STATE OF MICHIGAN

COURT OF APPEALS

APPLETREE RESIDENTS ASSOCIATION and APPLETREE RESIDENTS, et al,

Plaintiffs-Appellants,

v

ABE S. PEARLMAN, DAVID LEADER, FRED MORGANROTH and SYDNEY L. COHN, individually and d/b/a APPLETREE MOBILE HOME PARK, MUNICIPAL WATER & SEWER CO., and COLLEGE HEIGHTS MANAGEMENT,

Defendants-Appellees.

UNPUBLISHED
August 13, 1999

No. 207635
Kent Circuit Court
LC No. 93-084068 CZ

Before: Holbrook, Jr., P.J., and Murphy and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's grant of summary disposition in favor of defendants under MCR 2.116(C)(10). We affirm.

Under an agreement with the City of Walker, defendants provide residents of the Appletree Mobile Home Park with water and sewer service. Plaintiffs are all residents of the mobile home park. Defendants purchase water from the city and then distribute it within the park, billing plaintiffs a charge in addition to their monthly rent. Defendants measure usage by individual meters at each site, and charge plaintiffs $0.74 per unit used. Further, defendants individually invoice plaintiffs, based on the size of their residential meters, the same service charge they would be billed if provided water directly by the City of Walker. Defendants also pay the city a service charge for availability. The city invoices defendants a greater service charge, due to the larger commercial meter installed to service the entire park. Because the total of service charges invoiced to plaintiffs exceeds the single service charge paid by defendants, defendants have realized an annual profit on the services provided.

In November 1993, plaintiffs filed their initial complaint in Kent Circuit Court alleging that defendants charged residents for water service in a manner that violated both the Mobile Home Commission Act (MHCA), MCL 125.2301 *et seq.*; MSA 19.855(101) *et seq.*, and the Michigan

Consumer Protection Act (MCPA), MCL 445.901 *et seq.*; MSA 19.418(1) *et seq*. Subsequently, plaintiffs also brought their allegations before the Michigan Public Service Commission (MPSC). In April 1994, defendants filed in the circuit court a motion for summary disposition. In July 1994, the court held the summary disposition motion in abeyance pending resolution of proceedings before the MPSC.

The MPSC approved a settlement between the parties in December 1994. Under the terms of the settlement agreement, defendants agreed to file an application with the commission requesting determination of their potential status as a "water company" under the Water Company Act (WCA), MCL 486.551 *et seq.*; MSA 22.1730(1) *et seq*. Should it be concluded that they were in fact operating as a water company, the settlement called for a determination of the reasonableness of the rates charged to plaintiffs for water service. In March 1995, defendants filed their application for certificates of public convenience and necessity, and approval of water rates. However, before a ruling could be made, the WCA was repealed by 1995 PA 246. Thereafter, defendants' filed a brief with the MPSC requesting dismissal of defendants' application. Concluding that repeal of the WCA had abolished its jurisdiction to regulate the rates and conditions of service of private water companies, the MPSC dismissed defendants' application with prejudice.

Then in April 1996, plaintiffs moved to continue proceedings in the circuit court. Thereafter, defendants filed a new motion for summary disposition. After conducting two hearings on the motion, the court granted the motion in a final order dated October 23, 1997.

"This Court reviews decisions on motions for summary disposition de novo." *Auto Club Ins Ass'n v Sarate*, ___ Mich App ___; ___ NW2d ___ (Docket No. 204893, issued 06/25/99), slip op at 1.

> A motion pursuant to MCR 2.116(C)(10) tests the factual basis underlying a plaintiff's claim. MCR 2.116(C)(10) permits summary disposition when, except for the amount of damages, there is no genuine issue concerning any material fact and the moving party is entitled to damages as a matter of law. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other evidence in favor of the opposing party and grant the benefit of any reasonable doubt to the opposing party. [*Stehlik v Johnson (On Rehearing)*, 206 Mich App 83, 85; 520 NW2d 633 (1994).]

Plaintiffs first allege that the trial court erred in concluding that repeal of the WCA left them without a private cause of action arising out of that act. Though conceding that repeal of the WCA effectively ended the MPSC's jurisdiction, plaintiffs contend that they hold a vested right of action for violations of the MHCA that occurred when the WCA was still in effect. We disagree. Our analysis convinces us that neither alone, nor in combination, did these acts provide for a private cause of action. Our Supreme Court has recognized a basic difference between the repeal of a remedy, rule of evidence, or mode of procedure, and a vested right of action created by statute, which leaves a common-law right of action remaining. See *Minty v Bd of State Auditors*, 336 Mich 370, 395-396; 58 NW2d 106 (1953). The WCA altered common law only by providing a limited right to file a complaint with the

MPSC, and thus its repeal does no more than remove a mode of procedure. Because there was no common-law right of action by which plaintiffs could challenge defendants' method of providing water service, we agree with the trial court's determination that repeal of the WCA precluded plaintiffs' claim. *People v Reeves*, 448 Mich 1, 8; 528 NW2d 160 (1995) (observing that "[t]he repeal of a statute revives the common-law rule as it was before the statute was enacted").

Plaintiffs next allege that the trial court erred in refusing to consider written material submitted in response to defendants' motion for summary disposition. We disagree. Plaintiffs attached to their brief in response to defendants' motion the pre-filed written testimony of William English, a MPSC staff member involved in the proceedings that were eventually dismissed for loss of jurisdiction. The record informs us that MPSC procedures permit parties to pre-file written direct testimony in an attempt to streamline the presentation of evidence. At the hearing the witness is sworn, and a determination made whether to admit the testimony. If admitted, the witness is then subject to cross-examination. Because the MPSC proceeding never occurred, English was never sworn, the proposed testimony was never reviewed by an adjudicator, and there was no opportunity for cross-examination.

Additionally, despite a gap of five months between dismissal of the MPSC proceeding and defendants' renewed motion for summary disposition, plaintiffs never attempted to regenerate English's conclusions in acceptable form (i.e., a deposition or an affidavit). On appeal plaintiffs fail to suggest an exception to the hearsay rule under which the material, as submitted, qualifies. Our review convinces us that there is none. Therefore, we conclude that the trial court did not err when deciding not to consider the English document.

Plaintiffs' remaining claims argue that the trial court erroneously concluded that they had failed to present genuine issues of material fact regarding alleged violations of the MHCA and MCPA. After reviewing the evidence we conclude that plaintiffs have failed to substantiate these arguments. The only competent evidence before the court—the affidavit of Fred Morganroth—explains both that each resident's water usage is measured by meters located at the individual sites. Additionally, plaintiffs fail to demonstrate that the amounts charged for service were unreasonable or excessive. The Morganroth affidavit indicates that the rates charged are identical to those otherwise imposed on Walker residents receiving the same service.[1] Because plaintiffs are charged only as much as they would otherwise pay for identical service, we see no factual support for the requested finding that the rates charged are unreasonable or excessive. We do not believe that a management company in defendants' position should be required to assume all administrative costs for the distribution of water to its tenants. Yet in claiming that defendants should only be permitted to charge tenants, in total, an amount equal to the single service charge they pay the City of Walker, that is precisely the status plaintiffs seek us to impose upon defendants.

As for plaintiffs' assertion that defendants improperly billed late rent charges if outstanding water bills were not simultaneously paid, we conclude that that plaintiffs' argument is neither factually supported, nor backed by reference to applicable statutory provisions.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ William B. Murphy
/s/ Michael J. Talbot

[1] Even though we concluded that the trial court did not err in failing to consider the English document, we note that this document supports Morganroth's statements concerning the amounts charged.