STATE OF MICHIGAN

COURT OF APPEALS

TOWNSHIP OF HOWELL,

Plaintiff-Appellant,

v

TOWNSHIP OF MARION, TOWNSHIP OF OCEOLA, TOWNSHIP OF GENOA, MARION, HOWELL and OCEOLA SEWER and WATER AUTHORITY (SWATH), and LIVINGSTON COUNTY BOARD OF PUBLIC WORKS,

Defendants-Appellees.

UNPUBLISHED
July 28, 2000

No. 214918
Livingston Circuit Court
LC No. 97-015906-CZ

Before: Owens, P.J., and Murphy and White, JJ.

PER CURIAM.

In this appeal as of right, plaintiff challenges the trial court's grant of summary disposition to defendants under MCR 2.116(C)(8) and (10) and the court's decision to award defendants their costs and attorney fees. This case involves plaintiff's request for an injunction to prevent defendants from installing the last one-half mile of water pipeline to complete a joint water supply system shared by all party townships, and plaintiff's request for a declaration that plaintiff is not benefited by that final one-half-mile portion of the water supply pipeline and, therefore, that plaintiff is not obligated to pay for the installation of that portion. We affirm.

Standard of review

We review de novo a decision by the trial court to grant summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(8) "tests the legal sufficiency of the claim on the pleadings alone to determine whether the plaintiff has stated a claim on which relief may be granted. The motion must be granted if no factual development could justify the plaintiff's claim for relief." *Id.* A motion for summary disposition under MCR 2.116(C)(10) "tests the factual support of a plaintiff's claim. The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted

or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial." *Id.*

Entitlement to declaratory relief

Plaintiff first argues that a genuine issue of material fact exists regarding whether plaintiff received a benefit from the last half-mile of the "Howell-Oceola" pipeline (the M-59 line). It was regarding this claim that plaintiff requested declaratory relief. Plaintiff based its request on a provision of the March 1, 1994 general agreement creating the sewer and water pipeline plan that indicated that "[N]o township shall be obligated to pay Costs for a phase of the Project not being installed for the benefit of such Township and each of the Townships shall be responsible to make payments to the County for their part of the Project." Plaintiff contended that (1) the M-59 line ran through land that either belonged to the City of Howell (rather than the township) or that would soon belong to the city, (2) the placement of the M-59 line benefited Marion and Oceola Townships by transporting water between them, but that it would not benefit plaintiff unless it was run further to the north where plaintiff would be able to "hook-up" more of its residents, and (3) the substitution of 12" pipe for the originally specified 16" pipe had the effect of forcing plaintiff to pay for one hundred per cent of the pipeline when it would not receive any (or only a partial) benefit from the line. Plaintiff asked the trial court to conclude that the plaintiff township did not benefit from the uncompleted section of the M-59 line, and thus that plaintiff should not have to pay for it.

Plaintiff's argument is undercut by the testimony of plaintiff's witness, Edward Hubbel, the Howell Township Treasurer, who acknowledged that the disputed portion of the pipeline[1] was located in Howell Township and that it would benefit all of the properties that were being assessed for it. Hubbel further testified that plaintiff had not revoked the general agreement (despite the language of a resolution of April 18, 1997[2]), but instead passed the resolution providing for revocation of the general agreement in order to delay the pipeline construction while plaintiff attempted to obtain an agreement to re-direct the construction to an area farther north of the planned pipeline route. Furthermore, there was testimony that in order for the entire system to function properly, it had to be constructed in a complete loop. The failure to complete the M-59 line prevented the closure of the loop and thus was a detriment to all the parties; therefore, completion of the loop by construction of the last half-mile of the pipeline – over plaintiff's land – benefited plaintiff. Given this testimony, we conclude that the trial court properly found that plaintiff was benefited by the construction of the last one-half mile of the pipeline in Howell Township and therefore was obligated by the agreement to pay the costs of that section of the pipeline.

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[1] According to the record, the uncompleted portion of the pipeline was on the north side of M-59 from just east of Byron Road and continuing east to Oak Grove Road.

[2] According to the trial court's summary, the resolution passed by plaintiff declared that plaintiff "revoke[d] any consent or franchise that may have been granted to construct or operate a water line extending along and within Highway M-59 across Howell Township to the Oceola Township line."

Despite plaintiff's assertion to the contrary, there is no indication in the trial court's ruling that the court relied on MCL 123.744a; MSA 5.570(14),[3] to deny plaintiff declaratory relief. Rather, as explained above, the trial court determined that there was no genuine issue of material fact concerning whether plaintiff was benefited by the pipeline and that, because plaintiff was benefited, it was contractually obligated to pay the costs of installation of the pipeline. Under the plain language of the Common Elements Agreement addendum to the 1994 agreement, plaintiff is obligated to pay the costs of installation for this pipeline because it is a 12" pipeline installed within its boundaries. Plaintiff contends that this length of 12" pipeline was actually "an undersized common element line" that should have been 16" and that the cost should therefore be apportioned among the parties. However, a contract the terms of which are clear must be enforced as written. *Engle v Zurich-American Ins Group (On Remand)*, 230 Mich App 105, 107-108; 583 NW2d 484 (1998). Plaintiff agreed to the specification of 12" pipe for this section of the pipeline[4] and to the Common Elements Agreement; that plaintiff now believes that the contract provision for 12" pipe is disadvantageous is not sufficient reason for this Court to set it aside. Plaintiff is therefore bound by its agreement.

Creation of a franchise

Plaintiff next claims that a genuine issue of material fact exists regarding whether the joint sewer and water authority ("SWATH") that was to operate the water system (as provided for in the 1994 agreement) is a franchise. Plaintiff argues that SWATH is a franchise and that under Const 1963, art 7, §§ 19[5] and 29,[6] plaintiff was entitled to withdraw its consent to the 1994 agreement because the

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[3] MCL 123.744a; MSA 5.570(14) provides:

> All bonds or notes heretofore issued under this act, as amended, are validated. A county acting under this act, as amended, or any municipality, including the county, shall not contest the validity of any such bonds or notes or any contract which provides the security therefore, after they are sold and delivered and the county has received the consideration therefor.

[4] It appears that the original agreement between the parties specified the use of 12" pipe for the entire project. Plaintiff has not provided this Court with any evidence that this specification was later changed to 16" pipe, nor has plaintiff directed this Court to any evidence in the record where the original specification was changed to 16" pipe and then changed back to 12" pipe without plaintiff's knowledge or consent. Plaintiff, of course, "bears the burden of furnishing the reviewing court with a record that verifies the basis of any argument on which reversal or other claim for appellate relief is predicated." *Petraszewsky v Keeth (On Remand)*, 201 Mich App 535, 540; 506 NW2d 890 (1993). Because plaintiff has failed to provide this Court with evidence in support of his claim, and since plaintiff signed each amendment to the original agreement and never protested a change in the size of the water pipe, we conclude that plaintiff agreed to all changes and therefore may not now claim that the installation of 12" pipe was not a benefit to the township.

[5] Const 1963, art 7, § 19 provides:

> No organized township shall grant any public utility franchise which is not subject to revocation at the will of the township, unless the proposition shall first have

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electors in Howell Township never voted to authorize the grant of a franchise to SWATH. Plaintiff therefore asks this Court to conclude that the trial court erred in ruling that Const 1963, art 7, § 19 did not provide plaintiff with the authority to withdraw its consent to the installation of the pipeline in the M-59 right-of-way located within its boundaries. Plaintiff invoked these constitutional provisions below in support of its attempts to secure injunctive relief and prevent the installation of the then-remaining one-half mile of pipeline. The requested injunctive relief was denied and the pipeline was subsequently completed. Because the pipeline is complete, this Court cannot fashion a remedy. Accordingly, the issue is moot. *Contesti v Attorney General,* 164 Mich App 271, 278; 416 NW2d 410 (1987).

Moreover, we conclude that the trial court correctly determined that the grant by plaintiff of a right-of-way for the pipeline was not the grant of a franchise in contravention of the requirement of Const 1963, art 7, § 19 that such a grant must first be approved by a majority of the electors of the township. The contract in this case (the 1994 agreement) provided for the construction of a pipeline that would extend plaintiff's and defendant townships' existing water systems. According to paragraph 1 of the 1994 agreement, in order to comply with Const 1963, art 7, § 29, plaintiff and defendant townships agreed to the extension of the water system across their "streets, highways, alleys, lands, rights-of-way or other public places." In order to accomplish this water system extension in the most efficient and cost-effective manner, plaintiff and defendant townships agreed to have Livingston County issue the bonds to finance the project, undertake the initial payment for the project, and construct the pipeline system under the auspices of its department of public works, and the townships then contracted to repay the County for the costs incurred in the construction. The County would initially own the system and lease it back to the individual townships which in turn would sublease it to the joint operating authority; ultimately, the townships would pay off the construction costs and the system would be turned over to them. The townships were to "be responsible for the operation, maintenance, and administration of the Project through the [joint operating] Authority." The contract thus was entered into in order to join together and extend existing water systems within each participating township, not to create a public utility to operate a water system.

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been approved by a majority of the electors of such township voting thereon at a regular or special election.

[6] Const 1963, art 7, § 29 provides:

> No person, partnership, association or corporation, public or private, operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any county, township, city or village for wires, poles, pipes, tracks, conduits or other utility facilities, without the consent of the duly constituted authority of the county, township, city or village; or to transact local business therein without first obtaining a franchise from the township, city or village. Except as otherwise provided in this constitution the right of all counties, townships, cities and villages to the reasonable control of their highways, streets, alleys and public places is hereby reserved to such local units of government.

With respect to the disputed one-half mile section of the M-59 line, it appears that this entire line was within plaintiff's township boundaries and that it would consist of 12" pipe. Under the terms of the Common Elements Agreement, plaintiff was required to pay for this entire section. Accordingly, we conclude that there was no genuine issue of material fact that the contract did not contravene Const 1963, art 7, §19 because plaintiff did not grant a public utility franchise, but instead contracted to extend its existing water system.

In *Oakland Co Drain Comm'r v Royal Oak*, 306 Mich 124, 145; 10 NW2d 435 (1943), our Supreme Court held that the City of Detroit's grant to Oakland County of the right to construct a connecting sewer under a street within the city limits did not constitute a franchise,

> but was merely a right incidental to the principal purposes of the two contracts between the county and city. To carry out such principal purpose, which was the transmission of the district's sewage to the Detroit treatment plant for final disposition, it was necessary to convey the sewage from the district to the city's Seven Mile road sewer. This connecting sewer in Andover avenue was necessary to enable Oakland county and the city of Detroit to perform and carry out their contracts relative to sewage transmission and disposal.

Similarly, the grant by plaintiff to defendant county of a right-of-way for the water line that was to carry water to both plaintiff and the other townships was merely "a right incidental to the principal purpose" of the contract into which the signatories had entered.

Also, in *Butcher v Township of Grosse Ile*, 24 Mich App 389, 399; 180 NW2d 367 (1970), aff'd in part and reversed in part on other grounds 387 Mich 42; 194 NW2d 845 (1972), this Court held that a drain district that was entirely within the boundaries of the township could be created by resolution of the township directed to the county drain commissioner, and that such a sewer system, though "a public utility in the ordinary sense of the word . . . [was not] such as to require a franchise under the laws of this state." In this case, the only portion of the water system that plaintiff sought to challenge was the one-half mile stretch of the M-59 line that was entirely within the township boundaries.[7] Consenting to a right-of-way entirely within the boundaries of a township for the extension of the township's water system does not constitute the grant of a franchise to a public utility.

Award of costs and attorney fees to defendant county

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[7] Plaintiff asserted, in its pleadings, in the testimony of its witness, Hubbel, and in the arguments made below by its counsel, that it did not desire to repudiate the 1994 general agreement. Instead, it sought to force the other signatories to re-negotiate the agreement on terms that it considered more just and fair in light of what the current township board considered to be changed circumstances. In effect, plaintiff's lawsuit and its resolution that purported to repudiate the contract constituted a threat to the other signatories to render the entire project a nullity unless they submitted to plaintiff's re-negotiation demands.

Plaintiff also argues that the trial court clearly erred when it found that plaintiff's complaint was frivolous for purposes of awarding costs and attorney fees under MCL 600.2591; MSA 27A.2591. We disagree.

On the motion of a party, if the trial court finds that an action or defense was frivolous, the court must award the prevailing party the costs and reasonable attorney fees incurred by the party in connection with the action. MCL 600.2591(1); MSA 27A.2591(1); *Carpenter v Consumers Power Co*, 230 Mich 547, 555-556; 584 NW2d 375 (1998). A claim is frivolous within the meaning of MCL 600.2591(1) when: (1) the party's primary purpose was to harass, embarrass, or injure the prevailing party, or (2) the party had no reasonable basis upon which to believe the underlying facts were true, or (3) the party's legal position was devoid of arguable legal merit. MCL 600.2591(3); MSA 27A.2591(3); *Carpenter, supra*, at 556. "A trial court's finding that a claim is frivolous will not be reversed on appeal unless it is clearly erroneous." *Id*.

For the reasons set forth above, we conclude that the trial court did not clearly err when it determined that plaintiff's declaratory judgment action was devoid of arguable legal merit where plaintiff was contractually obligated to pay the costs of installation for the remaining one-half-mile section of the pipeline. The question then becomes whether the injunctive action was likewise devoid of arguable legal merit. We conclude that it was.

Plaintiff's initial complaint sought to enjoin construction of the "Howell-Oceola Line." At the time the complaint was filed, in excess of eight miles of the line had already been installed. Accordingly, plaintiff's request for relief was moot with regard to this completed portion of the line. *Contesti, supra* at 278.

The only portion of the pipeline that remained to be installed at the time of the filing of the complaint was a one-half mile section that was to be laid in the M-59 right-of-way. Plaintiff's claim for injunctive relief with regard to this portion of the pipeline was devoid of arguable legal merit because plaintiff lacked any authority to revoke its consent to the placement of the pipeline in the right-of-way.

Plaintiff sought to justify its request for injunctive relief, in part, with reliance on Const 1963, art 7, § 19. Plaintiff correctly observes that this constitutional provision authorizes an organized township to revoke a public utility franchise at will unless the franchise has been approved by a majority of the electors of the township voting thereon at a special or regular election. Const 1963, art 7, § 19. Plaintiff incorrectly concludes, however, that the question of whether a franchise existed is relevant to a determination of whether injunctive relief is required.

Plaintiff's request for injunctive relief was an attempt to prevent completion of the water supply pipeline. The 1994 agreement between plaintiff, defendant county and defendants Marion and Oceola Townships authorizes defendant county, though its department of public works, to finance and construct the water supply system and to locate a portion of it within the boundaries of plaintiff. This same agreement authorizes plaintiff and defendants Marion and Oceola Townships to operate the water supply system through the creation of an authority to do so. Where defendant county was charged solely with constructing the water supply system and not with operating it, no franchise was necessary to

permit defendant county to use plaintiff's M-59 right-of-way. *Butcher, supra* at 398-399. Plaintiff consented to defendant county's use of the specified rights-of-way as necessary for the installation of water pipeline by entering into the 1994 agreement. *Id*. at 399. By enacting the April 18, 1997, resolution withdrawing the consent given under the 1994 agreement, plaintiff was acting in breach of the contract. The trial court correctly determined that it was improper to approve plaintiff's breach by granting the injunction. Under these circumstances, plaintiff's claims lacked arguable legal merit and, therefore, the trial court correctly determined that plaintiff's action was frivolous.[8]

Reasonableness of the attorney fees

Plaintiff next challenges the reasonableness of the attorney fees awarded to defendants. Plaintiff attacks the reasonableness of a number of individual items charged by defendants. It is not the function of this Court to review every item submitted for compensation to determine each item's reasonableness. Rather, this Court must determine whether the award as a whole is reasonable. *Bradley v DAIIE*, 130 Mich App 34, 48; 343 NW2d 506 (1983). On our review of the record, we conclude that the trial court did not abuse its discretion when it determined the reasonableness of the fee requests. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

To the extent that plaintiff challenges the decision of the trial court to award costs and attorney fees to both law firms representing defendant county, we conclude that an award of fees for multiple attorneys was justified on the circumstances of this case. Cf. *JC Building Corp v Parkhurst Homes, Inc*, 217 Mich App 421, 429-430; 552 NW2d 446 (1996).

Award of attorney fees to the defendant townships

Finally, plaintiff's challenges to the trial court's determination that defendant townships are prevailing parties and to the timeliness of defendant townships' motion for costs and attorney fees were

[8] We note that plaintiff's initial complaint sought both a preliminary and a permanent injunction to prevent the completion of the Howell-Oceola water pipeline. However, both plaintiff's counsel and plaintiff's witness, Hubbel, stated that it was not plaintiff's intent to repudiate the 1994 general agreement. Instead, the intent behind the April 18 resolution, and, by extension, the lawsuit, was to gain time to conduct negotiations with defendants regarding re-routing the pipeline farther to the north of the planned line. Plaintiff subsequently filed an amended complaint seeking declaratory relief in the form of a determination by the trial court that plaintiff received no benefit from the M-59 line and was therefore not obligated to pay any portion of the costs of that line. Since the stated object of plaintiff's lawsuit was to prevent completion of the M-59 line and to be absolved from paying any of the costs for the construction of that line, the practical effect of the lawsuit was to repudiate the 1994 general agreement and to prevent the water system loop from being completed. The lawsuit therefore served as a "gun" held at defendants' "heads" in order to force them to restructure the agreement in a manner more favorable to plaintiff's perceived interests. As a result, it appears that it could also be concluded that the lawsuit was brought to harass or injure the prevailing party. MCL 600.2591(3)(a)(i); MSA 27A.2591(3)(a)(i).

not set forth in the statement of the questions presented and, therefore, we decline to address their merits. *Lansing v Hartsuff*, 213 Mich App 338, 351; 539 NW2d 781 (1995).

Affirmed.

/s/ Donald S. Owens
/s/ William B. Murphy
/s/ Helene N. White