STATE OF MICHIGAN

COURT OF APPEALS

WILLIAMSTON INVOLVED NOW, INC., EDWARD NOONAN, CHARLES CROSS, KEN ZICHI, and JAN RAAD,

Plaintiffs-Appellants,

v

CITY OF WILLIAMSTON and THE ECONOMIC DEVELOPMENT CORPORATION,

Defendants-Appellees.

UNPUBLISHED
October 8, 1999

No. 217923
Ingham Circuit Court
LC No. 99-089470 AW

Before: Bandstra, C.J. and Jansen and Whitbeck, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order entered by the circuit court dismissing their complaint and granting summary disposition in favor of defendants. We affirm.

Basic Facts and Procedural Background

In 1987, the Williamston Economic Development Corporation (EDC), acting as defendant city's Tax Increment Finance Authority (TIFA), obtained an option to purchase a 150-acre parcel of land located in adjacent Wheatfield Township. In March 1988, the EDC exercised its purchase option and entered into a land contract with the sellers. The EDC's intent was to expand its industrial park located immediately north of the subject parcel. In May 1988, the EDC passed a resolution confirming the acquisition and conveying an undivided one-half interest in the land contract to defendant city. The purpose of the conveyance was to make the property eligible for annexation from Wheatfield Township to the city as vacant property, by city council resolution. Defendant city passed a resolution on May 23, 1988, accepting the conveyance from the EDC and acquiring an ownership interest in the property. The consideration recited in the deed for the transfer was $1.00, subject to various limitations, *inter alia*, that the EDC was solely responsible for the payments due on the land contract.

In a previous case filed after defendant city annexed the property, Wheatfield Township claimed that defendant city did not follow the correct annexation procedure because the city was not the owner

of the property. In *Wheatfield Twp v Williamston*, 184 Mich App 745, 746; 458 NW2d 670 (1990), this Court held that defendant city followed the correct annexation procedure under the home rule cities act, reasoning that defendant city's land contract granted the city sufficient ownership of the property to satisfy the statute.

On four previous occasions, defendant city released its interest in portions of the parcel to the EDC to facilitate the sale of these smaller parcels to various business entities. Other than one transaction that involved an exchange of property, these transfers of interest were approved by city council resolution. Pursuant to the city charter, the resolutions were placed on file for public inspection at least twenty-five days before their final adoption and passage, and, thereafter, were approved by an affirmative roll call vote of five or more members of the council.

In January 1996, the EDC entered into a development agreement with Granger Construction Company, granting Granger the exclusive right to purchase the remaining portion of the parcel. In August 1998, Granger entered into two purchase agreements with Aldi Incorporated, whereby Aldi agreed to purchase the subject property and construct a large grocery warehouse. According to the agreement, the total amount due to the EDC at the closing would be $730,149.70. In the course of developing the property, Granger has incurred costs exceeding $400,000. Pursuant to the agreement with Granger, the EDC is to convey title to the property. For the EDC to grant clear title to Aldi, however, the city was required to release its undivided one-half interest in the property to the EDC.

In October 1998, plaintiff Williamston Involved Now, Inc., (WIN) was incorporated as a domestic, non-profit corporation with a declared purpose "[t]o promote responsible development through educated decision-making with outcome emphasis on the quality of life." Plaintiff WIN's members appeared at city council meetings and generally voiced opposition to the Aldi project and demanded that the proposed conveyance to the EDC be put to a vote of the city electorate pursuant to § 13.3(b)(2) of the city charter.

The city attorney submitted a memorandum of law concluding that § 13.3(b)(2) applied only to sales of property and that defendant city was merely disposing of property, not selling it, and thus was not required to have an election on the transfer of defendant city's interest in the property to the EDC. On January 11, 1999, the city council approved a resolution, by a five to two vote, authorizing the mayor "to execute a document of conveyance of the limited joint interest of the City in the property . . . to the EDC acting on behalf of the City" so as to fulfill the conditions of the 1996 development agreement with Granger. Thereafter, the mayor executed and delivered a quitclaim deed of defendant city's interest in the property to the EDC.

On January 13, 1999, plaintiffs[1] filed this action, seeking injunctive relief to prohibit the city's conveyance, which they asserted was in violation of § 13.3(b)(2) of the city charter because it had not been put to a vote of the electorate. Plaintiffs specifically alleged that (1) the transfer of the property was a "sale" and not a "disposal," (2) defendant city was the "owner" of the property, and (3) § 13.3(b) of the city charter was valid and enforceable. In response, defendants filed a "Joint Motion to Dismiss Complaint" pursuant to MCR 2.116(C)(4), (5), (7), (8), and (10). Following a hearing on January 19, 1999, the trial court issued an opinion and order, denying plaintiffs' request for injunctive

relief and granting defendants' motion to dismiss the complaint under MCR 2.116(C)(10). Plaintiffs' motion for reconsideration was later denied, resulting in this appeal.

Standard of Review

Summary disposition of all or part of a claim or defense may be granted when "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." MCR 2.116(C)(10). A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993). When deciding a motion for summary disposition pursuant to MCR 2.116(C)(10), a court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence available to it. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). The moving party has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Id.* The nonmoving party then has the burden of showing by evidentiary materials that a genuine issue of disputed fact exists, *id.*, and the disputed factual issue must be material to the dispositive legal claims, *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 267; 466 NW2d 287 (1991). If the nonmoving party fails to present documentary evidence showing the existence of a material factual dispute, the motion is properly granted. *Quinto, supra* at 363.

The only issue properly before us is whether the trial court appropriately granted summary disposition to defendants under the city charter.[2] In interpreting the charter, the usual rules of statutory construction apply. *Brady v Detroit*, 353 Mich 243, 248; 91 NW2d 257 (1958). Where the language of a charter is clear, there is no need for interpretation and the charter must be applied as written. *Farrington v Total Petroleum, Inc*, 442 Mich 201, 208; 501 NW2d 76 (1993).

Analysis

Section 13.3(b) of the city charter provides:

> (b) The city shall not have power to purchase, sell, lease, or dispose of any real estate unless:
>
> (1) The resolution authorizing the sale, lease, or disposal thereof shall be completed in the manner in which it is to be finally passed and has remained on file with the Clerk for public inspection for twenty-five days before the final adoption or passage thereof; and unless,
>
> (2) If the state equalized value of property, as shown on the current assessment roll, as certified by the Board of Review, or the state equalized appraisal of the assessor if no value thereof is shown on such assessment roll, exceeds $25,000, the sale of such property shall first be approved by a majority of the electors voting on the question at a regular or special city election; and unless,

(3) Such action is approved by the affirmative roll call vote of five or more members of the Council . . . . [Emphasis provided].

Comparing parts (1) and (2) of this provision, we conclude that while a "sale, lease, or disposal" of real estate requires a twenty-five day filing, only a "sale" of real estate requires the approval of a majority of voters.[3] The dispositive issue is therefore whether the city's conveyance of its limited joint interest in the property to the EDC, under the facts of this case, constituted a "sale" under this part.

Plaintiffs argue that, under *Kaplan v Huntington Woods*, 357 Mich 612; 99 NW2d 514 (1959), the only relevant issue in determining whether there was a "sale" is whether there was consideration. The *Kaplan* Court did state, with respect to the case before it, that "[i]f the mutual or reciprocal promises of the parties to the restriction agreement were a consideration for the execution of the said agreement, then clearly a sale was involved." *Id.* at 618. However, the *Kaplan* Court did not otherwise suggest, and plaintiff points to no other authority suggesting, that the presence or absence of consideration is the sole determinant of whether a sale occurred. In any event, we do not conclude that defendant city received consideration for its transfer of its one-half interest in the land contract to the EDC. No payment was made by the EDC to the city. In addition, the city was not relieved of any obligation to make payments under the land contract because it never had any such obligation. The EDC had maintained full responsibility for the payments even after it transferred an interest in the land contracts to the city.

Although plaintiffs may be correct in arguing that the city had an "ownership" interest in the property, as a panel of our Court determined in *Williamston*, *supra*, and as evidenced by the city's expending funds to defend that interest, this only begs the question. As an owner, the city could sell, lease, or otherwise dispose of the property.

We do not conclude that the trial court erred in considering all of the factors surrounding this transaction and concluding that it was not a "sale" for purposes of the city charter. As stated by the trial court:

> Plaintiff attempts to overcome this by arguing that the transaction involved in this matter is really a sale and not a disposal of the property due to the fact that the City "owns" the property. This Court disagrees because the evidence reflects:
>
> 1) the city has not and will not receive consideration for the transfer of its limited interest in the property to the EDC;
>
> 2) the EDC, acting as the TIFA, originally purchased the property and conveyed a limited one-half interest to the City for the narrow purpose of making it eligible for annexation;
>
> 3) the EDC, not the City, was responsible for the payments due and fulfillment of all terms under the land contract;

4) the City could not purchase the property directly for development as an industrial park;

5) the property was annexed to the city; and

6) all consideration required under the land contract was paid by revenues legally available to the EDC.

For the same reasons, this Court concludes that the city, while having taken a limited interest in the property to meet legal requirements incident to this economic development project, merely "disposed" of that interest to further the goals of the EDC. The transaction did not constitute a "sale" for purposes of the charter.

Plaintiffs further argue that the trial court erred in granting defendant's motion for summary disposition without requiring twenty-one days notice and an opportunity to respond. MCR 2.116(G)(1)(a). However, the transcript of the January 19 motion hearing indicates that plaintiffs made no objection to defendants' motion being considered and was prepared to respond to it at the hearing. Thus, plaintiffs essentially waived this issue; "a party cannot seek reversal on the basis of an error that the party caused by either plan or negligence." *Detroit v Larned Associates*, 199 Mich App 36, 38; 501 NW2d 189 (1993). Further, we note that MCR 2.116(G)(4) requires that the party opposing a motion for summary disposition has the obligation to "set forth specific facts showing that there is a genuine issue for trial" and that "[i]f the adverse party does not so respond, judgment, if appropriate, shall be entered against him or her." Even after the trial court granted summary disposition to defendants, plaintiffs did not argue in its motion for reconsideration that there were factual disputes or that additional time for factual development was needed. The motion for reconsideration filed by plaintiffs only pointed out another provision of the charter that plaintiffs argued supported their argument regarding the meaning of "sale."[4] Having never suggested that time was needed for factual development below, plaintiffs cannot raise this argument for the first time on appeal.

With respect to defendants' request for actual and punitive damages, we do not conclude that plaintiffs' appeal was vexatious pursuant to MCR 7.216(C). Thus, defendants' request is denied.

We affirm.

/s/ Richard A. Bandstra
/s/ Kathleen Jansen
/s/ William C. Whitbeck

[1] Plaintiffs Noonan, Cross, Zichi, and Raad are either residents or property owners in the city and were added as plaintiffs after the parties' cross-motions were argued before the trial court.

[2] Defendants argue that the Economic Development Corporations Act, MCL 125.1601 *et seq.*; MSA 5.3520(1) *et seq.*, and the Tax Increment Finance Act, MCL 125.1801 *et seq.*; MSA 3.540(201) *et seq.*, provide the city additional powers, beyond those granted by the city charter, which authorize the

transfer of its interest to the EDC without a vote of the electorate. Because we decide that the charter granted the city sufficient authority to take this action, we need not consider those arguments nor plaintiffs' response to them. Further, we do not consider the argument that plaintiff WIN was without standing to maintain this action as we have concluded that defendants were appropriately granted summary disposition on the merits. Finally, plaintiffs argue for the first time on appeal that the city's action violated the Michigan Constitution. Because that claim was not contained in plaintiffs' complaint, raised at the hearing, or argued as a reason the trial court's order should have been reconsidered, there was no development of factual questions relating to it. We decline to address plaintiffs' constitutional argument. *Alford v Pollution Control Industries of America*, 222 Mich App 693, 699; 565 NW2d 9 (1997).

[3] There is no dispute here that the real estate has a value exceeding $25,000.

[4] In deciding the motion for reconsideration, the trial court implicitly concluded that this provision had no impact on the correct understanding of what constitutes a "sale" for the purposes of this case. We agree.