

STATE OF MICHIGAN
COURT OF APPEALS

SAGINAW COUNTY LAND BANK
AUTHORITY,

UNPUBLISHED
June 21, 2011

Plaintiff-Appellee,

v

VREMYA HOLDINGS, LLC,

No. 293785
Saginaw Circuit Court
LC No. 08-001212-CH

Defendant-Appellant.

Before: MARKEY, P.J., and WILDER and STEPHENS, JJ.

PER CURIAM.

Plaintiff brought this case seeking to invalidate two easements held by defendant that burden a parcel currently owned by plaintiff. The trial court, after a bench trial, ruled the easements were void because they violated two Michigan environmental statutes. Defendant appeals by right, arguing that the trial court denied it procedural due process. We affirm.

The facts in this case are largely undisputed. In November 2003, Frank Urbiha and Scott Urbiha purchased the subject property at a state public auction. The Urbihases claimed soon after purchasing the property that it was subject to a Department of Environmental Quality lien and likely contains contaminated soil. In November 2004, the Urbihases transferred the property by quitclaim deed to Freeland Real Estate, LLC, an entity organized by Scott Urbiha. On February 23, 2005, Freeland Real Estate granted two easements to defendant, another entity, this one created by Frank Urbiha. The easements, which were granted for consideration of \$1 each, cover the entire property and were properly executed and recorded. The first easement granted defendant exclusive perpetual rights to excavate, dig, or extract soils from the property. The second easement granted defendant exclusive perpetual rights to use the property for ingress, egress, and parking related to the operation of a commercial office or enterprise.

The Urbihases did not pay any property taxes on the property, and the county eventually foreclosed on it. On December 1, 2006, the county transferred the property to plaintiff. On April 30, 2008, plaintiff brought this suit seeking to invalidate defendant's easements.

At the bench trial, plaintiff argued that the easements violated the public policy of the State of Michigan as expressed in MCL 211.78(1), part of the General Property Tax Act (GPTA). That section states that the Legislature intended the powers of foreclosure for non-payment of property taxes granted in the GPTA to encourage "the efficient and expeditious

return to productive use of property returned for delinquent taxes.” MCL 211.78(1). Plaintiff argued that defendant’s easements frustrate this policy by preventing any subsequent owners from making use of the property; therefore, the easements were invalid. Defendant countered that MCL 211.78k(5)(e) delineates an explicit exception to this general policy by providing that properly recorded easements are not dissolved when the underlying fee is foreclosed for non-payment of taxes.

After trial, the court issued an opinion ruling in favor of plaintiff. Although the trial court agreed with plaintiff that MCL 211.78k(5)(e) was not intended to allow land to become undevelopable, it based its ruling primarily on MCL 324.20126 and MCL 324.20107a, which are part of the Natural Resources and Environmental Protection Act. Neither party mentioned these statutes in their briefs or at trial. Nevertheless, the court held that the easements were inconsistent with these statutes. It therefore found the easements void “as inconsistent with the environmental laws of this state.”

On appeal, defendant argues that by raising an issue sua sponte in its final opinion, the trial court denied defendant an opportunity to mount a defense on that issue. This is essentially a procedural due process claim. Whether an action violates due process is a question of law, which we review de novo. *Reed v Reed*, 265 Mich App 131, 157; 693 NW2d 825 (2005).

The specific requirements of due process vary with the circumstances, but the essential requirement is one of fundamental fairness. *Id.* at 159. In a civil case, the essence of due process requires notice and a meaningful opportunity to be heard by an impartial decision maker. *Id.* A party does not receive a meaningful opportunity to be heard when the court raises an issue sua sponte and decides a matter on that basis without giving the party a chance to present countering arguments or evidence. *Al-Maliki v LaGrant*, 286 Mich App 483, 488-489; 781 NW2d 853 (2009).

An initial failure to provide due process may be rectified by a subsequent opportunity for the party to be heard. “Where a court considers an issue sua sponte, due process can be satisfied by affording a party an opportunity for rehearing.” *Id.* at 485-86; see also *Great Lakes Div of Nat’l Steel Corp v City of Ecorse*, 227 Mich App 379, 406; 576 NW2d 667 (1998). In addition, due process may be satisfied if the party has a chance to be heard on appeal. See, e.g., *By Lo Oil Co v Dep’t of Treasury*, 267 Mich App 19, 29-30; 703 NW2d 822 (2005).

The *Al-Maliki* Court found a lack of a meaningful opportunity to be heard where the trial court raised an issue sua sponte at oral argument. 286 Mich App at 486-488. Here, the trial court did not raise the environmental statutes until it issued its opinion. Defendant had no opportunity to make any arguments to the court on the issue of the environmental statutes. Therefore, defendant was not accorded procedural due process on this issue.

Since then, however, defendant has overlooked several opportunities to make its case. Defendant did not file a motion with the trial court for reconsideration or rehearing. And on appeal, defendant addresses at length MCL 211.78(1) and 211.78k(5)(e), but does not mention the environmental statutes upon which the trial court based its opinion except to argue that defendant had no chance below to address the applicability of the environmental statutes. The failure to brief an issue on appeal constitutes abandonment of that issue. *Prince v MacDonald*,

237 Mich App 186, 197; 602 NW2d 834 (1999). By failing to argue the merits of the trial court's reasoning regarding the effect of the environmental statutes on the easements, defendant has abandoned that issue. Since defendant has not moved for reconsideration or challenged on appeal the substance of the trial court's ruling, we decline to reverse the trial court's decision on procedural due process grounds.

Given our holding regarding defendant's due process challenge, we express no opinion as to the arguments the Michigan Department of Treasury raises as amicus curiae that defendant's easements are not true easements or that the transactions involved are governed by the Uniform Fraudulent Transfer Act.

We affirm. As the prevailing party, plaintiff may tax costs pursuant to MCR 7.219.

/s/ Jane E. Markey
/s/ Kurtis T. Wilder
/s/ Cynthia Diane Stephens