

STATE OF MICHIGAN
COURT OF APPEALS

JERRY SALL, LYLE LUGTEN, HELEN
KRUEGER, and RICK KLINGENBERG,

UNPUBLISHED
July 23, 2002

Plaintiffs-Appellants,

v

ALLEGAN COUNTY ROAD COMMISSION,

No. 229943
Allegan Circuit Court
LC No. 98-022037-CZ

Defendant-Appellee.

Before: Talbot, P.J., and Cooper and D.P. Ryan*, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendant's motion for summary disposition. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

This case concerns a dispute between plaintiffs and defendant regarding the legal status of an area that extends south approximately one-eighth of a mile from what defendant contends is the south line of 44th Street in Heath Township. This area is commonly referred to as "the disputed area," and consists of a gravel roadway that ends in a turnaround. The disputed area borders on property owned by plaintiffs. Plaintiffs filed suit alleging that for several years defendant had maintained the disputed area, but had recently declared it would no longer do so. Plaintiffs asserted they had relied on defendant's agreement to maintain the disputed area, and defendant was estopped from refusing to maintain the area.

Defendant moved for summary disposition pursuant to MCR 2.116(C)(7), (C)(8), and (C)(10), asserting: (1) no documentary evidence indicated the disputed area was included as a part of 44th Street over which it acquired jurisdiction in 1943; (2) the disputed area was not subject to a public road right-of-way and plaintiffs' complaint did not allege that a public road right-of-way was created in any recognized way, including by public user; (3) any agreement between one or more of the plaintiffs or their predecessors in title and employees of the Road Commission to maintain the disputed area indefinitely could not be performed within one year; thus, plaintiffs' claim that any agreement must be enforced was barred by the Statute of Frauds, MCL 566.132(1)(a); and (4) neither equitable nor promissory estoppel was applicable. In their response, which was not filed at least seven days prior to the scheduled hearing date as required

* Circuit judge, sitting on the Court of Appeals by assignment.

by MCR 2.116(G)(1)(a)(ii), plaintiffs argued extensively for the first time that an issue of fact existed as to whether the disputed area was a highway by public user.

In deciding defendant's motion, the trial court declined to consider plaintiffs' brief in response to the motion on the grounds the brief was untimely and contained allegations not raised in the complaint and discussion of issues not previously addressed. The trial court found the inclusion of new issues in the response amounted to an untimely attempt to amend the complaint, and determined that no amendment would be allowed due to plaintiffs' undue delay. The trial court concluded the complaint did not properly plead theories of estoppel, common law dedication, or highway by user, and granted the motion pursuant to MCR 2.116(C)(8) and (10).

We review a trial court's decision on a motion for summary disposition de novo. *Harrison v Olde Financial Corp*, 225 Mich App 601, 605; 572 NW2d 679 (1997).

A road may become public property pursuant to a finding it is a highway by public user. MCL 221.20. Such a finding requires proof of: (1) a defined line; (2) the road was used and worked on by public authorities; (3) public travel on and use of the road for ten consecutive years without interruption; and (4) open, notorious, and extensive public use. *Bain v Fry*, 352 Mich 299, 305; 89 NW2d 485 (1958).

If a trial court grants summary disposition pursuant to MCR 2.116(C)(8) and/or (C)(10), a party must be given leave to amend its pleading unless an amendment would be futile. Leave to amend should be freely given when justice so requires, and should be denied only because of: (1) undue delay; (2) bad faith or dilatory motive; (3) repeated failure to cure deficiencies by previous amendments; (4) undue prejudice to the opposing party; and (5) futility. A court may deny a party an opportunity to amend its pleadings based on undue delay that resulted in actual prejudice to the opposing party; however, delay alone does not warrant denial of an opportunity to amend. Prejudice may result when the moving party seeks to add a new claim or theory based on the same facts after discovery has closed and just before trial, and the opposing party shows it did not have reasonable notice the moving party would rely on the new claim or theory at trial. *Weymers v Khera*, 454 Mich 639, 658-660; 563 NW2d 647 (1997).

Plaintiffs argue the trial court erred by granting defendant's motion for summary disposition, and abused its discretion by refusing to allow them to amend their complaint to claim that the disputed area was a highway by user. We disagree and affirm. Plaintiffs' complaint did not allege facts that, if proven, would establish the disputed area was a highway by user. *Bain, supra*. Plaintiffs' response to defendant's motion for summary disposition contained affidavits and documentary evidence; however, that response was not considered by the court because it was untimely. MCR 2.116(G)(1)(a)(ii). Plaintiffs did not come forth with sufficient evidence to create an issue of fact regarding the status of the disputed area as a highway by user. The trial court properly granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) and (C)(10).

Furthermore, the trial court did not abuse its discretion by denying plaintiffs an opportunity to amend their complaint to assert a claim that the disputed area was a highway by user. Plaintiffs' complaint, filed in February 1998, did not assert the claim, and did not contain facts that would provide notice to defendant that the claim might be asserted. Plaintiffs' pre-trial statement, filed in April 2000, stated plaintiffs "believed" the disputed area had been used by the

public for “several years” before the lawsuit was filed, but stated no facts on which the belief was based. Plaintiffs’ response to defendant’s motion for summary disposition asserted the claim; however, that response was not filed in a timely manner and was not considered by the court. Plaintiffs first raised the claim after discovery was closed and shortly before trial. Defendant had had no opportunity to conduct discovery in order to defend against the claim. No abuse of discretion occurred. *Weymers, supra* at 659-660.

Affirmed.

/s/ Michael J. Talbot
/s/ Jessica R. Cooper
/s/ Daniel P. Ryan