STATE OF MICHIGAN

COURT OF APPEALS

SUZETTE GRUCZ, Plaintiff-Appellant,	UNPUBLISHED June 26, 2012
v	No. 302860 Macomb Circuit Court
CITY OF NEW BALTIMORE, Defendant-Appellee.	LC No. 2010-003303-CZ

Before: K. F. KELLY, P.J., and SAWYER and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right an order granting summary disposition to defendant in this constitutional challenge to a municipal zoning ordinance. We affirm.

I. FACTS AND PROCEDURAL HISTORY

This case arose out of plaintiff's attempt to erect a fence on the lake side of her waterfront property. Defendant prevented her from doing so on the basis of an ordinance prohibiting fences within 30 feet of the water. Plaintiff applied to the Zoning Board of Appeals (ZBA) for a variance, explaining that the fence was necessary to protect herself and her dog and to give her dog adequate exercise. She also provided a signed statement from her neighbors stating that they did not object to her proposed fence. The ZBA nonetheless denied the variance. Plaintiff then commenced the instant action in the circuit court, directly challenging the constitutionality of the ordinance.

Defendant asserted that the ordinance is constitutional and that much of plaintiff's complaint was an impermissible attempt to appeal the ZBA's decision without first exhausting all administrative remedies. Defendant moved for summary disposition, which the trial court denied so that the parties could exchange motions for declaratory relief. Plaintiff filed a motion arguing that the ordinance creates an improper "view easement" on her property, and, therefore, was a taking of her property. She also challenged the constitutionality of the ordinance under the equal protection and due process clauses. Defendant reiterated that the ordinance is presumptively constitutional and that its governmental interests of public safety and aesthetics

were valid. Defendant also moved for summary disposition again, which the lower court granted.[1]

Plaintiff now appeals.

II. STANDARD OF REVIEW

A lower court's ruling regarding the grant or denial of summary disposition is reviewed de novo by this Court. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). We review the entire lower record, including pleadings, admissions and other evidence in the light most favorable to the nonmoving party. *Latham v Barton Malow Co.*, 480 Mich 105, 111; 746 NW2d 868 (2008). If this Court finds that there is no genuine issue of material fact, then the moving party is entitled to judgment. *Id*. Constitutional issues are also reviewed de novo by this Court as a matter of law. *Thomas v Pogats*, 249 Mich App 718, 724; 644 NW2d 59 (2002). Along with these issues, questions of jurisdiction are also reviewed de novo as a matter of law. *Harris v Vernier*, 242 Mich App 306, 309; 617 NW2d 764 (2000).

III. THE NATURE OF PLAINTIFF'S ACTION

Initially, defendant argues that "the circuit court considered and decided plaintiff's claims, in part, as an appeal of the decision of the [ZBA]," and concludes that the circuit court's decision was therefore "rendered pursuant to its appellate jurisdiction" and "not a final appeal of right." Consequently, defendant argues that this Court lacks jurisdiction over the instant appeal. Plaintiff argues that this action is not an appeal of the ZBA's decision or procedure, but is rather a direct constitutional challenge to the ordinance. We agree with plaintiff.

In *Sun Communities v Leroy Twp*, 241 Mich App 665, 672; 617 NW2d 42 (2000), this Court stated that a party is not required to appeal to the circuit court in order to challenge the constitutionality of a zoning ordinance. In *Sun Communities*, the plaintiff challenged the constitutionality of a zoning ordinance when his request to have an area rezoned was denied. This Court held that where "a plaintiff's lawsuit does not involve a challenge to the administrative activities of a municipal body acting in the capacity of a zoning board of appeals" but instead "involves… constitutional challenges to the legislative actions of the township board in applying [a zoning ordinance] to plaintiff's property" then there is no requirement to pursue an appeal. *Id*. See also *Paragon Prop Co v City of Novi*, 452 Mich 568, 580 n15; 550 NW2d 772 (1996) ("a Zoning Board of Appeals decision to grant a variance is [not] relevant to the constitutionality or unconstitutionality of an ordinance's provisions.").

[1] Although both parties cite to the transcript from the hearing at which the second motion for summary disposition was granted, neither has provided this Court with a copy of that transcript. Appellants are required to secure the filing of transcripts. MCR 7.210(B)(1). Generally, this Court will refuse to consider issues for which an appellant fails to produce a transcript. *PT Today, Inc v Comm'r of Office of Financial and Ins Services*, 270 Mich App 110, 151-152; 715 NW2d 398 (2006); *Reed v Reed*, 265 Mich App 131, 160; 693 NW2d 825 (2005).

In *Arthur Land Co, LLC v Otsego County*, 249 Mich App 650, 664-665; 645 NW2d 50 (2002), this Court again confirmed that a direct, facial challenge to the constitutionality of a zoning ordinance is "within the trial court's original, rather than appellate, jurisdiction." In *Arthur Land*, the plaintiff sought rezoning of property in order to construct a gas station. When the request was denied, plaintiff sought injunctive and declaratory relief and argued that the decision was a constitutional violation. When the defendant attempted to argue that the court did not have jurisdiction, this Court affirmed the rule that when zoning actions are taken, they are legislative and, therefore, in the trial court's jurisdiction. *Id*. at 664.

Here, plaintiff's complaint directly attacked the constitutionality of the ordinance itself. Although the complaint did make references to the ZBA hearing, it did not seek a review of the ZBA's decision. Instead, it sought to invalidate the ordinance altogether. Therefore, it was proper for plaintiff to file her complaint as an original action in the circuit court, and this Court has jurisdiction to hear this appeal.

IV. SUMMARY DISPOSITION PRIOR TO DISCOVERY

Plaintiff argues that the trial court abused its discretion when it granted defendant's motion for summary disposition before plaintiff was able to conduct discovery. While it has been held that a grant of summary disposition before discovery is completed is generally premature, a grant of summary disposition will be upheld if it is unlikely that discovery would have supported the nonmoving party. *Liparoto Cons, Inc v General Shale Brick, Inc*, 284 Mich App 25, 33; 772 NW2d 801 (2009).

Plaintiff has not shown anything that would lead this Court to believe that discovery would have led to the detection of factual support for her claim. While Plaintiff has argued that discovery was necessary to determine what public policy argument defendants were claiming, it is apparent from context that plaintiff had no idea what it might find; consequently, this discovery request was a mere, and consequently impermissible, fishing expedition. See, e.g., *Augustine v Allstate Ins Co*, 292 Mich App 408, 419-420; 807 NW2d 77 (2011). Additionally, plaintiff would not have found anything that would have made a real difference to her case in any event. An ordinance is presumptively constitutional and will be found otherwise only if plaintiff can show there are no facts under which the ordinance is rationally related to a legitimate government interest. *Kyser v Township*, 486 Mich 514, 521; 786 NW2d 543 (2010). Consequently, even if plaintiff knew which public policy or policies defendant relied upon internally, she would still have been obligated to show that the ordinance could not have been rationally related to any legitimate government interest.

Plaintiff also argues that discovery would have uncovered the arbitrariness and unreasonableness of defendant's aesthetics and public safety justifications for the ordinance. However, this Court has previously held that both bases are legitimate government interests sufficient to justify zoning ordinances' constitutionality. *Adams Outdoor Advertising, Inc v City of Holland*, 234 Mich App 681, 693; 600 NW2d 339 (1999). Accordingly, the trial court had sufficient information on the record that existed before it to rule on the constitutionality of the ordinance without the need for further discovery.

In essence, plaintiff contends that defendant was obligated to justify its ordinance by affirmatively showing that it has a reasonable governmental interest in the ordinance. However, it is plaintiff who is required to affirmatively prove that defendant does not have a reasonable governmental interest. We agree with the trial court that plaintiff has not articulated how any discovery would have helped her. Indeed, to the extent plaintiff contends that the value of her property was impaired by the operation of the ordinance, she, not defendant, would be the sole possessor of any relevant evidence.

V. PROCEDURAL VIOLATIONS BY DEFENDANT

Plaintiff argues that defendant violated MCR 2.116(G)(1)(a) by filing a motion for summary disposition fewer than 21 days before a hearing was set. Plaintiff appears to be correct: defendant's motion was received by plaintiff 6 days before the hearing was set. Furthermore, the hearing was not set for oral arguments on summary disposition, but rather for oral arguments regarding declaratory relief. Additionally, MCR 2.116(G)(1)(a)(ii) required plaintiff's response to be filed 7 days prior to the hearing, making it impossible for plaintiff to comply. We agree with plaintiff that there appears to have been a clear violation of the court rules.

However, we do not find plaintiff entitled to any relief on this basis, for three reasons. First, as we discuss below, the grant of summary disposition in defendant's favor was substantively proper, and consequently this Court will affirm it despite a violation of the court rules. *Yee v Shiawassee Co Bd of Comm'rs*, 251 Mich App 379, 651 NW2d 756 (2002). Second, it appears that plaintiff raised this procedural issue with the trial court in its filing prior to the hearing for which we lack a transcript. We will not presume that a trial court engaged in any impropriety in the absence of a clear indication to the contrary. Because plaintiff has not provided us a transcript of the hearing, we presume that the trial court addressed the matter and dealt with it appropriately. Third, plaintiff does not articulate any request for relief on this basis insofar as we can determine from her brief on appeal.

VI. CONSTITUTIONAL ARGUMENTS

Plaintiff asserts that the ordinance in question is unconstitutional under the theories of: 1) substantive due process, 2) equal protection, and 3) regulatory taking. We disagree with each of these assertions.

A. SUBSTANTIVE DUE PROCESS

Plaintiff argues that the ordinance violates her substantive due process rights. Therefore, she must show that the ordinance is arbitrary and unreasonable. *Conlin v Scio Twp*, 262 Mich App 379, 390; 686 NW2d 16 (2004). She is also required to negate "every conceivable basis which might support the legislation." *TIG Ins Co v Dep't of Treasury*, 464 Mich 548, 558; 629 NW2d 402 (2001). The ordinance will be upheld under this argument if the ordinance is "rationally related to a legitimate government interest." *Conlin*, 262 Mich App at 389. The ordinance will pass the rational basis test if the legislative judgment behind the ordinance, "is supposed by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable." *Crego v Coleman*, 463 Mich 248, 260; 615 NW2d 218 (2000). Here,

the government advanced two interests to justify the ordinance: community aesthetics and public safety. Both are sufficient to justify the constitutionality of the ordinance.

Plaintiff disputes that aesthetic concerns are a legitimate government interest, but this Court has held otherwise. In *Adams Outdoor Advertising*, 234 Mich App 681, the plaintiff tried to argue that the city's ordinance prohibiting billboards and advertisements was not justified through aesthetic concerns. This Court reversed the decision of the lower court and held that this interest, even standing alone, is enough to justify an ordinance. *Id*. at 693.

Plaintiff also disputes that public safety is a legitimate government interest, at least under the circumstances at bar. Specifically, defendant contends that a fence could hinder emergency personnel from rendering assistance to swimmers and boaters in the lake. Plaintiff argues that defendant has not explained how the fence could do so. However, the ability of emergency personnel to reach a lakefront in an emergency is itself a legitimate government interest. We note that it is a matter of common knowledge that one function of fences is to impede access, so we find that it is rational for defendant to conclude that a fence could, indeed, at least slow down emergency personnel from accessing the lake in an emergency. Plaintiff's concerns about the wisdom of this rationale are misplaced: this Court does not adjudicate the wisdom of zoning ordinances beyond evaluating them for a rational basis. Moreover, the Supreme Court has found that an ordinance restricting multiple residences on lakefront property survived rational basis review because the ordinance was rationally related to the legitimate government purpose of ensuring access for emergency personnel. *Bevan v Brandon Twp*, 438 Mich 385, 399-400; 475 NW2d 37 (1991).

Therefore, plaintiff has failed to show that the ordinance is arbitrary and unreasonable. Consequently, the ordinance is rationally related to legitimate government interests and is not unconstitutional under substantive due process.

B. EQUAL PROTECTION

Plaintiff next argues that the ordinance violates her right to equal protection. US Const Am XIV; Const 1963, art 1 § 6. However, because lakefront property owners are not a protected class, plaintiff's constitutional challenge on equal protection grounds is reviewed using the rational basis test. *Houdek v Centerville Twp*, 276 Mich App 568, 585; 741 NW2d 587 (2007). Therefore, this Court inquires into whether "the enactment's classifications [are] based on natural distinguishing characteristics," have "a reasonable relationship to the object of legislation," and affect all persons of the same class in the same way. *Id*. (internal quotation and citations omitted).

Here, defendant's ordinance only applies to natural distinguishing characteristics of lakefront property. As we have already explained, the ordinance bears a reasonable relationship to the legitimate interests of aesthetics and public safety. The minutes of the ZBA hearing regarding plaintiff's variance request indicate that "persons of the same class are included and affected alike." The minutes additionally reflect that another lakefront owner was able to build a fence that complied with the ordinance and another person was forced to remove a tree to comply with it. The ordinance does not single out plaintiff or any other waterfront property owners for special treatment. Plaintiff has not presented any evidence that lakefront property

owners are treated differently under the ordinance. Rather, she simply asserts, without support, that the ordinance violates her equal protection rights.

C. REGULATORY TAKING

Finally, plaintiff argues that the ordinance restricting her use of her property constitutes an impermissible taking of private property for public purposes without compensation. US Const Am V; Const 1963, art 10, § 2. We disagree.

Although a taking can also occur when someone's property is overburdened by the government, three factors should be considered when determining whether any such taking has occurred: "(1) the character of the government's action, (2) the economic effect of the regulation on the property, and (3) the extent by which the regulation has interfered with distinct, investment-backed expectations." *Chelsea Inv Group LLC v Chelsea*, 288 Mich App 239, 261; 792 NW2d 781 (2010); see also *Penn Central Transportation Co v City of New York*, 438 US 104, 124; 98 S Ct 2646; 57 L Ed 2d 631 (1978). The first factor evaluates whether a plaintiff is being singled out or whether an ordinance applies broadly and equally, and the second factor evaluates the value removed from the property and compares it to the value remaining. *Id*. Mere diminution in value is not enough to establish a taking. *Id*.

As discussed, all lakefront property owners are treated identically under the ordinance. Plaintiff made some rough statistical calculations as to her alleged loss, but she has provided no substantiation, no evidence of the value of her property, nor any evidence of her tax burden. Even if her calculations are correct, she has not shown that they amount to more than a "mere reduction in the value of regulated property." See *Chelsea*, 288 Mich App at 262. Finally, plaintiff has not shown that she made any investments in the property that were subsequently lost because of the ordinance. This Court, when looking at this factor, has held that "a key factor is notice of the applicable regulatory regime." *K & K Constr, Inc v Dep't of Environmental Quality*, 267 Mich App 523, 555; 705 NW2d 365 (2005). Plaintiff knew about the ordinance and did not even begin to build the fence because of it. Plaintiff therefore fails to establish a regulatory taking.

VII. CONCLUSION

Plaintiff correctly brought this suit to the lower court and appealed to this Court, and the lower court's grant of summary disposition was proper. Zoning ordinances "'come[] to us clothed with every presumption of validity.'" *Adams*, 234 Mich App at 692 (internal citations omitted). Plaintiff has failed to overcome that presumption.

Affirmed.

/s/ Kirsten Frank Kelly
/s/ David H. Sawyer
/s/ Amy Ronayne Krause