STATE OF MICHIGAN

COURT OF APPEALS

MYRON ROLISON,

Plaintiff-Appellant,

v

NORTHFIELD TOWNSHIP, ROBERT LUPI, and WILLIAM ESKRIDGE,

Defendant-Appellees.

UNPUBLISHED
May 23, 1997

No. 185104
Washtenaw Circuit Court
LC No. 93-000863-NZ

NORTHFIELD TOWNSHIP, a Michigan municipal corporation,

Plaintiff-Appellee/
Cross-Appellant,

v

MYRON DAVID ROLISON and ROLISON SERVICE, INC., a Michigan corporation, d/b/a M & R SERVICE, INC.,

Defendants-Appellants/
Cross-Appellees.

No. 188284
Washtenaw Circuit Court
LC No. 93-000091-CE

Before: Bandstra, P.J., and Griffin and Fitzgerald, JJ.

PER CURIAM.

This case involves a zoning dispute. In Docket No. 185104, plaintiff, who operates Rolison Service, Inc., a towing business doing business as M & R Service, Inc., (referred to collectively here as "Rolison"), appeals as of right from the trial court's order of summary disposition dismissing Rolison's complaint against Northfield Township and its named officials (herein called "the township"). In Docket

No. 188284, Rolison appeals from the trial court's order of declaratory judgment enjoining Rolison from outside storage of abandoned, discarded, unused, unusable or inoperative vehicles or equipment on the property. The township cross appeals from that portion of the declaratory judgment allowing Rolison to operate his towing/wrecker business on the property. We affirm in all respects.

Rolison first claims the trial court committed legal error in granting the township's motion for summary disposition because the township failed to specifically identify the alleged issues of material fact about which there was a genuine dispute as required by MCR 2.116(G)(4). We disagree. In determining whether a motion for summary disposition meets the dictates of MCR 2.116(G)(4), our review is de novo. See *Skinner v Square D Co,* 445 Mich 153, 161-162; 516 NW2d 475 (1994). The township's motion and brief for summary disposition, when read together, specifically identify the material factual allegations in each count of Rolison's complaint for which the township asserted there was no basis in fact and for which summary disposition was proper. As to each factual allegation identified, the township presented evidence in support of its motion by way of specific deposition testimony and other documentary evidence for its contention that there was no issue of material fact as to the corresponding material allegations by Rolison. The requirements of MCR 2.116(G)(4) were satisfied.

Second, Rolison claims that the trial court's grant of summary disposition to the township was erroneous because the court used improper standards in deciding the motions under MCR 2.116(C)(8) and (10), and did not consider the affidavits or documents Rolison submitted in defense of the motion which Rolison contends create issues of fact for the jury to decide. This Court's review of a trial court's grant of summary disposition is de novo, and we review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Munson Medical Center v Auto Club Ins Ass'n,* 218 Mich App 375, 392; 554 NW2d 49 (1996); *Phillips v Deihm,* 213 Mich App 389, 398; 541 NW2d 566 (1995). In deciding the township's motion for summary disposition, the trial court treated it as if brought under MCR 2.116(C)(8) as to count I [i.e., the judge shopping claim] and under MCR 2.116(C)(10) on all counts. Our review reveals that the court used the correct standards to review the bases of the motion. See *Patterson v Kleiman,* 447 Mich 429, 432; 526 NW2d 879 (1994); *Skinner, supra* at 162.

Assuming arguendo that a cause of action exists for "judge shopping" based on a Fourteenth Amendment due process violation, see *People v Stafford,* 168 Mich App 247; 423 NW2d 634 (1988), the trial court properly granted summary disposition against that claim under either MCR 2.116(C)(8) or (10) because Rolison neither pleaded sufficient facts nor presented sufficient proof in support of such a cause of action. As to the remainder of Rolison's claims, summary disposition was properly granted pursuant to MCR 2.116(C)(10) because Rolison did not "come forward with at least some evidentiary proof, some statement of specific fact upon which to base his case," *Skinner, supra* at 161, as to any of his claims to withstand the township's motion for summary disposition. Where the burden of proof at trial would rest on the nonmoving party, in this case, Rolison as the party who instituted the complaint against the township, the nonmovant may not rest upon mere allegations or denials in the pleadings, but must, by documentary evidence, set forth *specific facts* showing that there is a genuine issue for trial. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314

(1996). The existence of a disputed fact must be established by admissible evidence; a mere promise to offer factual support at trial is insufficient, as are speculation, conjecture, matters upon information and belief, unsworn averments, and inadmissible hearsay. *Skinner, supra* at 161, 174; *Libralter Plastics Inc v Chubb Group of Ins Cos,* 199 Mich App 482, 486; 502 NW2d 742 (1993); *SSC Asso Ltd Partnership v General Retirement System of Detroit,* 192 Mich App 360, 364; 480 NW2d 275 (1991). Contrary to Rolison's assertion on appeal, there is no indication that the court did not consider, as it was required to do under MCR 2.116(G)(5), Rolison's affidavits and documents in support of his answer to the township's motion. The court simply, and we conclude correctly, found no basis or proof to support Rolison's claims that factual disputes existed. Because Rolison failed to meet his burden in this regard, the motion for summary disposition was properly granted under MCR 2.116(C)(10) against the complaint. *Quinto, supra* at 363; *Skinner, supra* at 161.

Third, Rolison claims that his case against the township should have remained with Judge Morris, to whom it was originally assigned, rather than be reassigned to Judge Shelton pursuant to MCR 8.111(D)(1). We agree with both Judge Shelton and Judge Morris that reassignment of the case on to Judge Shelton, who had already been assigned the declaratory judgment action brought by the township, was appropriate under MCR 8.111(D). Rolison has not established that the case was reassigned to Judge Shelton for an improper purpose and he has not demonstrated that Judge Shelton was biased against him or that he suffered prejudice as a result of Judge Shelton presiding over both cases. See *People v Rich,* 172 Mich App 494, 496; 432 NW2d 352 (1988).

Fourth, Rolison contends that, when the totality of the evidence is considered, the trial court abused its discretion in enjoining Rolison from maintaining outside storage of inoperative vehicles. We disagree. The trial court was well within its discretion in excluding from evidence and refusing to consider letters between the township and Rolison's attorney regarding settlement and dismissal of a previous claim against Rolison for zoning violations. MRE 408; *Thirlby v Mandeloff,* 352 Mich 501; 90 NW2d 476 (1958); *Windemuller Electric Co v Blodgett Memorial Medical Center,* 130 Mich App 17, 21; 343 NW2d 223 (1983). We agree with the trial court's determination that the township was not estopped from strictly enforcing the outside storage provision of the zoning ordinances. For estoppel to apply, the party asserting it must *justifiably rely* on the other party's representations or conduct. *Holland v Manish Enterprises,* 174 Mich App 509, 514; 436 NW2d 398 (1988). Although Rolison points to conduct by various township officials which purportedly induced him to believe that he either was in compliance with the zoning ordinance or did not have to comply with its provisions, any such reliance was unreasonable in light of Rolison's express acknowledgment at the rezoning hearing that outside storage was not permitted and in light of the township's many attempts to enforce the zoning ordinance. We note that no official of a municipality, other than the legislative body itself or some public body charged with the responsibility, may bind the municipality in a zoning matter. *Nickola v Grand Blanc Twp,* 47 Mich App 684; 209 NW2d 803 (1973), aff'd 394 Mich 589 (1975). There being no justifiable reliance by Rolison, the township was not estopped to enforce the zoning ordinance against Rolison regarding outside storage. *Pittsfield Twp v Malcolm,* 375 Mich 135, 146; 134 NW2d 166 (1965); *Holland, supra.* See also *Troy v Aslanian,* 170 Mich App 523, 530; 428 NW2d 703 (1988). The use of land in violation of local ordinances constitutes a nuisance per se which the township has a duty to enforce against and the court has a duty to abate. MCL 125.294;

MSA 5.2963(24); *Towne v Harr,* 185 Mich App 230, 231; 460 NW2d 596 (1990); *High v Cascade Hills Country Club,* 173 Mich App 622, 629; 434 NW2d 199 (1988). The trial court did not abuse its discretion in enjoining Rolison from the outdoor storage of abandoned, discarded, unused, unusable or inoperative vehicles or equipment on the property in violation of § 55.04(A) of the township's zoning ordinances. Pursuant to § 55.04(A)(1) of the ordinances, the above enumerated items must be stored in a completely enclosed building.

Rolison's final claim, that the trial court clearly erred in determining that the township zoning ordinances did not constitute exclusionary zoning in violation of MCL 125.297a; MSA 5.2963(27a) as to towing/wrecker businesses, is without merit. Our review of the trial court's ruling on a challenge to a zoning ordinance is de novo. *English v Augusta Twp,* 204 Mich App 33, 37; 514 NW2d 172 (1994). A towing service which is incidental to a lawful use under the ordinances has been held to be a lawful accessory use under the particular terms of an ordinance which nowhere specifically referred to towing operations. See *Bangor Twp v Spresny,* 143 Mich App 177; 371 NW2d 517 (1985). Here, as either a lawful accessory use under the township zoning ordinances as in effect in 1987, or under § 41.03(E) of the ordinances as amended in 1994, which specifically provides for a towing service as a conditional use, towing services have not been totally excluded by the ordinances. At all relevant times other towing/wrecker services have in fact operated in the township and nearby areas, as stipulated by the parties. The total prohibition requirement of MCL 125a; MSA 5.2963(27a) is not satisfied if the use sought by the landowner otherwise occurs within the township boundaries or within close geographical proximity. See *Guy v Brandon Twp,* 181 Mich App 775, 785-786; 450 NW2d 279 (1989); *Freemont Twp v Greenfield,* 132 Mich App 199, 204-205; 347 NW2d 204 (1984). Therefore, either under the ordinances or in practice the township did not totally preclude towing services within its boundaries. See *Freemont Twp, supra* at 204. Further, given the fact that other towing services operate within the area, Rolison has not demonstrated a need for *his* towing service. *Id.* The trial court correctly determined that the township did not engage in exclusionary zoning in violation of MCL 125.297a; MSA 5.2963(27a).

On cross appeal from the declaratory judgment, the township claims that the trial court erred in determining that the township is estopped from enforcing the zoning ordinances to prevent Rolison from operating a towing/wrecker service on his property. The township asserts that the general rule of nonestoppel should apply in this case, i.e., that a municipality cannot be estopped from enforcing its zoning ordinances by the ultra vires acts of its zoning officials. *Fass v Highland Park,* 326 Mich 19, 28-29; 39 NW2d 336 (1940). However, the question here should not be framed as one of estoppel, but as one concerning the propriety of issuing an injunction. As concluded above, a towing service was a lawful accessory use under the ordinances when Rolison's property was rezoned, *Bangor Twp, supra;* therefore, the planning commission's approval of the rezoning was not ultra vires. Further, because a towing service is a lawful use under the ordinances, there is no violation of the ordinances in this respect to enjoin. The trial court did not err in refusing to enjoin Rolison's use of the property as a towing/wrecker business.

Affirmed. The township may tax costs pursuant to MCR 7.219.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ E. Thomas Fitzgerald