

STATE OF MICHIGAN
COURT OF APPEALS

MICHAEL L. DEAL and LAVONDA DEAL,

Plaintiffs-Appellees,

v

SHAWN RADEBAUGH, LORETTA
RADEBAUGH, and KAREN FRALEY,

Defendants-Appellants,

and

DOUGLAS J. MERRILL, RITA MERRILL,
JAMES F. CARDINAL, CARLA R. CARDINAL,
WALTER and ANNABELLE MERICA TRUST,
WALTER MERICA, ANNABELLE MERICA,
WILBUR A. SCHMUCKER, IRENE K.
SCHMUCKER, ARTHUR SPRADLING,
JEANNETTE SPRADLING, MARK KNIGHT,
JESSICA KNIGHT, BUTLER TOWNSHIP,
BRANCH COUNTY DRAIN COMMISSION,
BRANCH COUNTY BOARD OF COUNTY
ROAD COMMISSIONERS, CONSUMERS
ENERGY, and CENTURY TEL,

Defendants,

and

STATE TREASURER,

Defendant-Appellee.

UNPUBLISHED
August 25, 2011

No. 298672
Branch Circuit Court
LC No. 08-007416-CH

Before: MARKEY, P.J., and SAAD and GLEICHER, JJ.

PER CURIAM.

In this action under the Land Division Act (LDA), MCL 560.101 *et seq.*, defendants Shawn Radebaugh, Loretta Radebaugh and Karen Fraley appeal the trial court's order that denied their motion for summary disposition and granted summary disposition to plaintiffs. We affirm in part, reverse in part, and remand for further proceedings.

I. FACTS AND PROCEEDINGS

Plaintiffs Michael and LaVonda Deal and defendants Shawn Radebaugh, Loretta Radebaugh and Karen Fraley, own adjacent property in the Village of Herricksville. The parties' respective lots are separated by Enterprise Street, which is platted but undeveloped. Plaintiffs filed suit against defendants under the LDA, seeking entry of an order vacating Enterprise Street. In essence, plaintiffs asked the court to split Enterprise Street down the middle and vest title in plaintiffs to half of the street and vest title in the other half to defendants, pursuant to MCL 560.227a. Defendants moved for summary disposition under MCR 2.116(C)(8) and argued that the LDA does not authorize courts to revise substantive property rights. Following a hearing on the motion, the trial court denied defendants' motion for summary disposition, and granted summary disposition in favor of plaintiffs under MCR 2.116(C)(10), MCR 2.116(I)(1), and MCR 2.116(I)(2).

II. ANALYSIS

Defendants argue that the trial court erred when it denied their motion for summary disposition under MCR 2.116(C)(8) because the LDA does not authorize courts to revise substantive property rights. The interpretation and application of a statute is a question of law that we review *de novo*. *Adair v State of Mich*, 486 Mich 468, 477; 785 NW2d 119 (2010). A trial court's ruling on a motion for summary disposition under MCR 2.116(C)(8) is reviewed *de novo*. *Henry v Dow Chem Co*, 473 Mich 63, 71; 701 NW2d 684 (2005). "A movant is entitled to summary disposition under MCR 2.116(C)(8) if '[t]he opposing party has failed to state a claim on which relief can be granted.'" *Id.* at 71, quoting MCR 2.116(C)(8).

The LDA permits a trial court to "vacate, correct, or revise all or a part of a recorded plat." MCL 560.221. The complaint must set out "[t]he part or parts, if any, sought to be vacated and any other correction or revision of the plat sought by the plaintiff[.]" and "[t]he plaintiff's reasons for seeking the vacation, correction, or revision." MCL 560.223. Our Supreme Court has held that "the exclusive means available when seeking to vacate, correct, or revise a dedication in a recorded plat is a lawsuit filed pursuant to MCL 560.221 through 560.229." *Martin v Beldean*, 469 Mich 541, 542-543; 677 NW2d 312 (2004). However, our Supreme Court has also specifically held that "[t]he LDA cannot be used to create substantive property rights." *Tomecek v Bavas*, 482 Mich 484, 497; 759 NW2d 178 (2008). While "[t]he LDA was never intended to enable a court to establish an otherwise nonexistent property right . . . the act allows a court to alter a plat to reflect property rights already in existence." *Id.* at 496.

Our Supreme Court recently clarified that "[i]f a party's interest in land is traceable to the plat or the platting process, the LDA is the appropriate avenue for relief." *Beach v Lima Twp*, ___ Mich ___; ___ NW2d ___ (Docket No. 139394, issued June 3, 2011), slip op at 18. Stated another way, "the LDA does not require a party to proceed under its procedures unless that party is seeking to alter the plat or the dedication language of the plat to which the party has a

preexisting substantive property right as the owner of the property or a person of record claiming under the owner.” *Id.* at 20.

As stated above, plaintiffs asked the trial court to vacate Enterprise Street and vest title up to the center line in plaintiffs and defendants, the respective owners of the abutting lots on each side, pursuant to MCL 560.227a. Plaintiffs correctly filed this action under the LDA because their interest in the land is “traceable to the plat or the platting process.” *Beach*, ___ Mich at ___, slip op at 18. Because plaintiffs sought “to alter the plat . . . to which [they] ha[d] a preexisting substantive property right as the owner of the property[.]” bringing suit under the LDA was the proper avenue for obtaining their requested relief. *Id.* at 20. Accordingly, plaintiffs stated a claim on which relief could be granted, and the trial court properly denied defendants’ motion for summary disposition on that basis.

Defendants further contend that the trial court erred in granting summary disposition in favor of plaintiffs under MCR 2.116(C)(10), MCR 2.116(I)(1), and MCR 2.116(I)(2). We review de novo questions of law and issues of statutory interpretation. *2000 Baum Family Trust v Babel*, 488 Mich 136, 143; 793 NW2d 633 (2010). We review de novo a trial court’s grant of a motion for summary disposition under MCR 2.116(C)(10) and MCR 2.116(I). *Latham v Barton Malow Co*, 480 Mich 105, 111; 746 NW2d 868 (2008); *Kenefick v Battle Creek*, 284 Mich App 653, 654; 774 NW2d 925 (2009).

“A trial court is not necessarily constrained by the subrule under which a party moves for summary disposition.” *Computer Network, Inc v AM Gen Corp*, 265 Mich App 309, 312; 696 NW2d 49 (2005). “It is well-settled that, where a party brings a motion for summary disposition under the wrong subrule, a trial court may proceed under the appropriate subrule if neither party is misled.” *Id.* However, here, plaintiffs did not move for summary disposition at all. The trial court’s determination that plaintiffs implicitly moved for summary disposition under MCR 2.116(C)(10) was erroneous: No proofs were filed in the action or submitted by the parties for consideration by the court as required by MCR 2.116(G)(5) when deciding a motion for summary disposition under MCR 2.116(C)(10).

However, a “trial court has the authority to grant summary disposition sua sponte under MCR 2.116(I)(1)[.]” *Al-Maliki v LaGrant*, 286 Mich App 483, 489; 781 NW2d 853 (2009), which provides that “[i]f the pleadings show that a party is entitled to judgment as a matter of law, or if the affidavits or other proofs show that there is no genuine issue of material fact, the court shall render judgment without delay.” MCR 2.116(I)(2) provides that “[i]f it appears to the court that the opposing party, rather than the moving party, is entitled to judgment, the court may render judgment in favor of the opposing party.”

Here, the pleadings did not demonstrate that plaintiffs were entitled to judgment as a matter of law. Although plaintiffs’ requested relief was permissible under the LDA, the trial court’s grant of summary disposition in favor of plaintiffs under MCR 2.116(I)(1) and MCR 2.116(I)(2) was erroneous because its vacation of Enterprise Street did not “alter a plat to reflect property rights already in existence.” *Tomecek*, 482 Mich at 496. Here, the trial court’s vacation of Enterprise Street altered the substantive property rights of the parties. Currently, both plaintiffs and defendants have use of Enterprise Street in its entirety, as reflected by the plat map. By vacating Enterprise Street and granting fee simple ownership to the plaintiffs and defendants

to the middle of the current street, the trial court abrogated their use of the entire road, thereby affecting their substantive property rights as reflected on the record before this court. While it is possible that further proofs could demonstrate that the trial court's vacation of Enterprise Street reflected the way in which the parties were actually using the property, i.e., if the parties were only using the respective half of the street abutting their property, the record was insufficiently developed to decide this issue. Moreover, further proofs are necessary to determine whether the requirements have been met for vacating the street under the LDA. In light of this determination, we need not address the remainder of defendants' arguments on appeal.

We affirm in part, reverse in part, and remand for further proceedings. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Elizabeth L. Gleicher