STATE OF MICHIGAN

COURT OF APPEALS

MARK ROBERT HERNE,

Plaintiff/Counter-Defendant-Appellant,

v

CHARTER TOWNSHIP OF WATERFORD,

Defendant/Counter-Plaintiff-Appellee,

and

DOUGLAS W. BRADLEY,

Defendant-Appellee.

UNPUBLISHED
December 19, 2006

No. 271400
Oakland Circuit Court
LC No. 2005-064250-AW

Before: Murphy, P.J., and Smolenski and Kelly, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting the township's motion for summary disposition on the ground that mandamus was not an available remedy to plaintiff. Plaintiff also challenges a denial of his motion for relief from judgment, which was treated as a motion for reconsideration, and included a determination that the zoning ordinance was not selectively enforced against him. We affirm.

Without a permit, plaintiff built a covered porch on his residence that extended approximately 12 feet into a 35-foot setback area. He also built a shed without a permit that extended approximately one and one-half feet into a five-foot side setback area. At least four of plaintiff's neighbors had built similarly offending porches, allegedly without permits.

When plaintiff applied for a building permit, he was allegedly directed to seek a variance from the Zoning Board of Appeals (ZBA). The ZBA denied the request. Plaintiff appealed to the circuit court, and the ZBA's decision was affirmed. Plaintiff did not pursue further appeals. Instead, he filed the present action, seeking a writ of mandamus to compel the township to issue a building permit. The circuit court granted the township's motion for summary disposition, concluding that mandamus was not an available remedy because plaintiff could have pursued an appeal of the decision affirming the ZBA. On reconsideration, the circuit court also held that

plaintiff had not established a selective enforcement claim because he was not in a protected class and he did not show that the uses on the neighboring properties were identical.

First, plaintiff argues that mandamus was appropriate because he had a clear right to the issuance of a building permit. He asserts that selective enforcement of a criminal case requires a showing of a protected class, but that no such requirement exists for selective enforcement of a zoning case. He also asserts that because the zoning ordinance could not be selectively applied to him alone, the township had a clear legal duty to issue a building permit. He maintains that he only sought a variance from the ZBA because the township directed him to do so in order to get a building permit. He maintains that this is not a proper case for a variance, and that the variance question differs from the issue whether an ordinance that has not been applied to neighboring properties can selectively be applied to his property. Furthermore, he asserts that the ZBA did not decide his right to a permit, and that a decision on his entitlement to a building permit was not necessary to the ZBA's decision that he was not entitled to a variance.

Plaintiff does not have to show that he was a member of a protected class to establish a claim of selective enforcement. See *Hillside Productions, Inc v Duchane*, 249 F Supp 2d 880, 897 (ED Mich, 2003). An action can also be brought where the plaintiff claims "to be a 'class of one' and allege[s] that the government intentionally treated [him] 'differently from others similarly situated and that there [was] no rational basis for the difference in treatment.'" *Id.* (Citation omitted).

Nonetheless, mandamus was not an appropriate remedy in this case.

> "To obtain a writ of mandamus the plaintiff must show that: (1) the plaintiff has a clear legal right to the performance of the duty sought to be compelled, (2) the defendant has a clear legal duty to perform, (3) the act is ministerial in nature, and (4) the plaintiff has no other adequate legal or equitable remedy." *White-Bey v Dep't Of Corrections*, 239 Mich App 221, 223-224; 608 NW2d 833 (1999), citing *In re MCI*, [460 Mich 396, 443; 596 NW2d 164 (1999)], and *McKeighan v Grass Lake Twp Supervisor*, 234 Mich App 194, 211-212; 593 NW2d 605 (1999). The plaintiff bears the burden of demonstrating entitlement to the extraordinary remedy of a writ of mandamus. *White-Bey*, *supra* at 223; *Herp v Lansing City Clerk*, 164 Mich App 150, 161; 416 NW2d 367 (1987). [*Citizens for the Protection of Marriage v Bd of State Canvassers*, 263 Mich App 487, 492; 688 NW2d 538 (2004)].

Even if plaintiff would be entitled to a permit if he could show that the ordinance was selectively enforced against him without reason, see *Hillside Productions, Inc*, *supra*, plaintiff could not show a clear legal right to the permit before establishing these facts and, coextensively, could not show that the township had a clear legal duty to issue the permit.

Moreover, plaintiff failed to show that he had no other equitable or legal remedy available to him. Had he successfully appealed the decision of the ZBA, he likely would have been granted the variance. If a variance had been issued, plaintiff would likely have gotten a building permit. Thus, even if issuance of a permit presents a question distinct from issuance of

a variance, plaintiff nonetheless may have been able to achieve the same result, making mandamus an inappropriate remedy.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly