

STATE OF MICHIGAN
COURT OF APPEALS

MICHIGAN DEPARTMENT OF NATURAL
RESOURCES,

UNPUBLISHED
November 22, 2002

Plaintiff-Appellee,

v

CHARLES A. BABCOCK and GLORIA
BABCOCK,

No. 237209
Marquette Circuit Court
LC No. 99-036257-CH

Defendants-Appellants.

Before: Markey, P.J., and Saad and Smolenski, JJ.

PER CURIAM.

Defendants appeal as of right the trial court's order denying their motion for relief from judgment. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendants purchased property adjacent to a large tract of land owned by plaintiff. They moved a home onto their property, and erected a cabin and a sauna. Subsequently, a survey showed that the sauna and a portion of the cabin were located on plaintiff's land. Defendants took no action to remove the structures.

Plaintiff filed a three-count complaint alleging trespass (Count I), violation of the Wetlands Protection Act, MCL 324.30301 *et seq.* (Count II), and violation of the Inland Lakes and Streams Act, MCL 324.30101 *et seq.* (Count III). The complaint sought a permanent injunction against further trespass by defendants and an order requiring defendants to remove the structures located on plaintiff's land.¹ Defendants answered, but did not assert plaintiff's alleged failure to apply its discretionary internal policies equally as an affirmative defense to the relief sought. In their answers to plaintiff's requests for admissions, defendants asserted they believed they were entitled to a land exchange, a remedy that plaintiff's internal policies allow it to offer.

Plaintiff sought summary disposition of the claim of trespass, and sought an injunction requiring defendants to remove the cabin and the sauna. In response, defendants contended that they were entitled to a hearing on the issue of the criteria used by plaintiff in determining what

¹ Subsequently, plaintiff voluntarily dismissed Counts II and III.

remedy it would utilize under any particular circumstances. The trial court granted plaintiff's motion for summary disposition of the claim of trespass. The court found it did not have the authority to order plaintiff to exercise its discretion in one particular fashion. The court ordered defendants to remove the encroaching structures within six months.

Defendants failed to remove the structures, and plaintiff filed a motion to require defendants to show cause why they should not be held in contempt. The trial court did not rule on plaintiff's motion, and gave defendants additional time to determine their next step.

Defendants filed a motion for relief from judgment pursuant to MCR 2.612(C)(1)(f). The motion asserted that, upon information and belief, the remedy ordered by plaintiff, removal of the encroaching structures, was not the remedy customarily ordered under similar circumstances, and that application of the remedy in this case denied defendants the equal protection of the law. Defendants requested a period of discovery to gather information on remedies imposed under similar circumstances. The trial court denied defendants' motion, finding the circumstances did not warrant setting aside its previous decision.

MCR 2.612(C)(1)(f) is a catchall rule and provides that relief from judgment may be granted for "[a]ny other reason justifying relief from the operation of the judgment." We review a trial court's decision to grant or deny a motion for relief from judgment for an abuse of discretion. *Driver v Hanley (After Remand)*, 226 Mich App 558, 564-565; 575 NW2d 31 (1997).

Defendants argue the trial court abused its discretion by denying their motion for relief from judgment and by failing to provide them with a hearing on what would constitute fair and just relief under the circumstances. They assert the trial court's failure to exercise its discretion when called on to do so constituted an abdication that was the equivalent of an abuse of discretion. *Rieth v Keeler*, 230 Mich App 346, 348; 583 NW2d 552 (1998). We disagree. Defendants did not plead the defense of unequal application of law and policy to the relief sought by plaintiff; therefore, the defense was waived. MCR 2.111(F); *Harris v Vernier*, 242 Mich App 306, 312; 617 NW2d 764 (2000). Defendants did not specifically request a hearing in their motion for relief from judgment. Rather, they requested that the trial court reopen discovery to allow them to attempt to collect evidence to support their assertion that plaintiff was treating them differently than it treated other landowners under similar circumstances. Defendants sought relief based on speculation.

Contrary to defendants' assertion, the trial court did not fail to exercise its discretion. The trial court correctly found that defendants' untimely and unsupported assertion that plaintiff was applying a discretionary policy in a discriminatory manner did not warrant granting relief from judgment pursuant to MCR 2.612(C)(1)(f). The trial court did not abuse its discretion by denying defendants' motion for relief from judgment.

Affirmed.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Michael R. Smolenski