STATE OF MICHIGAN

COURT OF APPEALS

CITY OF ST. CLAIR SHORES,

Plaintiff/Counterdefendant-Appellee,

v

JOHN J. ANDLER and MING-LIN HSIEH,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants.

UNPUBLISHED
October 11, 2002

No. 232277
Macomb Circuit Court
LC No. 99-004083-CE

Before: Griffin, P.J., and Gage and Meter, JJ.

PER CURIAM.

Defendants appeal as of right from an order granting summary disposition pursuant to MCR 2.116(C)(10) in favor of plaintiff and from an order denying defendants' cross-motion for partial summary disposition. We affirm.

Cyril DeBaene and Perrine DeBaene purchased land located at 32104 Jefferson Street in St. Clair Shores, Michigan, in 1949. Shortly thereafter, Cyril and Perrine built a two-family dwelling home. Between 1951 and 1961, Cyril and Perrine lived in the home with their two children, Ernest and Irene, and rented the second floor to various persons. After Cyril and Perrine passed away, the home was bequeathed to Ernest and Irene. Ernest moved into the home with his wife and children, while he and Irene continued to rent the second floor to various persons. On March 7, 1986, St. Clair Shores enacted a zoning ordinance, which restricted the use of land where the property was located to single-family detached dwellings. During 1986, a dispute arose with two renters who were subsequently evicted in the early part of 1987. Ernest and Irene decided that they would cease renting the property. Between the spring of 1987 and the fall of 1989, Ernest, his wife, and their children continued to live on the property. In the fall of 1989, one of Ernest's daughters got married, and she and her husband began to live, rent free, on the second floor of the home. On February 4, 1993, the St. Clair Shores Zoning Board of Appeals determined that the home could not be used as a two-family residence because it was located in a single-family district. On February 26, 1993, Irene and Ernest conveyed their interest in the home pursuant to a warranty deed to John Andler. Ernest listed the house as a duplex and told Andler that he always had rented out the second floor to various people. Andler continued to use the home as a two-family dwelling and claimed that his continued use was protected under the St. Clair Shores' nonconforming use statute. In 1996, following complaints by defendants' neighbors concerning the large amounts of unsanitary garbage and rubbish that

accumulated on the property and the numerous cars parked all over the front and back lawns, the zoning board of appeals denied defendants' request to use the home for multiple family uses.

In 1999, plaintiff City of St. Clair Shores filed a complaint against Andler and his wife, defendant Ming-Lin Hsieh, based on the fact that their property, which was used as a multiple-family dwelling, constituted a public nuisance and a nuisance per se in contravention of plaintiff's zoning ordinance. Plaintiff additionally requested injunctive relief. Pertinent to the present appeal, plaintiff filed a motion for summary disposition, claiming that pursuant to the relevant zoning ordinance, defendants' predecessors in title abandoned and discontinued all multi-family uses of the subject property in favor of a single-family use back in 1987, and accordingly, defendants were precluded from using the property for any use other than a single-family dwelling. The trial court ultimately agreed and, pursuant to MCR 2.116(C)(10), granted plaintiff's summary disposition motion pertaining to the request for injunctive relief. Defendants now appeal.

On appeal, defendants first argue that the trial court erred in granting plaintiff's motion for summary disposition because a question of fact existed regarding whether Ernest and Irene intended to abandon the home as a two-family dwelling. We disagree. A trial court's determination of a motion for summary disposition is reviewed de novo on appeal. *Peters v Dep't of Corrections,* 215 Mich App 485, 486; 546 NW2d 668 (1996). In reviewing a motion for summary disposition brought pursuant to MCR 2.116(C)(10), this Court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in a light most favorable to the nonmoving party. *Quinto v Cross & Peters Co,* 451 Mich 358, 362; 547 NW2d 314 (1996). The trial court may grant a motion for summary disposition pursuant to MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Id*.; MCR 2.116(C)(10); MCR 2.116(G)(4).

St. Clair Shores' zoning ordinance's nonconforming use statute provides:

> (5) **NONCONFORMING USES OF STRUCTURES AND LAND:** If a lawful use of a structure, or of a structure and land in combination, exists at the effective date of adoption or amendment of this Ordinance, that would not be allowed in the district under the terms of this Ordinance, the lawful use may be continued so long as it remains otherwise lawful, subject to the following provisions:
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> (e) When a nonconforming use of a structure, structure and premises in combination, is *discontinued or ceases to exist* for six (6) consecutive months or for eighteen (18) months during any three (3) year period, the structure, or structure and premises in combination, shall not thereafter be used except in conformance with the regulations of the district in which it is located. Structures occupied by seasonal uses shall be excepted from this provision. [Emphasis added.]

The statute provides two ways in which a nonconforming use of a property, which was lawful before the passage of the zoning ordinance, may become subject to the zoning ordinance. The statute states that when the nonconforming use is "discontinued *or* ceases to exist" for six consecutive months or for eighteen months during any three-year period, the use of that structure and premises thereafter must be in "conformance with the regulations of the district in which it is located."

The first means outlined in the statute is for the nonconforming use to be discontinued. In *Rudnik v Mayers*, 387 Mich 379, 384; 196 NW2d 770 (1972), the Supreme Court held that when interpreting the term "discontinued" in a zoning regulation context as it pertains to a nonconforming use statute, the term is synonymous with the term "abandoned." The "necessary elements of 'abandonment' are intent and some act or omission on the part of the owner or holder which clearly manifests his voluntary decision to abandon." *Id.* at 384. "Since intention is a necessary element in the concept of abandonment, it follows that 'lapse of time is not per se decisive of whether a nonconforming use has been abandoned, it being merely one of the factors which may evidence such an intention.'" *Id.* at 385, quoting 18 ALR 2d, 725, § 4, p 731. The Court determined that it was necessary to hear testimony from the grantor of the cottage to ascertain the intent to abandon element; however, the grantor was not called as a witness. *Id.* at 385. Therefore, the Court concluded that the factual evidence presented was insufficient to infer the intent to abandon. *Id.* at 384.

In the present case, Irene's and Ernest's intent must be ascertained to determine whether the intent existed to abandon the nonconforming use of the property for six months consecutively or for eighteen months during any three-year period after St. Clair Shores enacted the zoning regulation on March 7, 1986. During that year, a dispute arose with two renters who were subsequently evicted in the early part of 1987. Ernest's signed affidavit stated:

> Problems arose with a father and son who were both renting the second floor in 1986. They were evicted early in 1987. My sister and I vowed to never rent again and we *abandoned* all uses of the subject home other than for single-family purposes. My wife and I, along with our children, were the only residents of the subject home from the spring of 1987 until the fall of 1989.

Moreover, Irene's signed affidavit stated:

> Problems arose with a father and son renting the second floor in 1986. They were evicted early in 1987. Ernest and I vowed never to rent again. Ernest, his wife and their three children were the only residents of the home from the spring of 1987 until the fall of 1989.

Given this factual evidence, it is clear that both Ernest and Irene intended to abandon the nonconforming use of the structure and premises as a two-family unit in early 1987. Although Ernest may have, years later, sold the house under the guise of a two-family unit, the nonconforming use had already been abandoned at that time. If Ernest and Irene vowed never to rent the property again, and no one lived in the upstairs unit from early 1987 to the fall of 1989, this time span of over two years clearly satisfies both the six-month consecutive time span and the eighteen months within the period of three years' time span necessary to abandon the nonconforming use. More importantly, however, there is direct evidence from both Ernest and

Irene that they did in fact intend to abandon the use of the property as a two-family unit. Further, the zoning ordinance does not provide for the protection of the nonconforming use statute if the owner changes position after the abandonment has already occurred. Therefore, when viewing the evidence in a light most favorable to the nonmoving party, the only evidence that defendants present is of actions made by Ernest years after he and Irene abandoned the use of the property as a two-family unit. Ernest and Irene admit to abandoning the property as a two-family unit. Ernest further admitted in his affidavit that he was mistaken when he stated in a note solicited by John Andler on March 12, 1993, that the house had always "been used as a two family unit." Therefore, there is no genuine issue of material fact that exists to refute that the house was indeed abandoned as a two-family unit.

Moreover, even if debate existed regarding whether the property was abandoned as a two-family unit, the statute provides an additional means for nonconforming use property to fall under the zoning provisions. If a nonconforming use of a structure and premises in combination "*ceases to exist*" for six consecutive months or for eighteen months during any three-year period, then the structure and premises must conform with the appropriate zoning regulations. The nonconforming use statute states in pertinent part, "discontinued *or* ceases to exist." Unlike the statute in *Rudnik, supra,* which provided only that a nonconforming use must be discontinued, the nonconforming use statute provides that abandonment is one means to force a nonconforming use into compliance with the appropriate zoning regulations. The other means is if the nonconforming use *ceases to exist* for a period of six months or for eighteen months during any three-year period.

During 1987, a dispute arose with two renters who were subsequently evicted in the early part of 1987. The use of the property as a two-family dwelling home then ceased to exist until the fall of 1989, where debatably it may or may not have been used as a two-family dwelling home depending on whether Ernest's daughter and her family lived essentially separate from Ernest. Regardless of this factor, however, clearly the nonconforming use of the house as a two-family dwelling home "ceased to exist" from the early part of 1987 until the fall of 1989, satisfying the consecutive six months' requirement necessitated by statute. Therefore, in light of the dearth of evidence presented by defendants that the property was used as a two-family dwelling home from early 1987 until the fall of 1989, the trial court properly granted summary disposition in favor of plaintiff.

Defendants' second issue on appeal is that the trial court failed to present any factual or legal reason why it dismissed defendants' counterclaims. Moreover, defendants argue that plaintiff failed to address why the trial court should grant its request to summarily dismiss defendants' counterclaims. We disagree.

As discussed, *supra,* plaintiff did provide factual evidence that was not rebutted by defendants that Ernest and Irene abandoned the property prior to 1993, when the property was sold to John Andler. Moreover, the trial court did provide a basis and analysis for this conclusion. The trial court specifically referenced the basis of both plaintiff's motion for summary disposition, and defendants' cross-motion for partial summary disposition. The trial court found that evidence existed that proved Ernest and Irene intended to abandon multi-family use of the subject property in early 1987 through 1993. Both Irene and Ernest stated in their affidavits that they never rented the subject property from 1987 to 1993. The trial court further noted that the discontinuance of the use for six consecutive months was satisfied, and therefore,

plaintiff was entitled to summary disposition of its complaint for injunctive relief and defendants were permanently enjoined from utilizing the property in violation of the zoning ordinance. Moreover, the trial court stated that it was not persuaded by the arguments set forth in defendants' cross-motion for partial summary disposition. The trial court determined that, although defendants urged the trial court to disregard the affidavits of Ernest and Irene, defendants failed to provide evidence impeaching the affidavits or refuting the testimony contained therein. Therefore, the trial court properly concluded that defendants' motion for summary disposition should be denied.

Affirmed.

/s/ Richard Allen Griffin
/s/ Hilda R. Gage
/s/ Patrick M. Meter