STATE OF MICHIGAN

COURT OF APPEALS

ENVIRONMENTAL DISPOSAL SYSTEMS, INC., and REMUS JOINT VENTURE,

Plaintiffs-Appellants,

v

CITY OF ROMULUS, BEVERLY MCANALLY, WILLIAM WADSWORTH, RANDOLPH GEAR, MAICHAEL A. PRYBYLA, and DAVID PAUL,

Defendants-Appellees.

UNPUBLISHED
October 12, 1999

No. 206694
Wayne Circuit Court
LC No. 96-630337 CZ

Before: Bandstra, C.J., and Markey and Talbot, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order dismissing counts VIII and IX of plaintiffs' complaint. On appeal, plaintiffs challenge the trial court's decision to grant defendants' motion for summary disposition as to counts I through VII of plaintiffs' complaint. We affirm.

Plaintiffs' sought to build and operate a deep injection hazardous waste well in the city of Romulus. Plaintiffs spent three years securing capital for their project and permission from certain state and federal authorities. During this period, various Romulus city official consistently indicated their informal support for the well project. In 1993, shortly after the well was drilled, the city of Romulus officially sought to prevent plaintiffs from using the well by filing a lawsuit against plaintiff Environmental Disposal Systems, Inc (EDS). The city also issued EDS three appearance tickets charging it with violating various local ordinances. Three years later, plaintiffs filed this action against defendants claiming that they were damaged by defendants' unconstitutional efforts to stop the well project.

On appeal, plaintiffs first argue that the trial court erred in granting defendants' motion for summary disposition before the end of discovery. We disagree. Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. Summary disposition is appropriate, however, if the discovery does not stand a fair chance of uncovering factual support for opposing the motion for summary disposition. *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Here, plaintiffs ignore the fact that there was discovery in a related action

between the same two parties, much of which would bear on the issues raised in this action. Further, plaintiffs have not described any sort of relevant information that might be uncovered upon further discovery. Accordingly, we conclude that plaintiffs are not entitled to relief merely because summary disposition was granted prior to the close of discovery. Cf. *Ireland v Edwards*, 230 Mich App 607, 623; 584 NW2d 632 (1998).

Plaintiffs also argue that summary disposition was inappropriate merely because the trial court improperly resolved questions of fact. This contention is without merit. Because our review of a trial court's decision on a motion for summary disposition is de novo, e.g. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998), meaning that no deference is given to the trial court's resolution of the issue, the question whether the trial court improperly made findings of fact is of no moment. What matters is whether defendant was entitled to summary disposition on the basis of the record then before the trial court. See MCR 2.116(G)(5), & (I)(1); *Truby v Farm Bureau General Ins of Michigan*, 175 Mich App 569, 571; 438 NW2d 249 (1988).

Plaintiffs maintain that the trial court erred in granting defendants' motion for summary disposition with respect to count I of their complaint. We disagree. In count I, plaintiffs alleged that defendants violated their constitutional right to procedural due process when they summarily changed their position with respect to plaintiffs' well project without giving plaintiffs any opportunity to be heard. Plaintiffs brought their claim under 42 USC 1983, which provides a federal remedy against any person who, under color of state law or custom having the force of law, deprives another of rights protected by the constitution or laws of the United States. See *Payton v City of Detroit*, 211 Mich App 375, 398; 536 NW2d 233 (1995).

The trial court granted defendants' motion for summary disposition under MCR 2.116(C)(10). When reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court must consider pleadings, affidavits, admissions, depositions, and any other documentary evidence in a light most favorable to the nonmoving party. *Quinto v Cross & Peters*, 451 Mich 358, 362; 547 NW2d 314 (1996). Summary disposition may be granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

Plaintiffs do not contend that they were denied an opportunity to be heard in the 1993 action filed by the city against EDS or in response to the three appearance tickets issued to EDS. Instead, they contend that they were denied the opportunity to be heard to contest defendants' initial decisions to file the lawsuit and to issue the three appearance tickets. This claim is without merit. In order to prevail on a procedural due process claim, a plaintiff must establish that the state interfered with a liberty or property interest. See, e.g., *Jordan v Jarvis*, 200 Mich App 445, 448; 505 NW2d 279 (1993). Assuming plaintiffs had a property interest in using the land for the well project, their property interest was not interfered with by defendants' *mere decision* to take legal action against EDS. Rather, it was interfered with by the adjudication of the legal action brought against EDS when the trial court issued orders enjoining EDS's use of the well. It is undisputed that EDS had an opportunity to be heard to contest entry of the orders granting temporary and permanent injunctive relief against it.[1] Therefore, we hold that defendants were entitled to summary disposition with respect to count I of plaintiffs' complaint.

Plaintiffs next argue that the trial court erred in granting defendants' motion for summary disposition with respect to count II of their complaint. We disagree. In count II, plaintiffs alleged that defendants violated plaintiffs' procedural due process rights when, acting in bad faith and under color of law, they "authorized and directed" that the three appearance tickets be issued to EDS and that the lawsuit be filed against EDS. On appeal, plaintiffs' cursory argument provides no legal authority for the proposition that the bad faith instigation of a law suit by a municipality or government official constitutes a denial of procedural due process or a violation of 42 USC 1983. A party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims. *Joerger v Gordon Food Service, Inc*, 224 Mich App 167, 178; 568 NW2d 365 (1997). Because plaintiffs' argument contains insufficient supporting authority, we deem this issue to have been abandoned. See, e.g., *Goolsby v Detroit*, 419 Mich 651, 655 n 1; 358 NW2d 856 (1984).

Similarly, in count III plaintiffs alleged that defendants violated plaintiffs' procedural due process rights when they took certain improper actions to frustrate EDS's attempt to win zoning approval for the well project. Plaintiffs complaint alleged three distinct improper acts. On appeal, plaintiffs have mentioned only two of these alleged acts and have provided no direct legal authority in support of either allegation.[2] Accordingly, we deem this issue to have been abandoned. *Goolsby*, *supra* at 655 n 1.

Next, plaintiffs argue that the trial court erred in granting defendants' motion for summary disposition with respect to count IV of their complaint. We disagree. In count IV, plaintiffs alleged that defendants' decision to deny EDS the ability to use the well constituted a violation of their rights to substantive due process. In order to prevail on a substantive due process claim, a litigant faces a very high bar, in the sense that the interest sought to be protected must be of fundamental importance. See, e.g., *Regents of the University of Michigan v Ewing*, 474 US 214, 229; 106 S Ct 507; 88 L Ed 2d 523 (1985) (Powell, J., concurring). Plaintiffs admit that in order to prevail on their substantive due process claim, they must be able to show that defendants' actions were "arbitrary and capricious" in the strict sense, meaning that there was no rational basis for them. See *Duboc v Green Oak Twp*, 810 F Supp 867, 873 (ED Mich, 1992). Here the undisputed facts evidence a rational basis for both defendants' decision to take action (i.e., protests against the well by city residents) and defendants' belief that Romulus' local ordinances were not preempted by state or federal law. Certainly plaintiffs cannot successfully argue that it was arbitrary and capricious for defendants to attempt to follow the apparent will of the people. Therefore, we hold that defendants were entitled to summary disposition with respect to count IV of plaintiffs' complaint.

Plaintiffs also argue that the trial court erred in granting defendants' motion for summary disposition with respect to their equal protection claim. We disagree. Broadly speaking, the equal protection doctrine mandates that persons in similar circumstances be treated similarly. E.g. *Dowerk v Oxford Charter Twp*, 233 Mich App 62, 72-73; 592 NW2d 724 (1998). In their brief on appeal, plaintiffs assert that there were numerous other business in similar circumstances in the same zoning district that were treated differently. However, plaintiffs have failed to provide any specific factual support for this broad assertion.[3] Plaintiffs have also failed to explain which pieces of documentary evidence before the trial court support their equal protection claim. As noted above, a party may not merely announce his position and leave it to this Court to discover and rationalize the basis for his

claims. See *Joerger, supra* at 178. In the absence of an adequate argument on appeal, we are unable to assess the merits of plaintiffs' claim.

Plaintiffs next argue that the trial court erred in granting defendants' motion for summary disposition with respect to their inverse condemnation claim. We disagree. In count VI of their complaint, plaintiffs alleged that "the existence of the well and its potential to accept liquid hazardous waste" constituted a "severable property interest." Plaintiffs further alleged that the city of Romulus' zoning regulations preventing the use of "this resource" amounted to an unconstitutional taking, by "inverse condemnation," of plaintiffs' property interest. This claim is without merit. It is undisputed that the city's zoning regulations were in place *before* plaintiffs acquired any interest in the property. Accordingly, the enforcement of those ordinances could not have amounted to a "taking" of anything plaintiffs ever had in the first place. Defendants were therefore entitled to summary disposition on plaintiffs' inverse condemnation claim.

Plaintiff next argues that the trial court erred in dismissing count VII of their complaint, which was a request for a permanent injunction to prevent defendants from interfering with plaintiffs' use of the well site. We disagree. Although the trial court granted defendants' motion for summary disposition on a different ground, defendants were entitled to summary disposition on count VII based on MCR 2.116(C)(6), because a prior action (the 1993 lawsuit) had been initiated between the same parties involving the same claim. The fact that summary disposition was granted under one subpart of the court rule, when it was actually appropriate under a different subpart, is not necessarily fatal on appeal. *Ellsworth v Highland Lakes Development Associates*, 198 Mich App 55, 57; 498 NW2d 5 (1993). Because the record permits our review under MCR 2.116(C)(6), see *Royce v Citizens Ins Co*, 219 Mich App 537, 541; 557 NW2d 144 (1996), there is no danger that plaintiff could have been "misled" at the trial level, see *Blair v Checker Cab Co*, 219 Mich App 667, 671; 558 NW2d 439 (1996), and the trial court reached the correct result, see *Griffey v Prestige Stamping, Inc*, 189 Mich App 665, 668-669; 473 NW2d 790 (1991), we affirm the trial court's grant of summary disposition as to count VII of plaintiffs' complaint.

Plaintiffs also argue that the trial court's ruling with respect to the preclusive effect of a prior federal court decision was erroneous. Given the facts that (1) issue preclusion was, at best, an alternative basis for the trial court's decision, and (2) the trial court can be affirmed on the basis of the substantive flaws in plaintiffs' claims, we need not address this issue.

Next, plaintiffs argue that the trial court erred in preventing them from deposing the city's attorney, the mayor, and various members of city council. This Court reviews a trial court's decision to grant or deny discovery for an abuse of discretion. *Harrison v Olde Financial Corp*, 225 Mich App 601, 614; 572 NW2d 679 (1997). In general, litigants are entitled to obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action. MCR 2.303(B)(1). Because nothing those parties and witnesses could have said would have been material to the resolution of these issues by either the trial court or by this Court, we conclude that plaintiffs are not entitled to the relief requested.

Plaintiffs next argue that the trial court's ruling with respect to the qualified immunity of the individual defendants was erroneous. As with the question of issue preclusion, we need not address this issue because qualified immunity was an alternative basis for the trial court's decision which can also be affirmed on the basis of other flaws in plaintiffs' claims.

Finally, given our resolution of this case, we need not address plaintiffs' request for consolidation of this case with the 1993 action, or defendants' alternative arguments in support of affirmance.

Affirmed.

/s/ Richard A. Bandstra
/s/ Jane E. Markey
/s/ Michael J. Talbot

[1] It is worth noting that plaintiffs have provided absolutely no legal authority for their assertion that they had any right (whether constitutional or otherwise) to be heard with respect to defendants' decision to instigate legal action against them. The cases cited by plaintiffs involved adjudications of rights rather than decisions to seek an adjudication of rights.

[2] Two of the three federal cases cited by plaintiffs do not even address claims of procedural due process. Indeed, plaintiffs' statement that the court in *Duboc v Green Oak Twp*, 810 F Supp 867 (ED Mich, 1992), "ruled that there was a cause of action in respect to a denial of procedural due process" is patently false. In *Duboc*, *supra* at 872-873, the court specifically stated that there was no need to address whether plaintiff stated a claim for procedural due process. The third case cited by plaintiffs, *Nasierowski Brothers Investment Co v Sterling Heights*, 949 F2d 890 (CA 6, 1991), is factually inapposite.

[3] It is undisputed that plaintiffs business was the only deep injection hazardous waste well in the city of Romulus.