

STATE OF MICHIGAN
COURT OF APPEALS

KADIR A. and SHERI R. MOHMAND,

Plaintiffs-Appellants,

v

CHARTER TOWNSHIP OF OSHTEMO,

Defendant-Appellant.

UNPUBLISHED

July 26, 2002

No. 231041

Kalamazoo Circuit Court

LC No. 00-000160-CZ

Before: Neff, P.J., and White and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right an order of the trial court dismissing their declaratory judgment action concerning the zoning status of real property owned by plaintiffs in Oshtemo Township. We affirm.

I

In December 1997, plaintiffs purchased a parcel of real property in Oshtemo Township, which they allegedly believed to be zoned in part for commercial use. According to plaintiffs, they were later informed by defendant's zoning official that none of the property was zoned commercial and that they should submit a request for rezoning if they wanted to pursue a commercial use. In February 1999, plaintiffs requested the property be rezoned from the "R-2" Residence District to the "C" Local Business District zoning classification. Defendant denied plaintiffs' request.

On March 27, 2000, plaintiffs filed an action in circuit court seeking a declaratory judgment that the property at issue was commercially zoned. It was plaintiffs' contention that at least part of the property was zoned for commercial use, based on documentation plaintiffs had obtained from defendant under the Freedom of Information Act (FOIA).¹ The trial court granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10), finding that defendant's records conclusively established that plaintiffs' property was not zoned "C" Local Business District. The court denied plaintiffs' motion for reconsideration.

¹ MCL 15.231 *et seq.*

II

This Court reviews de novo a trial court's grant of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Summary disposition under MCR 2.116(C)(10) is properly granted when there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). The court considers the pleadings, affidavits, depositions, admissions and other documentary evidence in the light most favorable to the nonmoving party. *Id.*

A motion for summary disposition under MCR 2.116(C)(10) tests the factual support for a claim. *Spiek, supra* at 337. The moving party must specifically identify the matters regarding which there are no disputed factual issues, *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), and has the initial burden of supporting its position by affidavits, depositions, admissions, or other documentary evidence. *Smith, supra* at 455. The party opposing the motion then has the burden of showing by documentary evidence proofs that a genuine issue of material fact exists. *Id.*

III

Plaintiffs argue that the trial court erred in granting defendant's motion for summary disposition because they submitted documentary evidence creating a genuine issue of material fact regarding whether a portion of the property at issue was zoned commercial. As evidence of the commercial zoning status, plaintiffs provided a copy of a purported 1970 Oshtemo Township zoning ordinance amendment, allegedly obtained from defendant in a FOIA request, which appears to include the property at issue in an amendment rezoning certain property from residential to commercial status. Plaintiffs submitted the affidavit of Kadir Mohmand attesting that he obtained the copy of the zoning ordinance amendment from defendant's records, and submitted the affidavit of a land surveyor, stating that according to plaintiffs' copy of the amendment, the property at issue was included in the legal description for land classified as "C" Local Business District. Plaintiffs contend that because their documentary evidence creates a genuine issue of material fact concerning the zoning of their property, summary disposition was improper. Plaintiffs further contend that although defendant disputes the authenticity and accuracy of the zoning ordinance document, this is an issue of disputed fact warranting trial. We disagree.

Defendant's records, including official public notices of the rezoning published in the local newspaper, conclusively establish that the property at issue is zoned residential. Defendant submitted the affidavit of its township clerk, with supporting evidence of the official ordinance book and township records, showing that plaintiffs' property is zoned "B" Residential District. Defendant also submitted legal notices printed in the Kalamazoo Gazette in 1970 as public notification of the rezoning, which show that plaintiffs' property was not included in the zoning ordinance amendment.

The evidence relied upon by plaintiffs does not defeat the conclusion mandated by defendant's records. Plaintiff has produced no evidence to challenge the accuracy of the public notices from the newspaper. The trial court did not err in granting summary disposition.

IV

Plaintiffs next argue that summary disposition was premature because discovery was not yet complete and defendant's forensic expert had not yet provided a report on the authenticity of plaintiffs' copy of the zoning ordinance amendment. We disagree.

A motion for summary disposition is not premature if further discovery does not stand a reasonable chance of uncovering factual support for the opposing party's position. *Village of Dimondale v Grable*, 240 Mich App 553, 566; 618 NW2d 23 (2000); *State Treasurer v Sheko*, 218 Mich App 185, 190; 553 NW2d 654 (1996). Because defendant's records establish conclusively the residential zoning status of the property at issue, further discovery does not have a reasonable chance of adding support to plaintiffs' position. Even if further forensic investigation reveals that plaintiffs' copy of the zoning amendment is an authentic document, its authenticity does not affect the outcome. The document does not defeat the official township records and supporting evidence.

V

Finally, plaintiffs argue that the trial court abused its discretion in denying its motion for reconsideration. We disagree.

We review a trial court's decision on a motion for reconsideration for abuse of discretion. *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000). An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences a perversity of will or the exercise of passion or bias. *Id.* "The moving party must demonstrate a palpable error by which the court and the parties have been misled and show that a different disposition of the motion must result from correction of the error." MCR 2.119(F)(3); *Rickerson, supra* at 233.

Plaintiffs contend that their motion for reconsideration should have been granted on several grounds. First, the court failed to consider defendant's forensic expert's report finding that plaintiffs' copy of the zoning amendment was stamped with the township stamp and that the expert was uncertain whether the document had been altered. Second, the "official" records relied on by the trial court were in fact records retrieved from defense counsel's records and thereafter inserted within the records of the township. Third, because these "official records" came from defense counsel, the township clerk's statement in her affidavit that she was the custodian of the official records of the township was untrue.

Plaintiffs have shown no error by which the trial court was misled and have not shown that a different disposition must result from correction of the error. *Id.* at 233. As noted above, this new evidence does not defeat the conclusion mandated by defendant's records and the legal notices published in the newspaper, all of which indicated that the property at issue was not rezoned as plaintiffs allege. The trial court did not abuse its discretion in denying plaintiffs' motion for reconsideration.

Affirmed.

/s/ Janet T. Neff
/s/ Helene N. White
/s/ Donald S. Owens