaintiffs were limited to certiorari as provided in MCL 280.161. *Miller Foundation*, slip op at 4. This Court concluded that plaintiffs properly pleaded a cause of action in equity. *Id.*

In reaching this conclusion, this Court relied on *Elba Twp v Gratiot Co Drain Comm'r*, 294 Mich App 310; 812 NW2d 771 (2011) (*Elba Twp I*), rev'd *Elba Twp II*. In *Elba Twp I*, the plaintiffs filed a complaint against the defendant Drain Commissioner seeking to enjoin the consolidation of several drainage districts within the county because the petition allegedly lacked the requisite number of signatures. *Id.* at 313. Relying on MCL 280.161, the Drain Commissioner argued that the trial court lacked jurisdiction over the complaint because the plaintiffs failed to comply with the Drain Code's review procedures. *Elba Twp I*, 294 Mich App

at 336-337. This Court rejected the Drain Commissioner's argument and stated that "certiorari is not the exclusive remedy under the Drain Code. Although 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." *Id.* at 339. "Without the requisite number of signatures attached to the . . . Drain petition," the Court continued, "the Drain Commissioner had no authority or jurisdiction to act, and the proceedings establishing the . . . Consolidated Drainage District were void." *Id.* at 341. Thus, the Court concluded that "the circuit court properly exercised equitable jurisdiction." *Id.*

After our initial *Miller Foundation* opinion, the Michigan Supreme Court granted leave and reversed in *Elba Twp.* The Supreme Court held that the "lower courts improperly exercised equitable jurisdiction over the signature-requirement issue given that the matter did not arise from a violation of the Constitution." *Elba Twp II*, 493 Mich at 292. The Court stated, in relevant part:

Thus, the Court of Appeals concluded that the trial court had properly exercised equitable jurisdiction over the matter. . . . In so concluding, the Court of Appeals neglected our holding in *Clarence Twp [v Dickenson]*, 151 Mich 270; 115 NW 57 (1908), reaffirmed in *Fuller [v Cockerill]*, 257 Mich 35; 239 NW 293 (1932), that "[t]he lack of jurisdiction which will warrant relief in equity must arise from a violation of the Constitution." *Fuller*, [*id.*] at 39 (citation and quotation marks omitted). Even if there was a signature error, such error did not result in a lack of jurisdiction arising out of a violation of the Constitution.

It simply cannot be that every failure by the Commissioner or others to comply with the detailed requirements of the Drain Code deprives the Commissioner of jurisdiction in such a way as to permit invocation of the equitable jurisdiction of the judiciary. If this were the case, the exclusivity of certiorari review as set forth in MCL 280.161 would not only be restricted by our caselaw, but it would be of little general force. *Clarence Twp, Strack [v Miller]*, 134 Mich 311; 96 NW 452 (1903), and *Stellwagen [v Dingman]*, 229 Mich 159; 200 NW 983 (1924) make clear that an error regarding the number of petition signatures does not implicate the Constitution. . . . A failure to follow each and every requirement of the Drain Code does not warrant the exercise of equitable jurisdiction unless the failure is so egregious that it implicates constitutional concerns, which will almost always involve the deprivation of property without due process of law. See [*Altermatt v Dillman*, 269 Mich 177, 186; 256 NW 846 (1934)] (concluding, after discussing several drain cases in which equitable jurisdiction had been exercised, that in all the cases, the "taking of property without due process of law" was at issue). [*Elba Twp II*, 493 Mich at 284-285.]

On April 15, 2013, after the Michigan Supreme Court issued its decision in *Elba Twp II*, defendants in the instant case filed their motion for reconsideration. Defendants argue that this Court and the trial court improperly exercised equitable jurisdiction over plaintiffs' challenge to the underlying petition because plaintiffs did not allege a violation of the Constitution. Rather, defendants argue, plaintiffs' challenges were purely statutory in nature. Plaintiffs contend that *Elba Twp II* is not applicable because plaintiffs filed their complaint before any final order of

determination was issued, implying that the MCL 280.161 review procedures are inapplicable. We disagree.

Plaintiffs' complaint does not implicate constitutional concerns; rather, plaintiffs' challenges are purely statutory in nature. See, e.g., *Elba Twp II*, 493 Mich at 284-285. As such, plaintiffs' claims cannot be reviewed in equity. *Id.* at 283-286. Review of the proceedings below is thus governed by MCL 280.161, which states that "[t]he proceedings in establishing any drain and levying taxes therefor shall be subject to review on certiorari as herein provided." The statute does not contemplate any other avenue of review. *Elba Twp II*, 493 Mich at 272. Plaintiffs are necessarily limited to certiorari. See *id.* at 286.

Because plaintiffs were not seeking certiorari review after a final order of determination, as required by MCL 280.161, the trial court lacked jurisdiction. "When a court lacks subject matter jurisdiction to hear and determine a claim, any action it takes, other than to dismiss the action, is void." *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

Accordingly, the trial court improperly exercised equitable jurisdiction over plaintiffs' challenge to the drain petition. This Court's previous opinion in *Miller Foundation* is vacated, the trial court's opinion is vacated, and the case is remanded to the trial court for entry of an order dismissing plaintiffs' complaint for want of jurisdiction.

Vacated and remanded. We do not retain jurisdiction.

/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter
/s/ Mark T. Boonstra