STATE OF MICHIGAN

COURT OF APPEALS

CITY OF MACKINAC ISLAND, Plaintiff-Appellee,	UNPUBLISHED October 22, 2009
v	No. 289059 Mackinac Circuit Court
LEONARD E. WEBSTER and SUSAN WEBSTER, Defendants-Appellants.	LC No. 2006-006281-CH

Before: Hoekstra, P.J., and Bandstra and Servitto, JJ.

PER CURIAM.

Defendants appeal as of right a circuit court order granting plaintiff's motion to abate a nuisance, and requiring defendants to abate the nuisance in accordance with plaintiff's requested relief. We affirm.

In 1993, defendants purchased a vacant parcel of land on Mackinac Island. Defendants purchased the land with the intent to construct a single-family home. In 1999, defendants obtained the required zoning and building permits necessary to construct their home. Defendants began construction, and, by 2001, they had excavated and poured a concrete foundation with walls extending 3 to 4 feet above grade, and had installed a septic pit. In 2003, at plaintiff's insistence, defendants had an eight-foot fence constructed to enclose the foundation work. However, due primarily to financial difficulties, defendants have been unable to complete any additional construction on the property and, thus, their home remains unfinished.

Defendants first argue that the circuit court erred by holding that the unfinished structure on their property constituted blight and a nuisance. We decline to address the merits of this argument because our review of the record shows that defendants conceded this point below. Plaintiff's complaint alleged that the unfinished structure on defendants' property constituted blight and a nuisance. MCR 2.108(A)(1) states that "[a] defendant must serve and file an answer or take other action permitted by law or these rules within 21 days after being served with the summons and a copy of the complaint . . . ." Allegations in a complaint, "other than allegations of the amount of damage or the nature of the relief demanded, are admitted if not denied in the responsive pleading." MCR 2.110(B); MCR 2.111(E)(1). Defendants failed to file a responsive pleading or take any other action permitted by law to respond to plaintiff's allegations. For that reason, it is deemed admitted that the condition on defendants' property constituted a blight and nuisance. MCR 2.111(E)(1).

Additionally, plaintiff obtained an entry of default based on defendants' failure to file a responsive pleading. Defendants never moved to set aside the entry of default. Accordingly, defendants' were not permitted below to contest the issue of whether the condition on their property constituted blight and a nuisance. MCR 2.603(A)(3).

Furthermore, the record reflects that defendants and their counsel conceded below that the unfinished structure on their property constituted blight and a nuisance. It is well settled that a party cannot take a position on appeal that is inconsistent with the position it argued or acquiesced to in the trial court. See e.g., *Blazer Foods, Inc v Restaurant Properties, Inc*, 259 Mich App 241, 252; 673 NW2d 805 (2003).

Defendants also argue that the circuit court erred when it ordered defendants to abate the nuisance in accordance with the relief plaintiff requested. We disagree. Nuisance-abatement proceedings are generally equitable in nature, and, accordingly, this Court's review is de novo. *Capitol Properties v 1247 Center St*, 283 Mich App 422, 430; 770 NW2d 105 (2009).

Courts have broad equitable authority to abate a nuisance. *Ypsilanti Twp v Kircher*, 281 Mich App 251, 275-276; 761 NW2d 761 (2008). Here, in its order to abate the nuisance, the circuit court ordered that defendants:

> 1. Remove any and all structures or portions thereof which extend beyond the natural grade of the property.
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> 2. Remove any and all unnatural accumulations of soil, sand, gravel, rock or other material extending above natural grade of the property.
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> 3. Remove any and all building materials, rubbish or debris from the property.
>
> 4. Restore vegetative cover to the lot.

Defendants argue that the specific abatement ordered by the circuit court is a drastic and punitive measure and should not have been ordered because there were less drastic forms of abatement available. Specifically, defendants argue that, because the court-ordered abatement would require the complete destruction of the unfinished structure, the court abused its discretion when it failed to consider and impose an alternative form of abatement. Defendants correctly argue that, as a matter of policy, courts in abatement-nuisance proceedings should tailor a remedy that is no greater than necessary to abate the nuisance. *Eyde Bros Dev Co v Roscomon Co Bd of Rd Comm'rs*, 161 Mich App 654, 670; 411 NW2d 814 (1987), abrogated in part on other grounds by *Kraus v Gerrish Twp*, 205 Mich App 25; 517 NW2d 756 (1994). However, defendants unconvincingly argue that the remedy ordered was inappropriate and that the circuit court failed to consider less drastic measures. Other than defendants' own self-serving statement, they failed to present any evidence that the court-ordered remedy would completely destroy the unfinished basement structure. Also, partial removal and filling in of an unfinished structure, which had been in an unfinished state for nine years and in violation of plaintiff's zoning ordinances for most of that time, was not too drastic a remedy where defendants were repeatedly given opportunities to obtain financing so that they could remedy the blight, but did not do so. And, by all accounts, defendants would not be able to obtain financing in the

foreseeable future. Thus, absent the court-ordered remedy, the unfinished structure on their property would remain indefinitely.

Moreover, defendants' argument that the circuit court failed to consider less drastic measures to abate the nuisance is disingenuous. Before the circuit court issued its order requiring specific abatement, it gave defendants numerous opportunities to alleviate the blighted condition on their property by finishing construction. Even after the circuit court indicated its intent to issue an order requiring defendants to abate the blighted condition on their property, the circuit court gave defendants another opportunity to offer the court an alternative way to abate the blight other than that eventually ordered. The record also reflects that the circuit court specifically addressed the reasonableness of defendants' alternative proposal. Based on the record, we also find unconvincing defendants' argument that the remedy imposed was punitive in nature. For these reasons, defendants' argument that the circuit court issued a punitive remedy and failed to consider alternative remedies before issuing its order for specific abatement lacks merit.

Nevertheless, defendants allege that the only remedy the circuit court might have properly ordered is the one they proffered to the court. However, defendants' argument is based on the misconception that, if they performed some act that caused the unfinished structure to look like land in its natural state, that would remedy the nuisance. What defendants fail to acknowledge is that their proposed remedy would not provide plaintiff with sufficient relief because the structure, after defendants' proposed remedial measures were completed, would still violate plaintiff's ordinances.

We affirm. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Richard A. Bandstra
/s/ Deborah A. Servitto