

STATE OF MICHIGAN
COURT OF APPEALS

VAL JERSEVIC,

Plaintiff-Appellant,

v

DISTRICT HEALTH DEPARTMENT NO. 2, and
DOUGLAS W. GETTY,

Defendants-Appellees.

UNPUBLISHED
March 27, 2012

No. 306659
Iosco Circuit Court
LC No. 10-005860-CZ

Before: M. J. KELLY, P.J., and WILDER and SHAPIRO, JJ.

PER CURIAM.

In this suit to compel defendants District Health Department No. 2 (the Department) and Douglas W. Getty to disclose the identity of an informant, plaintiff Val Jersevic appeals by right the trial court's order of no cause of action. Because we conclude that there were no errors warranting relief, we affirm.

I. FACTS

Jersevic owns a restaurant with a bar in Tawas City known as The Bait Shop Bar & Food. In May 2010, a patron witnessed other patrons smoking at the end of the bar in violation of the ban on smoking in restaurants and bars. The witness approached an employee about the violation, but the bar's management took no action. The witness left and called in a complaint to the Department. The Department then contacted Jersevic about the allegations and asked him to re-educate his staff about the ban on smoking. Jersevic agreed and the Department closed the matter.

Jersevic then submitted a request under the Freedom of Information Act (FOIA), see MCL 15.231 *et seq.*, to the Department. He asked the Department to turn over all information relating to the smoking complaint. The Department provided Jersevic with a copy of the complaint, but redacted the informant's name, telephone number, and some facts that could reveal the informant's identity. Jersevic then sued the Department in an effort to obtain an unredacted copy of the complaint. The Department responded by filing an affirmative defense asserting that the informant was a confidential source; as such, it maintained, it was exempt from disclosing the informant's identity. In support of its defense, the Department alleged that it had a policy to treat all informants as confidential in order to prevent a chilling effect with regard to individuals coming forward to report violations.

Prior to trial, both parties moved for summary disposition. The trial court held a hearing on the motion and concluded that the Department's policy was insufficient to establish that a source was confidential; instead, it determined that the confidential status of the source must be determined from the informant's perception. The trial court also determined that there was a question of fact as to whether the informant wanted his or her identity to remain confidential. As such, the trial court denied both motions.

During opening statements at trial, Jersevic argued that the Department had only pleaded that the informant was a confidential source under its policy, and not due to the subjective belief of the informant. For that reason, Jersevic argued that the Department should be estopped from asserting a subjective belief theory at trial. In response, the Department offered to amend the pleadings, but the trial court simply proceeded with the trial.

The trial court heard the testimony of Alicia Dosh, who took the informant's complaint. Dosh testified that the informant had expressed the desire to remain anonymous prior to turning over any contact information. The trial court also took the opportunity to conduct an *in camera* examination of the informant via telephone. After concluding its examination and listening to closing arguments, the trial court issued an oral opinion in the Department's favor. In support of its ruling the trial court stated that the evidence showed that the informant had an express understanding of confidentiality and had specific concerns that Jersevic might retaliate. Accordingly, the trial court entered an order of no cause of action. Jersevic then appealed to this Court.

II. STANDARD OF REVIEW

We review de novo a trial court's decision on a motion for summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). We also review de novo a trial court's conclusions of law after a bench trial, but review its findings for clear error. *Chapdelaine v Sochocki*, 247 Mich App 167, 169; 635 NW2d 339 (2001). This Court will defer to the trial court's findings under the clear error standard unless it "is left with the definite and firm conviction that a mistake has been made." *Reed v Reed*, 265 Mich App 131, 150; 693 NW2d 825 (2005). Further, to the extent that a provision in FOIA gives the trial court discretion to act, this court reviews the trial court's exercise of discretion for abuse. *Herald Co, Inc v Eastern Michigan University Board of Regents*, 475 Mich 463, 472; 719 NW2d 19 (2006).

III. ANALYSIS

Jersevic first argues that the trial court erred by denying his motion for summary disposition and allowing the Department to assert a confidential source defense at trial. In order to assert an affirmative defense, the defendant must state the defense in its responsive pleading along with a statement of the facts constituting that defense. MCR 2.111(F)(3) and (3)(a). The failure to assert the defense constitutes a waiver of that defense. MCR 2.111(F)(2); *Kemerko Clawson, LLC v RxIV, Inc*, 269 Mich App 347, 351 n 2; 711 NW2d 801 (2005). Although a laundry list of affirmative defenses is not sufficient to comply with the requirements, see MCR 2.111(F)(3) (requiring that a party asserting an affirmative defense must state each defense under a "separate and distinct heading" and must state the "facts constituting" the defense), neither must the party plead every fact that might conceivably have a bearing on the defense. Rather, it

is sufficient to plead facts that enable the opposing party to take a responsive position. *Stanke v State Farm Mutual Auto Ins Co*, 200 Mich App 307, 317; 503 NW2d 758 (1993) (“[T]he primary function of a pleading in Michigan is to give notice of the nature of the claim or defense sufficient to permit the opposite party to take a responsive position.”). Moreover, the trial court should freely give leave to the parties to amend their pleadings—including their affirmative defenses—as justice so requires. MCR 2.118(A)(2); *Stanke*, 200 Mich App at 321.

Here, the Department pleaded as an affirmative defense that the informant was a confidential source under FOIA and alleged that it had a policy to treat all informants as confidential. Jersevic alleges that the trial court rejected the Department’s affirmative defense at the hearing on the parties’ motions for summary disposition, but then allowed it to assert the defense at trial on a separate factual basis that had not been pleaded and, accordingly, was waived. However, the trial court did not reject the Department’s affirmative defense at the hearing; it merely asserted that the Department had failed to establish that it was entitled to the defense as a matter of law. The trial court went on to determine from other evidentiary submissions that a genuine issue of material fact existed as to whether the defense applied. Specifically, the trial court wished to get Alicia Dosh’s account of the phone call with the informant. Because there was a genuine issue of material fact with regard to the affirmative defense, the trial court correctly denied both motions for summary disposition. Moreover, the trial court’s decision did not prejudice Jersevic because the trial court gave both sides notice of the factual issue to be determined at trial, as well time to conduct discovery. Finally, even if one might reasonably conclude that MCR 2.111(F)(3) limits the party asserting the defense to the specific facts alleged, given the trial court’s rulings, the Department would have been entitled to amend its affirmative defenses to accord with the trial court’s legal determinations. MCR 2.118(A)(2); *Stanke*, 200 Mich App at 321.

Next, Jersevic argues that the trial court clearly erred in finding that the informant was in fact a confidential source. The FOIA allows a public body to exempt confidential sources from disclosure. MCL 15.243(1)(b)(iv). The term “confidential source,” however, is not defined in the statute. During the hearing on the parties’ motions for summary disposition, the trial court held that a confidential source is a source that discloses information to a public body with the understanding that his or her identity will remain confidential. Jersevic did not dispute that standard at trial and does not now dispute it.¹ Rather, Jersevic argues that the trial court’s factual finding was incorrect, and that he was prevented from properly rebutting the evidence that supported the trial court’s decision.

At trial, the court heard testimony from Alicia Dosh, who stated that the informant in this case expressed a desire to remain anonymous. The trial court also conducted an *in camera* interview with the informant that we find corroborates Dosh’s testimony and establishes that the informant held specific fears about retaliation. Based on the standard adopted by the trial court—and to which Jersevic acquiesced—we cannot conclude that the trial court clearly erred in

¹ For that reason, we express no opinion as to whether application of the exception stated under MCL 15.243(1)(b)(iv) depends on the source’s subjective understandings.

finding that the informant was a confidential source. Moreover, we conclude that Jersevic had an adequate opportunity to test the evidence adduced at trial.

For these reasons, we conclude that there were no errors warranting relief.

Affirmed. As the prevailing parties, the Department and Getty may tax their costs. MCR 7.219(A).

/s/ Michael J. Kelly

/s/ Kurtis T. Wilder

/s/ Douglas B. Shapiro