STATE OF MICHIGAN

COURT OF APPEALS

ROBERT J. HERRERA,

Plaintiff-Appellant,

v

DELHI LEASING, INC., d/b/a
ALBERT SAND & GRAVEL, INC.
a Michigan corporation,

Defendant-Appellee.

UNPUBLISHED
July 7, 1998

No. 200582
Ingham Circuit Court
LC No. 96-84816 CZ

Before: Sawyer, P.J., and Kelly and Doctoroff, JJ.

PER CURIAM.

Plaintiff Robert J. Herrera appeals as of right from an order denying him injunctive relief against defendant and imposing sanctions on him for filing a frivolous lawsuit. We affirm the order denying plaintiff injunctive relief, but reverse the trial court's award of sanctions against plaintiff.

Defendant leased land from plaintiff's parents. When defendant began mining activities on the land, it obtained a special use permit in compliance with an Aurelius Township ordinance. The permit provided that the minimum setback of the slope of the mining operation was to be 150 feet from the residential property line, unless the property owner gave consent to the contrary. In February 1995, Aurelius Township passed Ordinance 11.01, which set out the requirements for special use permits and stated that setback slopes had to be only 75 feet from residential lot lines. Subsequently, defendant applied for and was granted a new special use permit, which required defendant to comply with the setback requirement of Ordinance 11.01. As a result, plaintiff sued for injunctive relief, alleging that defendant's setback was only 96 feet from the property line, in violation of the original special use permit. The lower court held that the new ordinance controlled over the old special use permit and that defendant was within the new legal setback requirement. Accordingly, plaintiff 's request for injunctive relief was denied.

In equity cases such as those granting or denying injunctive relief, this Court reviews the record de novo, giving due deference to the findings of the circuit court. This Court is required to sustain the

findings of the circuit court unless it is convinced that, had it heard the evidence in the first instance, it would have been compelled to reach a contrary result. *Groveland Twp v Jennings*, 106 Mich App 504, 509-510; 308 NW2d 259 (1981); aff'd 419 Mich 719 (1984).

Plaintiff first argues that the lower court erred in denying him injunctive relief, asserting that the language of the original special use permit issued on September 21, 1994 controls over language in the new ordinance, effective February 14, 1995, and over the new special use permit. He claims that if the original permit does not control, the new ordinance would allow for the expansion of a nonconforming use which is contrary to policy considerations behind special use permits and variances. We disagree.

While it is true that Michigan law has routinely refused to allow for the expansion of a nonconforming use, see e.g., *Norton Shores v Carr*, 81 Mich App 715, 719-720; 265 NW2d 802 (1978), the cases cited by plaintiff involve property owners expanding their uses in violation of local zoning ordinances. In the present case, the township approved both the new ordinance and the second special use permit, with which defendant is currently in compliance. That the common law does not allow for the expansion of a nonconforming use by the land owner does not answer the question actually presented by this appeal.

The question this Court must address is whether the language of the old special use permit controls over the new ordinance and new special use permit. We find that it does not. The general rule is that the law to be applied is that which was in effect at the time of the decision. *MacDonald Advertising Co v McIntyre*, 211 Mich App 406, 410; 536 NW2d 249 (1995); *Lockwood v City of Southfield*, 93 Mich App 206, 211; 286 NW2d 87 (1979). In *MacDonald, supra*, we held that in a dispute between an old ordinance and a new amendment to the same, the newly amended ordinance controlled. Plaintiff has presented no evidence here to convince us to rule otherwise.

Granting injunctive relief is a matter committed to the discretion of the trial court. *Charter Twp of Lyon v Lazechko*, 197 Mich App 681, 682; 495 NW2d 839 (1992). Injunctive relief is granted only when (1) justice requires it, (2) there is no adequate remedy at law, and (3) there exists a real and imminent danger of irreparable injury. *Id*. Plaintiff has not presented any evidence to show that justice requires an injunction, particularly in light of the planning commission's intent that the new ordinance should control. See *Lazechko, supra* at 682. Therefore, the trial court did not abuse its discretion in denying plaintiff injunctive relief.

Next, plaintiff argues that the trial court erred in denying injunctive relief based on the assertion that the township ordinance was enacted specifically with the knowledge of defendant's commercial use of the land. However, plaintiff failed to raise this issue in either its motion for injunctive relief or during its oral argument. Therefore, this issue is not preserved for appellate review. *McReady v Hoffius*, 222 Mich App 210, 218; 564 NW2d 493 (1997).

Finally, plaintiff argues that the trial court erred when it imposed sanctions on plaintiff for filing a frivolous suit. We agree.

A trial court's finding that a claim is frivolous will not be reversed on appeal unless clearly erroneous. *Cvengros v Farm Bureau Ins*, 216 Mich App 261, 266; 548 NW2d 698 (1996). A finding of fact is clearly erroneous when, although there is evidence to support it, the reviewing court is left with a definite and firm conviction that a mistake has been committed. *Contel Systems Corp v Gores*, 183 Mich App 706, 711; 455 NW2d 398 (1990). If a claim is found frivolous, imposition of sanctions is mandatory. MCR 2.114(E). A claim is frivolous when (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's position was devoid of arguable legal merit. *Cvengros, supra* at 266-267. Because another judge had previously awarded plaintiff a preliminary injunction in this case, plaintiff had reason to believe that his claim for a permanent injunction had some merit. Therefore, we are left with a definite and firm conviction that a mistake has been made, and the trial court clearly erred in finding that plaintiff's claim was frivolous.

We affirm the trial court's denial of plaintiff's motion for a permanent injunction, but we reverse the award of sanctions and remand this matter to the trial court for entry of the appropriate order. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Michael J. Kelly
/s/ Martin M. Doctoroff