STATE OF MICHIGAN

COURT OF APPEALS

In re SCHELLENBERG.

SHARON LEE SCHELLENBERG and DAVID W. RIGGLE,

Plaintiffs,

v

LEELANAU CIRCUIT JUDGE,

Defendant,

and

BINGHAM TOWNSHIP, ALAN R. WEVERSTAD, MICHELE A. WEVERSTAD, and CLARK & LYNN, LLC,

Intervenors.

UNPUBLISHED
July 16, 2009

No. 280872
Leelanau Circuit Court
LC No. 04-006692-CH

Before: Wilder, P.J., and Meter and Servitto, JJ.

PER CURIAM.

Plaintiffs filed this complaint for a writ of superintending control directing the Leelanau Circuit Court to reassign this case to another circuit judge and further directing that the new judge proceed to trial on the merits of the remaining issues in this land-development case and enter a final judgment or order disposing of all the parties and pending claims. We conclude that a writ should not be issued in this case because plaintiffs had the ability to appeal the trial court's orders, and we dismiss plaintiffs' complaint for the writ. See MCR 3.302(D)(2). This appeal has been decided without oral argument pursuant to MCR 7.214(E).

The extraordinary power of superintending control may only be exercised when a plaintiff has established that a clear legal duty has not been performed and that no other adequate legal remedy exists. MCR 3.302(B); *Recorder's Court Bar Ass'n v Wayne Circuit Court*, 443 Mich 110, 134; 503 NW2d 885 (1993); *Shepherd Montessori Ctr Milan v Ann Arbor Twp*, 259

Mich App 315, 347; 675 NW2d 271 (2003). The availability of a legal remedy by way of an appeal precludes this Court from exercising superintending control and requires that the complaint for superintending control be dismissed. MCR 3.302(D)(2); *Shepherd Montessori, supra* at 347; *Choe v Flint Charter Twp*, 240 Mich App 662, 667; 615 NW2d 739 (2000). An aggrieved party has a right to appeal a final order of a circuit court, MCR 7.203(A)(1), and may seek leave to appeal a circuit court order that is not a final order, MCR 7.203(B)(1).

In this case, there are no remaining issues to try, and there are two final orders: one denying plaintiffs' request for relief, entered on August 29, 2006, for which the period to apply for delayed appeal has expired, and the other denying attorney fees, entered on October 19, 2006. The trial court heard plaintiffs' "motion to impose mandated relief" on July 31, 2006. The transcript of that hearing clearly indicates that the trial court was resolving the merits of plaintiffs' underlying suit and that no further remedy was available at that time; thus, a final order resulted. MCR 7.202(6); *Rooyakker & Sitz, PLLC v Plante & Moran, PLLC*, 276 Mich App 146, 148 n 1; 742 NW2d 409 (2007). The trial court noted that no development had yet occurred and that development might never occur. Concluding the issue, the trial court indicated that the result of the pending permit application would involve new facts, "so bring it on when the time comes." The trial court adjourned only the attorney-fee issue. The August 29, 2006, order was not appealed.

The trial court heard plaintiffs' attorney-fee motion on September 25, 2006, and in an order entered October 19, 2006, denied it.[1] Plaintiffs assert that the attorney fee order was not a final order, and treat the absence of "resolving all claims" language as controlling. It is not. Whether an order contains language required by MCR 2.602(A)(3) declaring that the order disposes of the last pending claim and closes the case is not determinative. It is not the form of the order that renders it a final order, but the effect of the order. If the order finally disposes of the subject matter in controversy, then it is a final judgment. See *Faircloth v Family Independence Agency*, 232 Mich App 391, 400-401; 591 NW2d 314 (1998) (the trial court's certification of an order as a final judgment does not resolve whether the order is actually final). Thus, the October 19, 2006, order was a final order resolving the attorney-fee issue.

The effect of the August 29, 2006, order was to resolve the merits of the case: plaintiffs prevailed on the issue of whether there was a violation of the Land Division Act, MCL 560.101 *et seq*., and the trial court refused to grant the injunctive relief requested. Because no other violation had occurred at that point, the trial court indicated that if there were future violations, plaintiffs should begin a new lawsuit based on those new claims. Plaintiffs are still free to do that; nothing in any of the trial court's orders has shut off that avenue of relief. Because the trial court has already ruled that plaintiffs have no damages at this stage, there are no remaining issues to be tried in the instant case.

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[1] Despite confusion regarding the possible issuance of two orders denying attorney fees, it appears that the only order on file is the order entered October 12, 2006, that denies attorney fees and contains no language regarding whether the order resolved all pending claims in the case.

Finally, we note that we decline plaintiffs' request to convert their complaint into a claim of appeal or a delayed application for leave to appeal. Plaintiffs simply assert that they will provide supplementary briefing without demonstrating why there would be any merit to their appeal.

Plaintiffs' complaint is dismissed.

/s/ Kurtis T. Wilder
/s/ Patrick M. Meter
/s/ Deborah A. Servitto