

STATE OF MICHIGAN
COURT OF APPEALS

DARIO TOMEI,

Plaintiff-Appellant,

v

CAROL L. ZARNICK, SHEILA PLENTZ,
LARRY FOLTZ, SUSAN FOLTZ, FRANK
RYNICKI, and CHRISTINE RYNICKI,

Defendants-Appellees,

and

JOHN DOE,

Defendant.

UNPUBLISHED

October 23, 2001

No. 223662

Lenawee Circuit Court

LC No. 99-008300-CH

Before: Cooper, P.J., and Sawyer and Owens, JJ.

PER CURIAM.

Plaintiff appeals from an order of the circuit court granting defendants' motion for summary disposition on plaintiff's claim to quiet title. We reverse.

Plaintiff owns a lakefront lot in Lenawee County on Sand Lake. Defendants own various backlots and, pursuant to a 1955 grant of a right-of-way, have an easement over the easterly five feet of plaintiff's lot for access to the lake. The rights of the landowners under this right-of-way was previously litigated by the parties' predecessors in title,¹ resulting in a judgment of the circuit court entered on July 7, 1980. Based upon an alleged change in law under the Supreme Court's decision in *Thies v Howland*, 424 Mich 282; 380 NW2d 463 (1985), plaintiff filed this action to quiet title to the right-of-way on June 24, 1999. Specifically, plaintiff sought to restrain defendants from constructing a dock or anchoring boats, rights defendants enjoyed, with some restrictions, under the 1980 judgment.

¹ It does not appear that any of the current litigants were parties to the prior action or had an interest in these lots at the time of prior litigation.

Thereafter, defendants moved for summary disposition because the complaint failed to state a claim under MCR 2.116(C)(8) and because the action was barred by prior judgment under MCR 2.116(C)(7). Specifically, defendants' brief in the trial court argued that the claim was barred by the doctrine of res judicata, that the decision in *Thies, supra*, was inapplicable to this case and, therefore, there was no change in law, and that plaintiff had not timely requested relief from judgment under MCR 2.612.

In its decision, the trial court specifically indicated that it believed that *Thies* was applicable and, in the absence of the prior decision, would dictate the opposite result than was obtained in the prior litigation (i.e., a decision in favor of plaintiff). However, the trial court determined the prior judgment could not be revisited, specifically relying upon the law of the case doctrine. Accordingly, it granted summary disposition in favor of defendants.

On appeal, plaintiff argues that the law of the case doctrine is inapplicable. We agree. The Supreme Court discussed the law of the case doctrine in *Locricchio v Evening News Ass'n*, 438 Mich 84, 109; 476 NW2d 112 (1991):

This Court noted in *CAF Investment Co v Saginaw Twp*, 410 Mich 428, 454; 302 NW2d 164 (1981), that the law of the case doctrine

“[a]s generally stated, [provides that] if an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain materially the same.”

The law of the case doctrine exists primarily to “maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit.” [Quoting Wright, Miller & Cooper, *Federal Practice & Procedure*, § 4478, p 788.]

Further, this Court, in *Baks v Moroun*, 227 Mich App 472, 498; 576 NW2d 413 (1998), also commented on the law of the case doctrine being inapplicable in the absence of an appellate decision in a case:

Finally, plaintiffs contend that the trial court's denial of their claim that defendants waived the statute of limitations defense in a stipulated order violated the law of the case doctrine. However, because no prior appellate opinion decided any issues in this case, the doctrine is inapplicable to the trial court's ruling in the case.

We agree with plaintiff that the law of the case doctrine is inapplicable to this case. First, there was no prior appellate decision to establish the law of the case. Second, the instant case is not part of the same, continuing lawsuit. While this case presents the same issues as raised in the prior lawsuit, it is not the same action.

We caution, however, that we are not holding that the grounds raised by defendants for summary disposition are without merit. Summary disposition may well be proper under the res judicata doctrine, or one of the other grounds raised by defendants in their motion. We only hold

that the actual reason stated by the trial court for its decision, the law of the case doctrine, is not applicable. Because the trial court did not decide this case on the grounds argued by defendants in the trial court, we do not address the question whether summary disposition should be granted on any of those arguments.² On remand, the trial court shall resolve the summary disposition arguments actually raised by defendants.

Furthermore, in light of our resolution of the above issue, we need not address the other issues raised by plaintiff.

Reversed and remanded to the trial court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ David H. Sawyer
/s/ Donald S. Owens

² Arguably, the trial court did decide against defendants on their second argument, that *Thies* is inapplicable to the case at bar, in light of the trial court's comments at the hearing that *Thies* would, in the absence of the prior decision, dictate a judgment for plaintiff. However, to the extent that the trial court's comments can be read as a denial of defendants' motion on this ground, defendants have not appealed from that denial and, therefore, the issue is not before us.