

STATE OF MICHIGAN
COURT OF APPEALS

MESQUITE, INC., and HAMILTON FAMILY
LIMITED PARTNERSHIP,

UNPUBLISHED
September 23, 2008

Plaintiffs-Appellants,

v

CITY OF SOUTHGATE,

No. 278209
Wayne Circuit Court
LC No. 06-632904-AW

Defendant-Appellee.

Before: Schuette, P.J., and Zahra and Owens, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court order dismissing this case following the denial of their petition for a writ of mandamus. We affirm. We decide this appeal without oral argument under MCR 7.214(E).

As an initial matter, we note that plaintiffs sought the wrong remedy. Under MCR 3.302(C), a superintending control order replaces the writ of mandamus when directed to a lower court or tribunal. Accordingly, plaintiffs should have sought an order of superintending control rather than a writ of mandamus. See *Choe v Flint Charter Twp*, 240 Mich App 662, 667; 615 NW2d 739 (2000). However, the outcome is not affected by the label attached to the complaint because the legal rules governing superintending control mirror those governing mandamus. See *English Gardens Condominium, LLC v Howell Twp*, 273 Mich App 69, 73 n 1; 729 NW2d 242 (2006), rev'd in part on other grounds 480 Mich 962 (2007).

A trial court's decision to grant or deny an order of superintending control is reviewed for an abuse of discretion. *In re Goehring*, 184 Mich App 360, 366; 457 NW2d 375 (1990). An abuse of discretion occurs when the trial court's decision falls outside the range of "reasonable and principled outcome[s]." *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Superintending control is an extraordinary remedy that the court may invoke only when the plaintiff has no legal recourse and demonstrates that the defendant has failed to perform a clear legal duty. *In re Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993). Superintending control may not be used to review an exercise of discretion. *Wayne Co Prosecutor v Recorder's Court Judge*, 156 Mich App 270, 274; 401

NW2d 34 (1986). The plaintiff bears the burden of demonstrating entitlement to an order of superintending control. *In re Gosnell*, 234 Mich App 326, 342; 594 NW2d 90 (1999).

Plaintiffs requested that the trial court issue an order directing defendant to approve their requests for a “topless activity” permit and an “entertainment with dressing rooms” permit. We find no error requiring reversal because plaintiffs have not established that defendant failed to perform a clear legal duty or that they had no other legal recourse.

Plaintiffs rely on MCL 436.1916. However, nothing in the statutory text requires defendant to grant plaintiffs the permits that they seek. On the contrary, MCL 436.1916(4) states that “[t]he commission *may* issue to an on-premises licensee a combination dance-entertainment permit or topless activity-entertainment permit after application requesting a permit for both types of activities” (emphasis added). Unlike the word “shall,” which indicates a mandatory provision, the word “may” designates discretion. *Old Kent Bank v Kal Kustom Enterprises*, 255 Mich App 524, 532; 660 NW2d 384 (2003).

Plaintiffs assert that defendant manufactured an objection to the issuance of the entertainment and topless activity permits “based on a purported unspecified ordinance.” The minutes of the city council meeting reveal that plaintiffs’ permit request was denied on the basis of “noncompliance with zoning requirements.” While the minutes of the city council meeting do not specify any specific ordinance, they do state that there was discussion regarding plaintiffs’ permit request and “[i]t was stressed that rezoning or a variance would be necessary to allow this activity at the requested location.” There is nothing in the record indicating that defendant refused to disclose the citation of the pertinent ordinance to plaintiffs.

Further, defendant stated the following affirmative defense: “Plaintiff’s proposed use of the subject property is contrary to the applicable zoning regulations of the City of Southgate, including, but not limited to Section 1298.06(f).” To demonstrate entitlement to the extraordinary relief of a trial court order directing defendant to issue the permits, plaintiffs had the burden of showing that § 1298.06(f) of defendant’s zoning ordinance was not applicable. Plaintiffs failed to even address the provision in their brief; therefore, they have not shown that it is irrelevant to their permit request. Accordingly, plaintiffs have not established that they have a clear legal right to issuance of the permits.

Moreover, an order of superintending control is not warranted because plaintiffs concede that they have failed to pursue their other remedies. Superintending control should not be sought when another adequate remedy is available to the party seeking the order. MCR 3.302(B). Plaintiffs admit that they abandoned their application for rezoning after learning that defendant’s city council also functions as its board of zoning appeals. Plaintiffs assert that, under the circumstances, an application for rezoning would have been futile. However, futility will not be presumed. To invoke the exception to the requirement of exhaustion of administrative remedies, “‘it must be “clear that an appeal to an administrative board is an exercise in futility and nothing more than a formal step on the way to the courthouse.”’” *L & L Wine & Liquor Corp v Liquor Control Comm*, 274 Mich App 354, 358; 733 NW2d 107 (2007) (citations omitted). Here, the fact that defendant’s city council denied plaintiffs’ permit application on the basis of noncompliance with zoning requirements establishes neither animus to plaintiffs nor that the city council would fail to fairly evaluate plaintiffs’ rezoning request under the appropriate legal standard.

In sum, the trial court did not abuse its discretion in denying plaintiffs' request for an order directing defendant to approve their requests for a "topless activity" permit and an "entertainment with dressing rooms" permit.

Affirmed.

/s/ Bill Schuette
/s/ Brian K. Zahra
/s/ Donald S. Owens