STATE OF MICHIGAN

COURT OF APPEALS

KAWKAWLIN TOWNSHIP,

Plaintiff,

and

JEFF KUSCH and PATTIE KUSCH,

Intervening Plaintiffs-Appellants,

v

JAN SALLMEN and RICK SALLMEN,

Defendants-Appellees.

UNPUBLISHED
June 22, 2010

No. 290639
Bay Circuit Court
LC No. 07-003447-CE

Before: MURRAY, P.J., and SAAD and M. J. KELLY, JJ.

PER CURIAM.

In this suit to enforce a zoning ordinance, intervening plaintiffs Jeff and Pattie Kusch (the Kuschs) appeal as of right the trial court's opinion and order granting summary disposition in favor of defendants Jan and Rick Sallmen (the Sallmens) and refusing to enjoin the Sallmens' nonconforming use of their property. Because we conclude that there were questions of fact that precluded application of the doctrine of equitable estoppel, we reverse and remand for further proceedings.

I. BASIC FACTS AND PROCEDURAL HISTORY

In 2007, the Sallmens hired a contractor to construct a two-story three seasons addition to their home. The contractor prepared an application for a building permit, which he submitted to plaintiff Kawkawlin Township. On the drawing submitted with the application for a building permit, the contractor indicated that the new addition would be located 7 feet from the line of the fence between the Sallmens' house and the Kuschs' house to the south. He also showed that the addition would occupy the same space as an existing 12-foot by 12-foot deck. The drawing did not state whether the fence was on the property line and did not otherwise indicate where the property line was located. Under the applicable zoning ordinance, the Township required at least 10 feet of clearance between the side property line and any structures on the property. The Township accepted payment from the contractor for the permit application and apparently later approved the application.

In April 2007, the contractor began work on the addition. At some point during the construction, the Kuschs became concerned that the Sallmens addition violated the side setback requirements. For that reason, Pattie Kusch filed a formal complaint with the Township regarding the Sallmens' failure to adhere to the set back requirement.

Jeff Kusch averred that, in the summer of 2000, the Sallmens approached him about building a deck and he advised them about the 10-foot setback requirement. He stated that he helped them measure the distance so that the deck could be built in conformity with the requirement. He also indicated that the Sallmens built the deck with the required 10 feet between the edge of the deck and the side lot line. The Sallmens did not, however, approach him about the new three seasons addition. He stated that the new addition had a considerably larger "footprint" than the deck and that it encroached on the 10-foot setback by at least two and one-half feet.

On April 25, 2007, Jan Sallmen requested a variance to the 10-foot setback required under the ordinance. The Township's zoning board of appeals held a hearing on the request on May 10, 2007, which it denied.

In June 2007, the Township sued the Sallmens. In its compliant, the Township alleged that the Sallmens' addition violated the 10-foot setback requirement under the Township's zoning ordinance. The Township asked the trial court to determine that the addition violates the setback requirement and, for that reason, is a nuisance per se. The Township also asked the trial court to order the Sallmens to abate the nuisance by removing the encroachment.

On February 12, 2008, the trial court held a status conference. After the status conference, the trial court entered an order staying the Township's suit to enforce the ordinance. The court noted that the Sallmens' appeal of the Zoning Board's decision to deny the Sallmens' request for a variance was currently pending before it and determined that the Township's suit should be stayed pending resolution of that appeal.

In May 2008, the trial court determined that it did not have a sufficient record to review the Sallmens' appeal of the Zoning Board's decision to deny the Sallmens' request for a variance. For that reason, it ordered the Zoning Board to hold a new hearing on the matter to create a more complete record. The Zoning Board held the new hearing on July 21, 2008, which was transcribed by a court reporter. At the conclusion of the hearing, the Zoning Board again denied the Sallmens' request for a variance.

In September 2008, the Sallmens moved for a permanent injunction. In their motion, the Sallmens alleged that, in constructing their three seasons room, they relied on the Township's approval of their application for a building permit, building inspections, and conversations with Township personnel. The Sallmens also alleged that no Township personnel informed them that the project violated the side setback ordinance and no one ordered them to stop building the addition, which ultimately cost $35,000. The Sallmens argued that the Township should be estopped from enforcing the ordinance under these facts and asked the trial court to enjoin the Township from enforcing its ordinance with regard to the addition. In support of their motion, the Sallmens relied on the evidentiary record supplied to the trial court in the Sallmens' appeal of the zoning board of appeal's decision to deny the Sallmens' request for a variance.

On October 27, 2008, the trial court ordered the stay lifted and scheduled a hearing on the Sallmens' motion for a permanent injunction. On February 10, 2009, the trial court heard arguments on both the Sallmens' appeal from the Zoning Board's decision to deny the Sallmens' request for a variance and on the Sallmens' motion for a permanent injunction in this case.

The trial court granted leave to Jeff and Pattie Kusch to intervene as plaintiffs in this case on February 12, 2009. In its order, the trial court stated that the Kuschs would not need to file a separate complaint and that all references to plaintiff in the previously filed pleadings shall be deemed to include them as intervening plaintiffs. The trial court also issued its opinion and order concerning the Sallmens' motion for an injunction on the same day.

In its opinion, the trial court determined that the Sallmens' motion for a permanent injunction was, in effect, a motion for summary disposition under MCR 2.116(C)(10) founded on the affirmative defense of estoppel.[1] On the basis of both the record in the present case and the record developed in the case involving the Sallmens' appeal from the Zoning Board's decision, the trial court determined that the evidence established that the Sallmens relied on the Township's permit in good faith and substantially completed the addition before any notification that the addition violated the ordinance. Because this evidence constituted "exceptional circumstances" that precluded enforcement of the ordinance under the doctrine of equitable estoppel, the trial court determined that the Sallmens' had obtained a "vested non-conforming use as it relates to the side lot setback." Accordingly, the trial court dismissed the Township and Kuschs' complaint with prejudice.

This appeal followed.

II. SUMMARY DISPOSITION

A. STANDARDS OF REVIEW

This Court reviews de novo a trial court's decision on a motion for summary disposition. *Barnard Mfg Co, Inc. v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009). This Court also reviews de novo the proper scope and application of equitable principles. *McDonald v Farm Bureau Ins Co*, 480 Mich 191, 197; 747 NW2d 811 (2008).

B. ZONING ENFORCEMENT AND EQUITABLE ESTOPPEL

On appeal, we must determine whether the trial court properly granted the Sallmens' motion for summary disposition. A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Dressel v Ameribank*, 468 Mich 557, 561; 664 NW2d 151 (2003).

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[1] At the hearing held on February 10, 2009, the trial court noted that the Sallmens had not filed a counter-complaint seeking a permanent injunction and that the motion for a permanent injunction was, procedurally speaking, really a motion for summary disposition under MCR 2.116(C)(10). In response, the Sallmens' counsel agreed that it was "realistically a (C)(10) motion . . . ."

Summary disposition is appropriate under MCR 2.116(C)(10) when there is "no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." Thus, in the present case, we must determine whether the trial court correctly determined that there was no genuine issue as to any material fact such that the Township's request for an injunction was barred as a matter of law on grounds of equitable estoppel.

In *Fass v Highland Park*, 326 Mich 19; 39 NW2d 336 (1949), our Supreme Court examined whether a municipality could be estopped from enforcing its zoning ordinance where the business relied on the municipality's issuance of a building permit in good faith. In that case, the plaintiffs applied for a permit to construct a building for the sale at retail of dressed and live poultry. *Id.* at 25. Highland Park's zoning board advised the city engineer that the use was permitted under the ordinances as long as the poultry was not killed on site. In accordance with that opinion, the city engineer issued a building permit and the plaintiffs built the building at a cost of $18,000. *Id.* The city later determined that the ordinance did not permit the sale of live poultry in that area and, for that reason, the city refused to issue plaintiffs a license to sell live poultry. *Id.* at 21. The plaintiffs then sued Highland Park and asked the trial court on grounds of equitable estoppel to restrain the city from interfering with their business and order the issuance of a license to sell live poultry. *Id.* at 21-22.

On appeal, our Supreme Court had to determine "whether defendants are estopped to enforce the ordinance as properly construed because of the erroneous opinion of certain administrative officials of the city in prior years." *Id.* at 27. The Court determined that the improper issuance of a building permit and licenses did not preclude the city from enforcing its zoning ordinance:

> At the time such acts were performed plaintiffs were charged with knowledge of the restrictive provisions of the ordinance as applied to property in a "B2" district. Such acts being unauthorized and in express contravention of ordinance provisions of the city, plaintiffs acquired no vested right to use their property for a purpose forbidden by law. [*Id.* at 31.]

In determining that equitable estoppel did not apply, the Court noted that there was no claim that the plaintiffs could not use the building or equipment they purchased for a permissible business purpose; rather, the sole question was whether the plaintiffs had a right to sell live poultry, which they did not have. *Id.*

Approximately 15 years after its decision in *Fass*, our Supreme Court again addressed whether a municipality could be estopped from enforcing its zoning ordinance. In *Pittsfield Township v Malcolm*, 375 Mich 135, 137; 134 NW2d 166 (1965), the township sought to enjoin the defendants from operating a kennel on their property. Prior to building the kennel, the defendants obtained a letter from the township supervisor asserting that the applicable zoning ordinance permitted a kennel. *Id.* In addition, the defendants applied for and received a permit to build the kennel, which they eventually completed at a cost of $45,000. *Id.* The defendants then operated the kennel for more than ten months before the township sought to enjoin that use. *Id.*

On appeal, the Court had to determine whether the township could be precluded from enforcing its zoning ordinance on equitable grounds. *Id.* at 138-144. The Court first examined the decision in *Fass* and agreed that the decision there clearly enunciated a general principle of nonestoppel. *Id.* at 146. However, the Court noted that the opinion in *Fass* also "expressed undoubted awareness of an exceptional circumstance which could militate against application of the rule." *Id.* at 146-147. The Court then turned to foreign authorities that had recognized that "under exceptional circumstances a municipality may be estopped from enforcing a zoning regulation where municipal authorities had previously issued a permit later found to be contrary to zoning law." *Id.* at 147. After surveying the foreign authorities, the Court determined that the exceptional circumstances in the case before it "require [that] an exception be made to the general rule." *Id.* at 148.

In examining the issue, the Court noted that there was no one factor that was itself decisive; rather, it viewed the "entire circumstances" together and concluded that there were "compelling reasons why equity should refuse plaintiff's request for injunction." *Id.* Specifically, the Court found it noteworthy that there was no evidence that the defendants had acted in bad faith and that the locality had adequate notice of the proposed construction. *Id.* The Court also noted that the building cost $45,000 and was of such a specialized type that it was doubtful that it could be used for any other purpose. Finally, the Court cited the 10-month delay in seeking to enjoin the use. *Id.* Under these facts, the Court concluded that it would be "contrary to equity and good conscience" to grant the township's request for an injunction. *Id.* Since the decision in *Pittsfield*, Michigan courts have recognized that a municipality may, under exceptional cases, be equitably estopped from enforcing its zoning ordinances. See *Mazo v Detroit*, 9 Mich App 354, 360-361; 156 NW2d 155 (1968) (distinguishing *Pittsfield* and concluding that equitable estoppel did not apply); *City of Center Line v Metropolitan Renewal Corp*, 15 Mich App 545, 546; 166 NW2d 824 (1969) (stating that the case before it did not involve the type of exceptional circumstances that would warrant estoppel); *Grand Haven v Brummel*, 87 Mich App 442, 445-446; 274 NW2d 814 (1978) (stating that the decision in *Pittsfield* stands for the proposition that a court will not grant an injunction that will work an injustice and concluding that the township was not entitled to an injunction under the facts of the case). Accordingly, the Sallmens would be entitled to summary disposition in their favor if there were no genuine issue as to any material fact that equitable estoppel applies to the Township's requested for an order of abatement.

C. ANALYSIS

In support of their motion, the Sallmens cited the record from the hearing conducted by the Zoning Board after the trial court ordered a new hearing to develop the record. On appeal, the Kuschs argue that the trial court erred to the extent that it utilized that record in deciding the motion for summary disposition. Specifically, the Kuschs contend that the trial court could not rely on the statements made in the transcript from that hearing because, unlike a deposition or affidavit, the persons making the statements were not sworn. We decline to address whether the transcript or exhibits from the hearing on the variance request could properly be considered by

the trial court as "other documentary evidence" under MCR 2.116(G)(2).[2] Even assuming that the trial court could properly consider the statements related in the transcript, the statements do not establish that the Sallmens were entitled to judgment as a matter of law. See MCR 2.116(C)(10). Therefore, the Sallmens are entitled to relief without regard to whether the trial court could properly consider that evidence.

There was evidence to support the trial court's conclusion that the Township and Kuschs should be equitably estopped from enforcing the setback requirement. The Sallmens' application for a building permit suggests that the Sallmens applied for the permit in an honest belief that they could properly construct the three seasons room on the same area as their current deck. Moreover, there was evidence that the Township issued the Sallmens' a building permit. Richard Sabias, who was the Township's inspector, stated at the zoning hearing that an approved application for a permit was the official building permit. He also stated that he was sure that the Sallmens had a permit because one was placed in his box and he conducted the inspections of the building site. Finally, there was evidence that, after Pattie Kusch complained to the Township, Sabias inspected the construction site again and determined that the construction was consistent with the permit. All this evidence demonstrates that the Sallmens proceeded in good faith and relied on the Township's issuance of a building permit and inspections in proceeding with their construction project.

There was also evidence that the reliance led to the expenditure of more than $30,000 on the improvement and that the Sallmens could not come into compliance by simply changing their use of the property. Rather, because the zoning regulation at issue is a setback requirement, the only remedy would be to remove a significant portion or all of the addition. Given good faith reliance, the expenses already incurred, and the extreme nature of the proposed remedy, the trial court could properly apply equitable estoppel. However, there is also evidence that the Sallmens might not have proceeded in good faith.

At the zoning hearing, Pattie Kusch stated that the new addition does not occupy the same footprint as the Sallmens' previous deck. She also read into the record a letter wherein she stated that the Sallmens had always discussed improvement projects with her and her husband, but for some reason did not do so with this project. She also related that she told the Sallmens' contractor during construction that she and her husband were protesting the addition and that he might want to hold up until the dispute was resolved, but that he refused. Jeff Kusch averred that the Sallmens consulted with him in the past prior to constructing their deck and that, at that time, he told the Sallmens about the ten-foot setback requirement and even helped them measure the distance for the proposed deck. Viewing this evidence in the light most favorable to the

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[2] The court rules specifically require the parties to submit affidavits, depositions, admissions, and other documentary evidence in support of a motion for summary disposition under MCR 2.116(C)(10). See MCR 2.116(G)(3). However, the submissions must be substantively admissible. *Barnard Mfg*, 285 Mich App at 373. And, even if the transcript at issue constituted "other documentary evidence" and was admissible as a record of regularly conducted activity or public record, see MRE 803(6)(8), the statements within the transcript would also have to be admissible in order to be properly considered by the trial court.

Sallmens, see *Dressel*, 468 Mich at 561, a reasonable finder of fact could conclude that the Sallmens knew that their proposed addition violated the zoning ordinance and that they proceeded in defiance of the ordinance. Indeed, one might plausibly conclude that the Sallmens proceeded to request a building permit with this knowledge in the hopes that the permit would be issued without objection and that they could, in this way, construct their addition without the need to procure a variance. If the finder of fact were to so find, this finding would militate strongly against the use of equitable estoppel to insulate the Sallmens from the enforcement of the setback requirement. See, e.g., *Pittsfield*, 375 Mich at 148; see also *Johnson Family Ltd Partnership v White Pine Wireless, LLC*, 281 Mich App 364, 394; 761 NW2d 353 (2008) (refusing to insulate a party against an injunction on equitable grounds because the party proceeded with full knowledge of the potential for an adverse result and "should not now be heard to complain about the result.").

Because there was a question of fact as to whether the Sallmens acted in good faith, the trial court erred when it granted the Sallmens motion for summary disposition.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. As the prevailing parties, the Kuschs may tax costs. MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Henry William Saad
/s/ Michael J. Kelly