STATE OF MICHIGAN

COURT OF APPEALS

THOMAS J. GAWRYCH and CAROL A. GAWRYCH,

Plaintiffs/Counter-Defendants-Appellants,

v

MARK RUBIN,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
October 26, 2004

No. 247744
Alcona Circuit Court
LC No. 99-010306-CE

Before: Murphy, P.J., and Sawyer and Markey, JJ.

PER CURIAM.

In this case involving claims for abatement of a public nuisance and trespass, plaintiffs appeal as of right from an order of the circuit court denying their motion for reconsideration. Previously, the court had summarily dismissed plaintiff's nuisance claim, riparian rights trespass claim, claim for treble damages under MCL 600.2919, and partially dismissed plaintiffs' claim for breach of subdivision restrictions. The court granted plaintiffs partial summary disposition on their claim for trespass onto their property and awarded damages in the amount of $733.50. The court then granted plaintiffs' motion for voluntary dismissal of all remaining claims, but conditioned it on the payment of defendant's taxable costs and reasonable attorney fees, which, in its order denying plaintiffs' motion for reconsideration, the court assessed to be $3500. We reverse and remand.

Plaintiffs own a home with a view of Lake Huron, located across the road from three lots owned by defendant. Plaintiffs also own a lot on the other side of the road, adjacent to one of defendant's three lots. In violation of a local zoning ordinance, defendant built a second pole barn on the lot adjacent to plaintiffs' lot. Plaintiffs allege that this building blocks their view of the lake from their home. In the course of construction, defendant trespassed onto plaintiffs' adjacent lot.

Plaintiffs first argue that the court erred in denying them summary disposition on their public nuisance claims. We review the grant or denial of a motion for summary disposition de novo. *Rice v Auto Club Ins Co*, 252 Mich App 25, 30; 651 NW2d 188 (2002). For the reasons stated below, we affirm the trial court's denial of plaintiffs' motion for summary disposition, but

we reverse and remand for further consideration of the lower court's grant of summary disposition in favor of defendant.

Michigan law permits private citizens to bring an action for abatement of public nuisance provided they can show that they suffer damages that are different from those suffered by the general public. *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). Defendant's building was in violation of local zoning ordinances for front and rear setbacks and therefore was a nuisance per se under MCL 125.294, which provides as follows: "A use of land, or a . . . building, or structure . . . erected . . . in violation of a local zoning ordinance or regulation adopted pursuant to this act is a nuisance per se."

Defendant argues that the pole building was not in violation of any zoning ordinance because the township zoning administrator filled out the land use permit and the building was sited according to the stakes placed by the administrator. Furthermore, defendant claims that although the building is not set back forty feet from the road, the administrator applied an exception to his lot. However, the zoning board of appeals (ZBA) found defendant's application "was improperly prepared, signed, submitted, and approved." A permit issued in violation of local ordinances is void. See *Building Comm of Detroit v Kunin*, 181 Mich 604, 612; 148 NW 207 (1914).

In addition, the ZBA made specific findings that the building was in violation of the zoning ordinance for accessory buildings and found that the building's 4-½ foot setback violated the township's forty-foot rear lot line setback requirement. Although the trial court reversed the decision of the ZBA, it did so solely on procedural grounds and not because it found that defendant's building complied with the zoning ordinance. Therefore, pursuant to MCL 125.294, defendant's building was a nuisance *per se* which "[t]he court shall order . . . abated."

However, because the issue of whether plaintiffs have sustained special damages was not addressed by the circuit court, the private nuisance claims are remanded for further consideration on the issue of plaintiffs' standing. Specifically, the trial court needs to address the issue of whether the obstruction of plaintiffs' scenic view of Lake Huron is a special damage that would permit plaintiffs to proceed on their public nuisance claim.

Plaintiffs next argue that the trial court erred in deciding that they had to exhaust their administrative remedies by appealing to the ZBA before proceeding in circuit court. However, by agreeing to bring its nuisance abatement claim before the ZBA, plaintiffs waived appellate review of this issue. "A party is not entitled to relief based on an issue that the party's attorney concluded was proper at trial." *Hilgendorf v St John Hosp*, 245 Mich App 670, 696; 630 NW2d 356 (2001).

Plaintiffs also appeal the trial court's application of laches to their public nuisance claims. This Court reviews a trial court's application of laches for clear error. *Gallagher v Keefe*, 232 Mich App 363, 369; 591 NW2d 297 (1998). The trial court denied plaintiffs' motion for summary disposition on the ground that plaintiffs were not timely in bringing their claim before the ZBA. We disagree. For laches to apply, defendant must prove that plaintiffs unreasonably delayed in enforcing their rights and that defendant was prejudiced by plaintiffs' lack of due diligence. *Id.* at 369-370. We do not believe that the record establishes that plaintiffs unreasonably delayed to the detriment of defendant. In this case, defendant was aware within

days after beginning construction that there were potential violations of the zoning ordinance and that plaintiffs were considering an action in circuit court. Defendant proceeded with construction at his own risk, and any hardship was self-inflicted. Moreover, it was not within the power of the ZBA to sustain defendant's permit in violation of the zoning ordinance. *DeGaynor v Bd of Trustees, Dickenson Co Mem Hosp*, 363 Mich 428, 437; 109 NW2d 777 (1961).

We also agree with plaintiffs that the trial court erred in failing to award treble damages for defendant's intentional trespass onto their property. MCL 600.2919(1) provides as follows: "Any person who . . . cuts down . . . or injures any trees on another's lands or . . . digs up or carries away stone, . . . gravel, clay, sand, turf, or mould . . . is liable for 3 times the amount of actual damages."

The court granted plaintiffs partial summary disposition on this trespass claim. Plaintiffs submitted a bill of costs that included the value of fill dirt removed by defendant, the cost of a survey of the boundary line between plaintiffs' and defendant's lots, cost of the damage to plaintiffs' trees, and the cost of a fence to deter further trespass. It is not clear from the record, but it appears that the award of $733.50 included all of plaintiffs' costs except the cost of the fence and half the cost of the survey and recording fee.

In a trespass case, "there is no fixed, inflexible rule for determining, with mathematical certainty, what sum shall compensate for the invasion of the interests of the owner. Whatever approach is most appropriate to compensate him for his loss in the particular case should be adopted." *Schankin v Buskirk*, 354 Mich 490, 494: 93 NW2d 293 (1958). Thus, the court's decision to compensate plaintiffs for $733.50 of their costs was reasonable and should not be disturbed on review. *Kratze v Order of Oddfellows*, 190 Mich App 38, 45; 475 NW2d 405 (1991), rev'd on other grounds 442 Mich 136 (1993).

However, because defendant's trespass was admittedly intentional,[1] plaintiffs are entitled to treble damages, or $2200.50, in accordance with *Governale v Owosso*, 59 Mich App 756, 760-761; 229 NW2d 918 (1975), which holds that in order to limit an award to single damages, a "trial judge had to find that the trespass was casual and involuntary." Absent this finding, we reverse for entry of judgment for triple the amount awarded to plaintiffs for defendant's willful trespass.

Finally, plaintiffs argue that the trial court erred in assessing sanctions when granting their motion for voluntary dismissal of all claims. "This court will not set aside the grant or denial of a voluntary dismissal unless the circuit court's action was without justification."

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[1] In a letter dated July 30, 1999, defendant indicated that "during the construction, a grade level differential was observed, and the most obvious solution was to create a gentle slope which would be most esthetically pleasing. In order to carry the slope to its intersection with the current grade, fill material was taken on" plaintiffs' adjacent lot. After plaintiffs protested this unauthorized re-grading of their property, defendant again entered their property and removed the fill defendant had placed, as well as fill plaintiffs had previously placed on the lot. In both cases, by defendant's own admission, he entered plaintiffs' property intentionally.

McKelvie v Mt Clemens, 193 Mich App 81, 86; 483 NW2d 442 (1992). An award of attorney fees and costs is reviewed for abuse of discretion. *Auto Club Ins Ass'n v State Farm Ins Cos*, 221 Mich App 154, 167; 561 NW2d 445 (1997).

On November 4, 2002, plaintiffs moved for voluntary dismissal of all remaining claims, with each party to bear its own fees and costs. Defendant responded with a request that plaintiffs be ordered to pay some portion of defendant's costs. The court granted plaintiffs' motion for voluntary dismissal "upon the condition that Plaintiffs pay unto Defendant any taxable costs and a reasonable attorney fee, which Plaintiffs may consent to in the amount of $2,000.00 or demand a bill of costs."

Under MCR 2.504(A)(2), an action may be dismissed "by order of the court, on terms and conditions the court deems proper." However, "[t]he final choice whether to accept the conditions imposed by the trial court lies with the plaintiff." *Mleczko v Stan's Trucking*, 193 Mich App 154, 156; 484 NW2d 5 (1992). Thus, "a party seeking a voluntary dismissal must be given a choice to either proceed to trial or accept a dismissal on the terms and conditions established by the trial court." *McKelvie*, *supra*, 193 Mich App 84. Here, the court granted the dismissal and ruled that plaintiffs must pay defendant $2,000 in fees and costs. The court further increased the fee by $1,500 in its order dated March 10, 2003, which cited no authority or factual basis for the increase. This was all done without first determining whether this was an acceptable condition. The court's orders as to fees and costs are vacated and the matter is remanded to give plaintiffs an opportunity to decide if the court's conditions are acceptable.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ David H. Sawyer
/s/ Jane E. Markey