

STATE OF MICHIGAN
COURT OF APPEALS

DEVLON PROPERTIES, INC.,

Plaintiff-Appellant,

v

CITY OF BOYNE CITY, MICHAEL CAIN,
DANIEL W. REED, and BOYNE CITY ZONING
BOARD OF APPEALS,

Defendants-Appellees.

UNPUBLISHED

December 18, 2008

No. 279188

Charlevoix Circuit Court

LC No. 06-035021-AA

Before: Saad, P.J., and Fitzgerald and Beckering, JJ.

PER CURIAM.

Plaintiff appeals as of right the order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and MCR 2.116(C)(10). We affirm.

I. Facts and Procedural History

Plaintiff owned a parcel of land situated on Lake Charlevoix in Boyne City. Plaintiff allegedly purchased the property for the sole purpose of developing it into a condominium, hotel, restaurant, and marina to be known as Boyne Beach Club. On April 20, 2004, plaintiff submitted a development plan application to the Boyne City planning commission for the project. The planning commission approved plaintiff's development plan on May 17, 2004, and issued plaintiff a conditional land-use permit.

Plaintiff submitted its application for a zoning permit for the project on July 12, 2004. Defendant Daniel Reed, the city's planning director, denied the application on July 29, 2004, because he believed that the project's kitchen facilities did not comply with the city's marina district zoning requirements. Plaintiff appealed Reed's decision to the Boyne City Zoning Appeals Board (ZBA). Following a hearing held on September 7, 2004, the ZBA affirmed Reed's denial of the zoning permit, but granted a variance for the kitchen facilities. The following day, the planning commission approved plaintiff's zoning permit application. Pursuant to Boyne City Ordinance § 28.35, plaintiff's zoning permit for the land-based portion of its project was valid for one year and expired on September 8, 2005.

Shortly after receiving its zoning permits, plaintiff apparently began what it considered to be due diligent activities toward the construction of its project. According to plaintiff, it

demolished a structure on the property, performed grading and excavating activities, performed boring and soil condition work, removed underground storage tanks, prepared documents regarding the project, engaged in negotiations with various agencies, and researched financing options and potential general contractors.

In June 2005, the city filed objections with the Michigan Department of Environmental Quality (MDEQ) regarding the marina portion of plaintiff's project. The parties thereafter entered into negotiations in an attempt to resolve the objections. On November 11, 2005, Reed wrote a letter to plaintiff's lender indicating that although plaintiff's permits had technically expired, defendants would honor the permits so long as plaintiff exercised due diligence toward completion of the project.

After months of negotiation regarding defendants' objections to plaintiff's marina portion of its project, the negotiations halted on January 6, 2006. Plaintiff alleged that defendant Michael Cain, the city manager, began a systematic effort to punish plaintiff for its unwillingness "to deal." Defendants revoked plaintiff's permits on May 16, 2006. Reed denied plaintiff's June 2006 request to reinstate the permits. The ZBA affirmed Reed's decision. Plaintiff then filed the present suit seeking to overturn the ZBA's decision. Plaintiff alleged that defendants' act of revoking plaintiff's permits violated plaintiff's constitutional right to due process. Plaintiff also sought a declaratory ruling that Boyne City Ordinance § 27.65 is unconstitutionally vague. Following a hearing, the trial court granted defendants' motion for summary disposition.

II

Plaintiff argues that the trial court erred in holding that plaintiff lacked a sufficient property interest to assert its constitutional claims. We disagree.

We review de novo a trial court's grant or denial of a motion for summary disposition. *In re Handelsman*, 266 Mich App 433, 435; 702 NW2d 641 (2005). Constitutional claims are reviewed de novo. *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 623; 552 NW2d 657 (1996).

Both the United States and Michigan Constitutions guarantee that no person can be deprived of life, liberty, or property without due process. US Const, Amend XIV; Const 1963, art 1, § 17. The right to due process includes both procedural and substantive due process. *Kampf v Kampf*, 237 Mich App 377, 381-382; 603 NW2d 295 (1999). A person claiming that his or her due process rights were violated has the burden of establishing that he or she has a constitutionally protected interest. *Bd of Regents v Roth*, 408 US 564, 577; 92 S Ct 2701; 33 L Ed 2d 548 (1972). In determining whether a landowner has a constitutionally protected interest, courts should look to substantive state law. *Silver v Franklin Twp Bd of Zoning Appeals*, 966 F2d 1031 (CA 6 1992).

In Michigan, a landowner intending to build on his or her property does not acquire a protected property interest merely upon the issuance of a permit. In *City of Lansing v Dawley*, 247 Mich 394; 225 NW 500 (1929), the Court held that a landowner acquires a vested property interest if he or she acquires a building permit and does anything of a "substantial character towards the construction" of the project upon which the permit was obtained. *Id.* at 396-397. While the Court did not specifically define "substantial character," it made clear that preliminary

work such as the removal of old buildings, the ordering of plans, and conducting surveys of the land is not sufficient. *Id.* at 396-397. In a later case, the Court held that a landowner's expenditure of monies in preparation for building does not give rise to a vested property interest. *Bloomfield Twp v Beardslee*, 349 Mich 296, 307-309; 84 NW2d 537 (1957); see also *Franchise Realty Interstate Corp v Detroit*, 368 Mich 276, 279-280; 118 NW2d 258 (1962).

Here, the zoning permits were issued on September 8, 2004, and expired on September 8, 2005. See Boyne City Ordinance § 28.35.¹ To obtain a vested property interest in the zoning permits, plaintiff had to obtain a building permit and begin activities of a substantial character toward construction before September 8, 2005. Plaintiff did not present sufficient evidence that it satisfied either of these conditions. At no time between September 8, 2004, and May 16, 2006, when the zoning permits were revoked, did plaintiff obtain a building permit to begin construction on its project. By plaintiff's own admission, it did not begin any activities that the Court in *Dawley* considered of "substantial character towards the construction" until November 5, 2005, which was nearly two months after the expiration of the zoning permits. Plaintiff's argument that strict compliance with *Dawley* is not required and that mere reliance can create a vested property interest is misplaced. *Dawley's* test for a vested property interest does not include reliance as a factor to consider with regard to whether a landowner acquired a property interest. *Schubiner v West Bloomfield Twp*, 133 Mich App 490, 495-500; 351 NW2d 214 (1984). Indeed, in *Schubiner*, on which plaintiff relies, this Court examined the same cases cited by plaintiff in support of its argument and stated:

Under all of the cases cited herein a building permit or its counterpart, a permit to commence operations, is the *sine qua non* for obtaining "vested rights[.]" An approved site plan is not a permit to build. *The features of reliance and estoppel which may give rise to a vested right under a building permit do not necessarily arise under an approved site plan, which, by statute, merely signifies that the proposed use complies with local ordinances and federal statutes.* Furthermore, the grant of a permit to build does not in itself confer on the grantee "vested rights[.]" Actual construction must commence. The making of preparatory plans, landscaping, and the removal of an existing structure is not sufficient. Where the building permit has been applied for but has not been issued, "vested rights" are *not* acquired even though the applicant has expended substantial sums. [*Schubiner, supra* at 501 (emphasis added and internal citations omitted).]

This passage clearly indicates that the Court was willing to entertain a reliance argument only after a landowner had acquired a building permit. Here, plaintiff never acquired a building permit. Plaintiff did not perform substantial work in utilizing the property in accordance with the zoning permits. Plaintiff failed to establish that it had a vested property interest in the zoning permits.

¹ Plaintiff incorrectly argues that Boyne City Ordinance § 27.65 governed the validity of its approvals in this case. The ordinance is not applicable unless a landowner receives a permit pursuant to an order of the ZBA. Plaintiff has failed to show that its September 8, 2004, permits were issued pursuant to the ZBA. Thus, the ordinance is not applicable here.

III

Plaintiff argues that defendants' decision to revoke the zoning permits was arbitrary and capricious and therefore violated its substantive due process rights. We disagree.

The touchstone of substantive due process is to protect an individual against arbitrary action of the government. *Wolff v McDonnell*, 418 US 539, 558; 94 S Ct 2963; 41 L Ed 2d 935 (1974). Unless a party claiming a substantive due process violation demonstrates he or she has a constitutionally protected interest, his or her claim must be dismissed. *Roth, supra* at 577. To sustain a claim of substantive due process against a municipal actor, the complaining party must show that the governmental conduct was so arbitrary and capricious as to shock the conscience. *Collins v Harker Heights*, 503 US 115, 129; 112 S Ct 1061; 117 L Ed 2d 261 (1992). While what "shocks the conscience" is not subject to precise definition, the complaining party "must do more than show that the government actor intentionally or recklessly caused injury to the plaintiff by abusing or misusing government power." *Uhlrig v Harder*, 64 F3d 567, 574 (CA 10, 1995).

Here, plaintiff's argument rests entirely on Cain's conduct. Plaintiff argues that Cain overstepped his authority and improperly influenced Reed to revoke the zoning permits because plaintiff was unwilling to "deal." Plaintiff has failed to show that Cain's allegedly improper conduct caused Reed to revoke the zoning permits. In fact, Reed's deposition testimony reveals that the decision to revoke the zoning permits was not unduly influenced by Cain's conduct, but rather, was based on plaintiff's lack of progress on its project. Moreover, Reed testified that because nearly two years had passed since the zoning permits were issued and little visible evidence that plaintiff was proceeding on the project existed, he believed it was in the city's best interest to revoke the zoning permits. Plaintiff has failed to cite to any authority that demonstrates this rationale is either arbitrary and capricious or shocks the conscience.

IV

Plaintiff argued below, and argues on appeal, that Boyne City Ordinance § 27.65 is unconstitutionally vague. Whether § 27.65 is vague is immaterial to plaintiff's case because the plain language of the ordinance reveals that it was not applicable to plaintiff's zoning permits. For the ordinance to be applicable, a landowner must be issued a permit pursuant to an order of the ZBA. At no time before defendant's revocation of plaintiff's zoning permits did it receive a permit pursuant to an order of the ZBA. Instead, the city's planning commission issued plaintiff's zoning permits. Thus, the ordinance applicable to this case is § 28.35, which states, in its entirety, that "[z]oning permits shall be valid for one (1) year from the date of issuance." Plaintiff does not dispute that the language of this ordinance is unambiguous. In fact, plaintiff revealed its understanding of the ordinance in a letter to Reed on May 18, 2005, when it sought confirmation that its reading of the ordinance meant that its zoning permits were valid until September 8, 2005.

V

Lastly, plaintiff argues that it was error for the trial court to dismiss its claims for declaratory relief. Because we find that the trial court properly disposed of plaintiff's claims upon which it sought declaratory relief, it follows that the trial court properly dismissed the

claims for declaratory relief regardless of whether the trial court applied *Jones v Powell*, 462 Mich 329; 612 NW2d 423 (2000).

Affirmed.

/s/ Henry William Saad
/s/ E. Thomas Fitzgerald
/s/ Jane M. Beckering