

STATE OF MICHIGAN
COURT OF APPEALS

DELORES GUAY,

Plaintiff-Appellant,

v

BEAVER CREEK TOWNSHIP,

Defendant-Appellee.

UNPUBLISHED

June 30, 2011

No. 296321

Crawford Circuit Court

LC No. 09-007918-AS

Before: WHITBECK, P.J., and MARKEY and K. F. KELLY, JJ.

PER CURIAM.

Plaintiff appeals as of right from the circuit court's order granting defendant's motion for summary disposition. We affirm.

I. BASIC FACTS AND PROCEDURAL BACKGROUND

Plaintiff is a resident of defendant Beaver Creek Township and her home is located in a residentially zoned neighborhood. Defendant prohibits the operation of businesses in a residentially zoned area with the exception of "Home Occupations" which are defined in the Beaver Creek Township Zoning Ordinance, § 14.21.

In 2006 or 2007, plaintiff began to operate Leaning Oaks Cat Haven in her home. Leaning Oaks Cat Haven is a tax exempt, non-profit cat rescue service. According to plaintiff, she started the rescue operation in order to provide a service to the community, which includes taking in cats, neutering and spaying them, giving them shots, and offering them for adoption. She further asserted that the "rescued cats" are kept in enclosures and are never let outside.

Township officials became aware of Leaning Oaks Cat Haven after a newspaper article was published regarding plaintiff's efforts to address an alleged "feral cat" problem in Crawford County. Gerald Balmes, defendant's Zoning Administrator, contacted plaintiff and informed her that defendant had received complaints regarding her property. He informed her that she could face a civil infraction if the number of cats she housed continued to exceed the number of animals allowed under the local ordinance. However, he also advised her that she could seek a variance if she chose to continue her cat rescue operation.

In response, plaintiff retained counsel, who notified Balmes that plaintiff was not required to obtain a permit in order to operate a home business, and that she reserved the right to

pursue any necessary course of action in furtherance of her position. However, plaintiff's counsel also included plaintiff's application for a special use permit "in the vein of cooperation." On her application, plaintiff described the special use requested as "Home Business/Feline Rescue/Trapping and Adoption/Shot Clinic for the Public Monthly."

After a public hearing, the Beaver Creek Township Planning Commission determined that plaintiff's animal rescue did not qualify as a "home occupation." It also denied her request for a special use permit. Plaintiff sought review by the Beaver Creek Township Zoning Board of Appeals, but was informed that pursuant to the requirements of the local ordinance, appeals of a planning commission decision may only be appealed directly to the circuit court.

Rather than appealing the planning commission's decision, plaintiff instead chose to file the instant suit against defendant. The initial complaint requested superintending control and alleged substantive due process violations. Defendant moved for summary disposition, arguing that plaintiff's failure to appeal the decision of the planning commission precluded her from raising the same issues in this action. Plaintiff's counsel conceded that summary disposition was proper but requested permission to file an amended complaint. The trial court granted the motion for summary disposition and also granted plaintiff leave to file an amended complaint.

Plaintiff's amended complaint sought declaratory relief in the form of an order declaring that plaintiff's cat rescue is a "home occupation" consistent with the Beaver Creek Township Zoning Ordinance. Defendant again moved for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8). Following a hearing, the circuit court found that plaintiff had failed to exercise her available administrative remedy to appeal the decision of the planning commission. The circuit court, relying on this Court's opinion in *Krohn v City of Saginaw*, 175 Mich App 193; 437 NW2d 260 (1989), concluded that because plaintiff had failed to exhaust her administrative remedies in relation to the planning commission's decision, she was barred from filing a civil action concerning the same matter as it constituted a collateral attack.

Plaintiff appeals of right.

II. STANDARD OF REVIEW

This Court reviews de novo a motion for summary disposition brought under MCR 2.116(C)(4).¹ *Papas v Mich Gaming Control Bd*, 257 Mich App 647, 656; 669 NW2d 326 (2003). MCR 2.116(C)(4) authorizes a trial court to grant summary disposition when it does not have jurisdiction over the subject matter. A circuit court does not have subject matter jurisdiction if a plaintiff has failed to exhaust her administrative remedies. *Papas*, 257 Mich App at 656, citing *Citizens for Common Sense in Gov't v Attorney General*, 243 Mich App 43, 50; 620 NW2d 546 (2000).

III. ANALYSIS

¹ Although the trial court's opinion and order references both MCR 2.116(C)(4) and (C)(8), our review of the order demonstrates that the motion was granted on jurisdictional grounds.

Plaintiff argues that her action for declaratory judgment is not barred by her failure to pursue her administrative remedies and her failure does not negate her ability to pursue separate relief in this action. We disagree and conclude that the circuit court properly relied on *Krohn*, 175 Mich App at 195-196, in granting summary disposition.

In *Krohn*, adjoining landowners disputed a planning commission's decision approving an auto parts store's request for a variance. *Id.* at 195. Pursuant to the zoning code, the planning commission had "the authority of the board of appeals to hear such matters where special requests or special uses are to be considered." *Id.* at 195-196. The plaintiffs filed a complaint in circuit court challenging the decision of the planning commission, seeking relief under several theories, including declaratory relief. *Id.* at 197-198. The trial court concluded that plaintiffs' request for declaratory relief was untimely, reasoning that because the claim raised an issue "relative to the decision of the planning commission and the procedures employed," it did "not establish [a] separate cause[] of action, but merely address[ed] alleged defects in the methods employed by the planning commission or the result reached by the commission." *Id.* at 198. Accordingly, the Court concluded, that issue should have been "raised in an appeal from the decision of the planning commission." *Id.* "[S]ince plaintiffs were tardy in claiming their appeal," the claim for declaratory relief was "properly dismissed." *Id.*

The language of the statutory provision relied on in *Krohn* that addressed appeals of zoning decisions to the circuit court is substantially and materially similar to MCL 125.3606(1). Further, the Beaver Creek Township Zoning Ordinance provides, "No appeal shall be available [to the Zoning Board of Appeals] from a Special Use or Planned Unit development decision of the Township Planning Commission. An appeal of such latter decision must be made directly to the Crawford County Circuit Court." Beaver Creek Township Zoning Ordinance, § 20.04. Thus, the planning commission has the final say in special use decisions. See *Krohn*, 175 Mich App at 195-196 (noting that "the planning commission [has] the authority of the board of appeals to hear such matters where special requests or special uses are to be considered"). Like the action in *Krohn*, plaintiff's request for declaratory relief represents no more than a collateral attack on the planning commission's decision. Because plaintiff failed to exhaust her administrative remedies when she failed to appeal the decision of the planning commission to the circuit court, her claim for declaratory relief based on issues previously addressed by the planning commission is barred.

Plaintiff also relies on MCR 2.605 to support her claim that the trial court erroneously concluded it lacked subject matter jurisdiction. MCR 2.605(A)(1) provides that "[i]n a case of actual controversy within its jurisdiction, a Michigan court of record may declare the rights and other legal relations of an interested party seeking a declaratory judgment, whether or not other relief is or could be sought or granted." Further, MCR 2.605(A)(2) provides that "[f]or the purpose of this rule, an action is considered within the jurisdiction of a court if the court would have jurisdiction of an action on the same claim or claims in which the plaintiff sought relief other than a declaratory judgment." Plaintiff argues that under MCR 2.605, she is not barred from obtaining declaratory relief merely because administrative remedies may have been available.

Plaintiff's argument is that her request for declaratory relief is separate and distinct from the decision of the planning commission, and, therefore, does not represent an attack upon it.

Her argument is without merit. Jurisdiction is determined “not by how the plaintiff phrases [her] complaint, but by the relief sought and the underlying basis of the action.” *Colonial Village Townhouse Coop v City of Riverview*, 142 Mich App 474, 478; 370 NW2d 25 (1985). The substance of plaintiff’s claim for declaratory relief seeks what the planning commission explicitly denied, i.e., a determination that her cat rescue constitutes a “home occupation” under the ordinance.

Finally, plaintiff argues that judicial economy would be served by granting her request for declaratory relief. However, plaintiff has provided no authority for the proposition that the interests of judicial economy can serve to effectuate a bypass of the appropriate appellate process or cure plaintiff’s error in filing a complaint as opposed to an appeal to the circuit court.

Affirmed.

/s/ William C. Whitbeck
/s/ Jane E. Markey
/s/ Kirsten Frank Kelly