STATE OF MICHIGAN

COURT OF APPEALS

CITY OF BLOOMFIELD HILLS, Plaintiff-Appellee,	UNPUBLISHED April 27, 2010
v	No. 288766 Oakland Circuit Court
WILLIAM P. FROLING and MARILYN FROLING, Defendants-Appellants.	LC No. 2008-088541-CE

Before: JANSEN, P.J., AND CAVANAGH AND K. F. KELLY, JJ.

PER CURIAM.

In this abatement action, defendants appeal as of right the trial court's orders granting defendants summary disposition and other injunctive relief. We affirm.

I. BASIC FACTS

Defendants have owned certain residential property in the city of Bloomfield Hills, Michigan since 1987. The property is situated in the lowest lying point of the subdivision and is subject to flooding problems. However, water overflows did not begin to adversely affect defendants' property until April of 1989, when according to defendants, additional construction and regrading in their subdivision redirected the flow of water toward their property and exacerbated the problem. In 2004, defendants filed suit against the city, their neighbors, and a nearby golf course, asserting claims of nuisance, trespass, gross negligence, and an unconstitutional taking, against the city only, by inverse condemnation for failing to prevent the flooding. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club (Froling I)*, 283 Mich App 264, 273; 769 NW2d 234 (2009). Defendants' suit was dismissed and this Court affirmed the dismissal. *Id*. at 292-296.

In the interim, the city notified defendants in October 1997 that their sump pump[1] connection to the city's sanitary sewer system was illegal in violation of state law and county

[1] Defendants' sump pump permitted storm water and ground water to be discharged into the city's sanitary sewer system.

regulations. The city directed defendants to disconnect the sump pump. Apparently, defendants failed to do so. A study conducted in the early 2000s revealed the sump pump connections contributed to sanitary system overflows. As a result of this study, the city entered into a consent order with the Michigan Department of Environmental Quality (MDEQ), which required the city to undertake corrective actions to prevent sanitary sewer overflows in the future. Further study identified defendants' sump pump as contributing to the overflows and the city, in June 2007, again directed defendants to disconnect their sump pump. Defendants refused to do so.

In addition, in November 2007, defendants installed a berm, or garden wall, around their property without first obtaining a grading permit. The berm was meant to redirect the flow of water away from their property and to prevent further damage to their home. Apparently, in March 2006, defendants had proposed a berm to the city, but the city's planning commission had denied the permit.

In January 2008, the city filed suit against defendants seeking injunctive relief requiring defendants to immediately remove the berm and sump pump from their property. The city alleged that the berm violated the city's Grading and Storm Water Management Ordinances and that the continued use of the sump pump violated its Wastewater Ordinance. The city then moved for a preliminary injunction requiring the same. It argued that the city was likely to prevail on the merits as to both the sump pump and the berm; that drainage from defendants' sump pump would cause irreparable injury to the city and users of the sewer system by causing or contributing to overflows and by causing the city to be in violation of the MDEQ's consent order; that the continued existence of the berm would also cause irreparable harm by damaging properties adjacent to the berm; and, that the requested injunctive relief was in the public's interest.

Subsequently, in September 2008, the trial court granted the injunction as to the berm, requiring that it be removed within 18 days.[2] The city then filed a motion for summary disposition under MCR 2.116(C)(9) and (10) regarding defendants' sump pump, arguing that no genuine issue of material fact existed regarding the legality of the pump. The trial court granted summary disposition in the city's favor and granted it the injunctive relief requested. According to the trial court, the ordinance prohibiting defendants' sump pump is regulatory in nature and is, thus, not subject to the rights of those having pre-existing non-conforming uses. Defendants now appeal the court's decision.

II. INJUNCTIVE RELIEF

Defendants first argue that the trial court erred when it granted injunctive relief requiring defendants to remove the berm from their property. We disagree. We review a trial court's decision to grant injunctive relief for an abuse of discretion. *Pontiac Fire Fighters Union Local 376 v Pontiac*, 482 Mich 1, 8; 753 NW2d 595 (2008). A trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Id.* "Injunctive relief is an extraordinary remedy that courts normally grant only when (1) justice requires it, (2) there is no adequate

[2] Apparently, the parties agreed to limit the hearing to the issue of the berm only.

remedy at law, and (3) there exists a real and imminent danger of irreparable injury." *Higgins Lake Prop Owners Ass'n v Gerrish Twp*, 255 Mich App 83, 106; 662 NW2d 387 (2003) (citations and quotation marks omitted).

Here, in granting the injunction, the trial court emphasized the flood damage being done to defendants' neighbors' properties as a result of the berm and the fact that defendants built the berm expressly without approval from the city. We see no error in this reasoning. The berm was illegally constructed because no approval or permit was ever issued by the city's planning commission, see Bloomfield Hills Grading Ordinance, §7.5-1 and 2 (requiring a permit for grading), the only remedy appears to be its removal, and its continued existence would cause recurring damage to surrounding properties. Thus, we cannot conclude that the trial court abused its discretion by granting plaintiff the relief requested.

Defendants' contrary argument is unavailing. Defendants argue that the berm was necessary to prevent further flooding and damage to their house, that plaintiff's actions caused the berm to become a necessity, and that defendants would not be able to remove their sump pump without mitigating the flooding with the berm. This argument, however, is not responsive to whether the trial court abused its discretion by granting the injunction. Rather, it is responsive to the city's ultimate decision to deny the permit for the berm. In fact, defendants' argument on appeal that the trial court erred by granting the injunctive relief is no more than a conclusory allegation without citation to any legal authorities. We emphasize that the only decision before the trial court with regard to the berm was whether to issue a preliminary injunction for its removal. Defendants have presented no reason on appeal from which we can conclude that the trial court abused its discretion in issuing the injunction. Thus, as to the berm, we decline to grant the relief requested.

III. SUMMARY DISPOSITION

Defendants next argue that the trial court erred when it granted summary disposition in the city's favor and, consequently, granted the city the requested injunctive relief requiring defendants' to remove their sump pump. Defendants contend that the trial court erred by concluding that the relevant ordinance was regulatory; that the ordinance nonetheless contains a grandfathering clause, which permits them to maintain their sump pump connection; that the suit is otherwise precluded; and, that the city's claim is barred by the doctrine of laches. We disagree. Because the trial court ruled on the city's motion based on a lack of material factual dispute, we will review this matter under that sub-rule. We review a trial court's decision on a motion for summary disposition de novo. *Curry v Meijer, Inc*, ___ Mich App ___; ___ NW2d ___ (2009). A motion under MCR 2.116(C)(10) is properly granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Fries v Mavrick Metal Stamping, Inc*, 285 Mich App 706, 712-713; 777 NW2d 205 (2009). In doing so, we must review all the admissible evidence in a light most favorable to the nonmoving party to determine whether a genuine issue of material fact exists to warrant a trial. *Delta Engineered Plastics, LLC v Autolign Mfg Group, Inc*, 286 Mich App 115, 119; 777 NW2d 502 (2009). A genuine issue of material fact exists if the record leaves open an issue upon which reasonable minds could differ. *Fries*, 285 Mich App at 713.

A. WASTEWATER ORDINANCE

Contrary to defendants' position, we find no error with the trial court's conclusion that the plaintiff's wastewater ordinance is regulatory in nature. The ordinance in question was adopted in response to the MDEQ's Final Order of Abatement requiring the county to update its ordinance to prevent sanitary sewer overflows. Section 21-140 of the ordinance states in relevant part:

> (a) [Compliance required.] All sanitary sewer systems connected directly or indirectly into the intercepting sewer or sewers of the Oakland County department of public works shall meet the requirements set forth in this section.
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> (b) Plans, permits and bonds.
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> (6) Removal of storm water and groundwater from sanitary sewers connected directly or indirectly to the county system.
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> a. No discharge of storm water into sewers. *All buildings and lands located in the city shall not be permitted to discharge storm water and groundwater into any sanitary sewer connected directly or indirectly to the county system except as provided under this section.*
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> * * *
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> e. Service Area C (SW-C). All buildings and lands located within Service Area C (SW-C) shall not be permitted to discharge excessive surface or groundwater flows into any sanitary sewer connected directly or indirectly to the county system after December 31, 2000. *Perimeter and footing drains that serve buildings located within Service Area C (SW-C) that were existing on or before December 16, 1968, and that were legally permitted and connect to a sanitary sewer system prior to December 16, 1968, shall not be required to disconnect from the sanitary sewer system.* [Bloomfield Hills Wastewater Treatment Ordinance, § 21-140 (emphasis added).]

Plainly, this ordinance is characterized as one protecting the health, safety, and welfare of the general public. However, "[t]he distinction between zoning and regulatory ordinances cannot be predicated on whether the purpose of the ordinance is to promote the public good, since both may have as their purpose the public good." *Natural Aggregates Corp v Brighton Twp*, 213 Mich App 287, 298-299; 539 NW2d 761 (1995). Rather, "[w]hether a particular ordinance is a zoning ordinance may be determined by considering the substance of its provisions and terms, and its relation to the general plan of zoning in the city." *Id*. at 299. Zoning ordinances regulate land uses, while regulatory ordinances regulate activities. *Id*. at 299-302.

Here, the relevant portion of the Wastewater Treatment Ordinance makes no reference to the city's zoning scheme and its requirement to remove connections to the county's sewer system bears no relation to the zoning plan. Moreover, the exception permitting perimeter and footing drains does not depend upon where a particular parcel is situated on the zoning map, but upon the date a permit was legally obtained. Thus, the ordinance does not regulate land use; rather, it regulates activities and it is properly characterized as a regulatory ordinance. Further, the ordinance is authorized under a grant of power other than the state zoning enabling act; specifically, it was adopted at the directive of the MDEQ, which has authority to seek remedies for sanitary sewer overflows under the Natural Resources and Environmental Protection Act. Thus, the ordinance is regulatory in nature and it does not bow to pre-existing non-conforming uses, as a zoning regulation would. See *Casco Twp v Brame Trucking Co, Inc*, 34 Mich App 466, 469-471; 191 NW2d 506 (1971). It logically follows that the ordinance applies to defendants' sump pump and it plainly precludes defendants' use of the pump.

Defendants, however, argue that their sump pump is a perimeter or footing drain and that there is no evidence showing that their connections were installed illegally after December 16, 1968. This argument is without merit. First, it is irrelevant whether the sump pump was illegally installed after December 16, 1968. Even if it was legally installed, the pump's current existence would still violate the ordinance. This is because the ordinance only permits the existence of perimeter or footing drains legally installed on or before December 16, 1968. It makes no reference to sump pumps legally installed on or before that date. Thus, even if the sump pump was legally installed, the ordinance makes no exception for such sump pumps; rather, it plainly requires their removal. Thus, the trial court did not err in granting summary disposition in plaintiff's favor and granting the requested injunctive relief requiring defendants to remove the sump pump.

B. CLAIM PRECLUSION

Defendants also assert that plaintiff is precluded from even raising its claim related to the sump pump because the issue was allegedly raised in previous litigation between the parties. Although defendant does not specify which preclusion doctrine their argument is premised upon—res judicata or collateral estoppel—it appears from their brief on appeal that they are arguing that res judicata is applicable to the present matter. We disagree.

"Res judicata bars a subsequent action between the same parties when the evidence or essential facts are identical." *Bd of Co Road Comm'rs v Schultz*, 205 Mich App 371, 375; 521 NW2d 847 (1994). It is applicable where "the first action was decided on its merits, the second action was or could have been resolved in the first action, and both actions involve the same parties or their privies. The doctrine also bars every claim arising from the same transaction that the parties, exercising reasonable diligence, could have raised but did not." *Solution Source, Inc v LPR Assoc Ltd Partnership*, 252 Mich App 368, 376; 652 NW2d 474 (2002) (citation and quotation marks omitted).

Here, plaintiff admits that it acknowledged in the previous litigation between itself and defendants that the sump pump was connected. Nonetheless, the essential facts in this case are not the same as the essential facts in *Froling I*. The first case involved defendants' claim that the city's actions constituted an unconstitutional taking of defendants' property, while the present matter involves the city's claim that defendants have violated various ordinances. Plaintiff's suit

was not, and could not have been, litigated in the first suit because the same evidence would not sustain both actions. See *Bd of Co Road Comm'rs*, 205 Mich App at 375. Thus, res judicata does not apply and plaintiff's suit is not barred.

C. LACHES

We also disagree with defendants' contention that plaintiff's claim is barred by the doctrine of laches. This is because defendants have failed to explain how they have suffered any prejudice. They indicate that their predecessor in interest, now deceased, could have testified regarding the legality of the sump pump connections at the time of their installation. However, we fail to see how this individual's testimony would have resulted in a different outcome. This is because such testimony would be irrelevant: as we have already concluded, even if the pump was legally installed, it would still be illegal under the city's Wastewater Ordinance. Defendants' defense of laches fails.

IV. RETALIATION

Finally, defendants posit that plaintiff's claim was brought in retaliation for prior litigation defendants initiated. The trial court never addressed this claim. Moreover, on appeal, defendants have provided neither factual support nor legal authority that would permit this Court to review the issue. Thus, we consider this issue to be unpreserved, and otherwise abandoned, and we decline to review it. *Heydon v MediaOne of Southeast Mich, Inc*, 275 Mich App 267, 278; 739 NW2d 373 (2007).

Affirmed.

/s/ Kathleen Jansen
/s/ Mark J. Cavanagh
/s/ Kirsten Frank Kelly