Court of Appeals, State of Michigan

ORDER

James Schenden v Addison Township

Docket Nos. 244389; 245805

LC No. 01-028622-AA

David H. Sawyer
Presiding Judge

Hilda R. Gage

Donald S. Owens
Judges

On the Court's own motion, the August 17, 2004, opinion is hereby VACATED. The first paragraph of the opinion contained clerical errors involving the docket numbers. A new opinion is attached which corrects those errors.

Presiding Judge

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

AUG 26 2004
Date

Sandra Schultz Mengel
Chief Clerk

STATE OF MICHIGAN

COURT OF APPEALS

JAMES SCHENDEN and CAROLYN SCHENDEN, Plaintiffs-Appellants, v ADDISON TOWNSHIP and ADDISON TOWNSHIP ZONING BOARD OF APPEALS, Defendants-Appellees.	UNPUBLISHED August 26, 2004 No. 244389 Oakland Circuit Court LC No. 01-028622-AA
JAMES SCHENDEN and CAROLYN SCHENDEN, Plaintiffs-Appellants, v ADDISON TOWNSHIP and ADDISON TOWNSHIP ZONING BOARD OF APPEALS, Defendants-Appellees.	No. 245805 Oakland Circuit Court LC No. 01-028622-AA

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

PER CURIAM.

Plaintiffs own Nettles Island and mainland property on Lakeville Lake in Addison Township (the Township). These consolidated cases involve plaintiffs' proposed construction of a driveway bridge between these two properties. In Docket No. 245805, plaintiffs appeal by leave granted the January 3, 2002 order affirming the denial by defendant Addison Township Zoning Board of Appeals (ZBA) of plaintiff's request for a variance from Addison Township Ordinance 200, § 13.03.7. In Docket No. 244389, plaintiffs appeal as of right the July 24, 2002 order granting defendants summary disposition and denying plaintiffs summary disposition on plaintiffs' vested rights, equitable estoppel, and takings claims, and the September 20, 2002 order granting defendants summary disposition on their nuisance counter-claim. We reverse and remand in Docket No. 244389.

Plaintiffs planned to construct a driveway bridge to connect their mainland property to their island so that they could build a permanent residence on the island. In 1994, plaintiffs presented the Township with their plans. The Township expressed that its only concerns were emergency vehicle access to the island and interference with navigation of boats on the lake. On the advice of the Township, plaintiffs applied for a state permit from the Michigan Department of Natural Resources (MDNR) in July 1994.[1] The MDEQ eventually approved plaintiffs' request after a contested case hearing. In April 1998, the MDEQ issued plaintiffs a permit pursuant to the Michigan Inland Lakes and Streams Act. The Township did not appeal this decision.

In May 1998, the Township's building inspector, James T. Elsarelli, told plaintiffs that he did not know whether they needed further approval beyond the MDEQ permit to construct the bridge. Elsarelli made a similar representation to plaintiffs in August 1998. He never indicated any objections nor did he express any concerns regarding the proposed construction. In reliance on these representations and the MDEQ permit, plaintiffs commenced construction of the bridge. Plaintiffs began to fabricate the steel bridge sections and poured thirty cubic yards of reinforced concrete to install the bridge abutment into the mainland. While the abutment was being installed, Elsarelli silently watched and took no action to stop it.

In September 1998, Elsarelli issued a cease and desist order relative to the construction of plaintiffs' bridge, stating that all work had to be discontinued until plaintiffs acquired the necessary approvals and permits from the Township. One week later, the Township's board of trustees conducted a special meeting and decided that plaintiffs needed to apply for a structural permit from the Township. Plaintiffs applied for this permit and received it in November 1998.

A group of Township residents appealed the grant of plaintiffs' permit, prompting Elsarelli to issue another stop work order in December 1998. By this time, plaintiffs had completed substantial work toward construction of the bridge, spending more than $200,000. Nine forty-foot bridge pilings had been driven eighteen feet into the lakebed, with a tenth piling partially driven. All the bridge sections had been fabricated, and the bridge was anchored to the abutment on the mainland side.

At a January 1999 hearing, the ZBA set aside plaintiffs' structural permit because it determined that plaintiffs needed a variance from Ordinance 200, § 13.03.7, which prohibits structures within twenty-five feet of Lakeville Lake. Plaintiffs admit that they were aware of Section 13.03.7 when they installed their bridge abutment within twenty-five feet of the lake, but contend that in 1996 Elsarelli told them that the Township historically did not enforce the ordinance.[2] The Township does not dispute this claim.

In September 2000, plaintiffs filed an application with the ZBA, requesting a variance from Ordinance 200, § 13.03.7. At a November 2000 ZBA hearing, the Township's City Planner

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[1] The MDNR is now the Michigan Department of Environmental Quality (MDEQ).

[2] Plaintiff James Schenden served on the ZBA for fifteen years.

presented twenty-one objections to plaintiffs' variance request. Five weeks later, the ZBA conducted another hearing and voted to deny plaintiffs' variance request. Plaintiffs appealed this decision to the circuit court, which affirmed the decision. Plaintiffs amended their complaint to include claims of destruction of vested rights, equitable estoppel, and federal and state takings. Both parties moved for summary disposition pursuant to MCR 2.116(C)(10). On July 24, 2002, the trial court denied plaintiffs' motion and granted defendants' motion. Defendants also brought a nuisance per se counter-claim under MCL 125.294, alleging that plaintiffs' bridge abutment violated Ordinance No. 200, § 13.03. Defendants moved for summary disposition, which the trial court granted on September 20, 2002.

Plaintiffs pleaded equitable estoppel as a cause of action in their amended complaint. This was legal error in that equitable estoppel has never been recognized as an independent cause of action. *Van v Zahorik*, 227 Mich App 90, 102; 575 NW2d 566 (1997). However, in their answer to defendants' nuisance counter-claim, plaintiffs properly raised estoppel as an affirmative defense.[3] Plaintiffs argue that the trial court erred in granting defendants summary disposition on their nuisance counter-claim. We review a trial court's decision on a motion for summary disposition de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). MCR 2.116(C)(10) tests the factual support of a plaintiff's claim. *Id.* 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 material fact exists to warrant a trial. *Id.*

Equitable estoppel is a doctrine that may assist a party by preventing the opposing party from asserting or denying the existence of a particular fact." *West American Ins Co, supra*, 230 Mich App 309-310. "The doctrine is generally available as protection from a defense raised by a defendant or as an aid to the plaintiff." *Van, supra*, 227 Mich App 102. It is well established that the state and zoning authorities, as well as individuals, may be estopped by their acts, conduct, silence, and acquiescence. *Oliphant v State*, 381 Mich 630, 638; 167 NW2d 280 (1969); *Howard Twp Bd of Trustees v Waldo*, 168 Mich App 565, 575-576; 425 NW2d 180 (1988).

Equitable estoppel arises where:

> (1) a party, by representations, admissions, or silence intentionally or negligently induces another party to believe facts, (2) the other party justifiably relies and acts on that belief, and (3) the other party is prejudiced if the first party is allowed to deny the existence of those facts. *West American Ins Co, supra*, 230 Mich App 310.

It is undisputed that the Township officials induced plaintiffs to believe that they could construct a driveway bridge with the imprimatur of the Township. In May 1998, after receiving

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[3] Although this issue was not addressed by the trial court, we will review it because it is a question of law and all the facts necessary for its resolution have been presented. See *Brown v Loveman*, 260 Mich App 576, 599; 680 NW 2d 432 (2004).

the MDEQ permit, plaintiffs told the Township building inspector that they planned to build a bridge and asked if they needed anything from the Township. Plaintiffs were told, "I don't know." Again, in August 1998, plaintiffs asked the building inspector if the Township required anything at all from them, and were told, "not that I know of." Shortly thereafter, plaintiffs jackhammered the thirty yard steel abutment into the ground in plain view of the building inspector. The inspector watched the construction from his boat and made no mention of the twenty-five foot setback requirement. In fact, he said nothing at all.

Notwithstanding his statements and acquiescence, the building inspector shut down plaintiffs' construction in September 1998, claiming that they lacked the proper permits. The Township Board of Trustees then conducted a special meeting where the Township Attorney, Nick Treinen, stated that, he "knows of no ordinance to say it can't be built." The Township Supervisor, Robert Koski, similarly commented that he "is aware that many would like to have [the] project stopped . . . but doesn't know of [a] legal reason to stop." Despite these comments in favor of plaintiffs, the Board decided that plaintiffs needed a structural permit from the Township. Six weeks later, the Township issued plaintiffs a structural permit containing no limitations.[4] However, after a few more weeks of construction, the building inspector ordered plaintiffs to shut down once again because a group of citizens brought an appeal to the ZBA contesting plaintiffs' building permit. The ZBA conducted a hearing and set aside plaintiffs' permit for failure to comply with the setback provision of Ordinance No. 200, § 13.03.7.

Plaintiffs have spent more than $200,000 on the construction of their bridge. They have fabricated all of the custom-made bridge sections, and have been paying fees for storage of these sections since the fall of 1998. Plaintiffs rented a barge and pile drivers, and paid contractors and subcontractors to drive nine forty-foot bridge pilings eighteen feet deep into the lakebed. Because plaintiffs have justifiably relied to their detriment on defendants' representations (including the building permit), admissions and silence, and would be severely prejudiced by defendants' denial of these facts, we find that defendant Addison Township should be estopped from enforcing Section 13.03.7 of Ordinance No. 200. *West American Ins Co, supra*, 230 Mich App 310.

This Court has held that zoning authorities will not be estopped from enforcing their ordinances absent exceptional circumstances. *Howard Twp Bd of Trustees, supra*, 168 Mich App 575-576. We find that the issuance of state and local permits, in conjunction with the statements and acquiescence of several Addison Township officials constitute exceptional circumstances warranting estoppel. Accordingly, the trial court erred in awarding summary

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[4] At the November 16, 2000 ZBA hearing, plaintiff James Schenden alluded to the fact that the ZBA members had reason to know that his bridge abutment was in violation of Ordinance No. 200, § 13.03.7 at the time they issued his building permit. He remarked: "I gave this to the township in 1994, if they were concerned about the 25 feet, why didn't they say so? . . . When I put the abutment in, in August 98, why didn't somebody say something? In November of 98 when the structural permit was issued everybody knew that the abutment was there, in fact I think most of the then members of the board had viewed the site and had seen it and I wasn't trying to hide it."

disposition for defendants on their nuisance per se counter-claim. Because the Township is barred from enforcing Ordinance No. 200, § 13.03.7 against plaintiffs, we conclude that summary disposition should have been granted in favor of plaintiffs in accordance with MCR 2.116(I)(2) and pursuant to MCR 2.116(C)(10).

Plaintiffs also argue that the trial court erred in granting defendants summary disposition on their vested rights claim. Plaintiffs assert that the trial court erred in determining that their vested rights claim was barred by the doctrine of res judicata. Res judicata is employed to prevent multiple suits litigating the same cause of action, and bars a second, subsequent action when:

> (1) the prior action was decided on the merits, (2) both actions involve the same parties or their privies, and (3) the matter in the second case was, or could have been, resolved in the first. This Court has taken a broad approach to the doctrine of res judicata, holding that it bars not only claims already litigated, but also every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not. *Adair v State*, 470 Mich 105, 121; 680 NW2d 386 (2004) (citations omitted).

At issue in the instant case is whether the vested rights issue could have been raised in the February 4, 1999, or December 8, 1999, complaints. If a second claim has not ripened when the first claim is filed, res judicata does not bar the second claim. *Peterson Novelties, Inc v Berkley*, 259 Mich App 1, 15; 672 NW2d 351 (2003). Plaintiffs contend that res judicata does not apply to their vested rights claim because it did not become ripe until December 21, 2000, when the ZBA denied their request for a variance. We agree. Accordingly, we find that the trial court erred in granting defendants' motion for summary disposition on the application of res judicata to the vested rights claim.

Because we find that plaintiffs' vested rights claim is not barred by res judicata, we will now consider it on the merits. We recognize that plaintiffs have acquired a vested right in the Township building permit, having conducted substantial work in reliance on the "acts, conduct, silence and acquiescence" of the Township officials and the issuance of the permit. See *Oliphant, supra*, 381 Mich 638. A vested right is defined as: "an interest that the government is compelled to recognize and protect of which the holder could not be deprived without injustice." *Detroit v Walker*, 445 Mich 682, 699; 520 NW 2d 135 (1994). To determine whether a right has vested this Court examines whether "the holder possesses what amounts to be a title interest in the right asserted." *Id.*

In support of plaintiffs' vested rights claim is *Dingeman Advertising v Algoma Twp*, 393 Mich 89; 223 NW2d 689 (1974), which stands for the proposition that issuance of a valid permit and substantial reliance thereon creates a vested right in a permit. There, Algoma Township issued a building permit to the plaintiff to erect a billboard, but subsequently adopted a zoning ordinance banning all billboards. Because the plaintiff completed a large portion of the frame structure before being shut down by the building inspector, equity required that he be allowed to complete construction. The Court held that "once a city or township issues a valid permit to an applicant, that applicant has every reason and right to rely thereon in his business dealings. Permits are not issued by local authorities when the contemplated use for which the permit is

issued conflicts with a local zoning ordinance." *Id*. By definition, a permit is an official document of the local community authorizing one to proceed with his contemplated project. *Id*.

Furthermore, in *Expert Steel Treating Co v Clawson*, 368 Mich 619, 621-622; 118 NW2d 815 (1962), the plaintiff was found to have acquired a vested right to complete an addition to his heat-treating plant, even though he was in violation of a setback provision in the Clawson city ordinance. The Court took into consideration that in reliance on the city building permit, the plaintiff purchased materials, spent thousands of dollars on labor, and commenced construction, all before the city manager revoked his permit. *Id.*

Expert Steel and *Dingeman Advertising* are distinguishable from the instant case because the Township ordinance was passed in 1988 and therefore predates the issuance of plaintiffs' permit. Thus, plaintiffs do not assert that their permit was revoked due to a subsequent amendment to an ordinance. Instead, the ZBA set aside plaintiffs' permit at a hearing conducted as part of the Township appeals process. Nonetheless, because we are mindful that policy considerations must control when determining whether a right is vested, we find that equity, justice, and good conscience support our finding that plaintiffs have acquired a vested right in the Township building permit. *Detroit, supra,* 445 Mich 699; *Oliphant, supra,* 381 Mich 638-639. The equitable principles that drove the Court to permit the plaintiffs to complete construction in *Expert Steel* and *Dingeman Advertising* also apply here to allow plaintiffs to complete construction of their driveway bridge. Thus, summary disposition was improperly awarded to defendants on the issue of plaintiffs' vested rights and should have been granted in favor of plaintiffs pursuant to MCR 2.116(C)(10) in accordance with MCR 2.116(I)(2).

Because we conclude, *supra,* that the Township is estopped from enforcing ordinance No. 200, Section 13.03.7 against plaintiffs, we need not address plaintiffs' remaining claims concerning the ZBA denial of their variance request and federal and state takings.

Reversed and remanded for entry of judgment in accordance with this opinion. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Hilda R. Gage

I concur in result only.

/s/ Donald S. Owens