

STATE OF MICHIGAN
COURT OF APPEALS

ADAMS OUTDOOR ADVERTISING OF
MICHIGAN,

Plaintiff-Appellant,

v

CITY OF NOVI,

Defendant-Appellee.

UNPUBLISHED
April 19, 2002

No. 221990
Oakland Circuit Court
LC No. 98-008771-CZ

Before: Bandstra, C.J., and Doctoroff and White, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing its complaint without prejudice. We reverse and remand.

In June 1998, plaintiff applied for sign permits from defendant that would allow plaintiff to erect outdoor advertising on property it leased from CSX railroad. Defendant rejected plaintiff's permit applications because the proposed signs would not conform to defendant's setback and height regulations. Plaintiff appealed the denial of its applications by seeking zoning variances from defendant's zoning board of appeals (ZBA). On August 4, 1998, the ZBA denied plaintiff's requests for variances because of "insufficient hardship and for the health, safety and welfare of the City of Novi."

On September 2, 1998, plaintiff filed a complaint against defendant in which plaintiff (1) sought an "appeal" of the ZBA's decision, (2) asked for a declaration of rights regarding defendant's sign ordinance, (3) claimed that defendant's actions constituted an inverse condemnation and a regulatory taking, and (4) sought a declaration of rights and an injunction regarding defendant's alleged noncompliance with the Zoning Enabling Act.

Defendant filed a motion for summary disposition asking the trial court to dismiss plaintiff's complaint pursuant to MCR 2.116(C)(7), (8), and (10), arguing that its sign ordinance was a valid exercise of its authority under the Home Rule City Act and the Zoning Enabling Act. However, on July 1, 1999, before hearing defendant's motion for summary disposition, the trial court sua sponte issued an order to show cause why plaintiff's "Claim of Appeal" should not be dismissed. The order stated that plaintiff "erroneously" filed a "Claim of Appeal" from the ZBA's decision in conjunction with a three count complaint and indicated that the ZBA was not a party defendant in the matter.

At a hearing in July 1999, the trial court first stated that the action was a claim of appeal, then suggested that plaintiff's cause of action was inappropriate because it did not file a claim of appeal:

Mr. Perry [Plaintiff's counsel]: Your Honor, we've been ordered to show cause received Friday by fax why the Court should not dismiss Count I of my Complaint. We filed —

The Court: It's not a Complaint, this is a Claim of Appeal.

Mr. Perry: Count I is a claim of appeal, yes, your Honor. We filed by fax yesterday . . . our response to the Show Cause Order indicating, which the defendant has admitted, that the Court has subject matter jurisdiction. The defendant has admitted that the action was timely filed, and I refer to two Michigan Supreme Court cases, Kolmer and Jones, which indicate that a Zoning Board of Appeals is not a necessary party defendant in an action in which one challenges the validity of an ordinance. . . . the Show Cause Order pertained, as I read it, to the absence of the Zoning Board of Appeals as an alleged defect in our pleadings and we would ask the Court to find we've shown cause why the Court should not dismiss it.

* * *

The Court: Well, basically, the claim is that you didn't file the claim of appeal.

Mr. Perry: I included it within our Complaint, yes, I did, as Count I of our pleading. I entitled Count I as Appeal from the ZBA Decision, I think that's how it reads.

The Court: And that's the way you wish to have it written and you don't wish to amend it then I'll be happy to issue an opinion. Thank you.

At the hearing, defendant also inquired whether the court would be deciding its motion for summary disposition. In response, the trial court stated that it didn't have a motion for summary disposition. The court then stated that it would issue a written opinion "[o]n all of it."

In an opinion and order dated August 2, 1999, the trial court noted that plaintiff filed a civil action against defendant seeking damages and declaratory relief with regard to issues in plaintiff's claim of appeal. The court found that "[t]his is procedurally inappropriate and, therefore, in error, since a final determination has not been made as to the issues preserved under the Claim of Appeal." For this reason, the court dismissed plaintiff's cause of action without prejudice. Plaintiff filed a motion for rehearing, which the trial court denied.

Plaintiff first argues that the trial court erred by dismissing its complaint without any supporting legal authority or rationale and based on the erroneous finding that the ZBA did not make a final decision on plaintiff's request for a variance.

We note at the outset that the trial court's rationale for dismissing plaintiff's complaint is not clear from the existing record. The lower court's August 2, 1999 opinion and order states that plaintiff's civil action is "procedurally inappropriate," however the court did not indicate how plaintiff failed to follow proper procedure. At least twice in the opinion and order, the trial court refers to plaintiff's action as a "Claim of Appeal," implying that the court itself was confused whether the case involved an appeal or a civil action. Further, the court's order states that the complaint was "in error" because "a final determination has not been made as to the issues preserved under the Claim of Appeal."

Defendant argues that the trial court properly dismissed plaintiff's complaint because the court had no jurisdiction over a mandamus action against defendant where MCL 125.585(11) limited plaintiff's remedy to an appeal to the circuit court. Defendant further claims that plaintiff's complaint did not constitute a proper appeal of the ZBA's decision because it did not follow the procedure established in the court rules for filing a claim of appeal. Although there may be some merit to defendant's arguments, see *Choe v Flint Charter Twp*, 240 Mich App 662, 667; 615 NW2d 739 (2000), there is no indication in the record that the trial court dismissed plaintiff's complaint for lack of jurisdiction.

Although the trial court's opinion and order lacks a clear statement of its rationale for dismissing the complaint, it is apparent that the decision hinged on the court's factual finding that the ZBA's determination was not a final decision. Therefore, we review this finding of fact for clear error. MCR 2.613(C); *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 171; 530 NW2d 772 (1995). A finding of fact is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made. *Id.*

To the extent that the trial court dismissed plaintiff's complaint because no final determination was made by the ZBA, we would agree that the court clearly erred. There is nothing in the lower court record that would support a factual finding that the ZBA's decision was not final. There is no indication that defendant or the trial court raised the issue of the finality of the ZBA's determination, and, in fact, defendant admitted in its answer to plaintiff's complaint that the ZBA's decision was a final determination. Further, there was no discussion of the finality of the decision at the hearing or in the pleadings of either party. It is apparent that the ZBA did make a final decision on plaintiff's request for a variance, dismissal of plaintiff's complaint for this reason constituted clear error, and reversal is required.

Plaintiff further argues that, to the extent that the trial court considered the issues in defendant's motion for summary disposition when it determined that plaintiff's complaint should be dismissed, that decision was in error. However, it is apparent from the transcript of the hearing and the lower court's opinion and order that the court did not consider defendant's motion or the issues raised in the motion when it decided to dismiss plaintiff's complaint. Further, we need not reach this issue because we already determined that reversal is required because of the trial court's erroneous factual finding regarding the finality of the ZBA's decision.

Reversed and remanded. We do not retain jurisdiction.

/s/ Richard A. Bandstra
/s/ Martin M. Doctoroff