STATE OF MINNESOTA
IN COURT OF APPEALS
A19-2017

H. Joseph Slater,
Appellant,

Kimberly Devine, et al.,
Plaintiffs,

vs.

Wabasha County,
Respondent.

Filed June 15, 2020
Affirmed; motion denied
Worke, Judge

Wabasha County District Court
File No. 79-CV-19-318

Erick G. Kaardal, Mohrman, Kaardal & Erickson, P.A., Minneapolis, Minnesota (for appellant)

Jason J. Kuboushek, Iverson Reuvers Condon, Bloomington, Minnesota (for respondent)

Considered and decided by Worke, Presiding Judge; Hooten, Judge; and Jesson, Judge.

U N P U B L I S H E D O P I N I O N

WORKE, Judge

Appellant argues that the district court erred by: (1) concluding that mandamus does not lie because appellant has an adequate remedy at law; and (2) sua sponte granting

summary judgment to respondent and dismissing appellant's complaint. We affirm. Appellant also moves this court to supplement the record. We deny the motion.

FACTS

In April 2000, appellant H. Joseph Slater submitted his preliminary plat for the Pepin Bluff Preserve Development (Pepin Bluff) to the Wabasha County Planning Commission. Pepin Bluff is comprised of two subdivisions, or phases, each located within a different jurisdiction. Phase 1 is located within the boundaries of Lake City, whereas Phase 2 is located outside of Lake City's boundaries and is subject to the subdivision requirements of Wabasha County. The present dispute involves the maintenance of roads located within Phase 2 of the development.

While initial plats of Phase 2 indicated the use of outlots and private roads, the amended final plat included a dedication of the access thoroughfares to the public. That plat contains the following dedication language: "Have caused the same to be surveyed and platted as PEPIN BLUFF PRESERVE 2 and do hereby donate and dedicate to the public for public use forever the thoroughfares and cul de sacs."

During a June 25, 2001 meeting of the Wabasha County Planning Commission, a board member raised the concerns of the Lake Township Board regarding the dedication of roads to the public and requested that Slater address the township board. According to the minutes of the meeting, "Mr. Slater stated [that] all questions have been answered and he had no further comment." The Wabasha County Board ultimately approved the amended final plat and it was recorded on September 18, 2001.

Following approval of the final amended plat, Slater sought to rezone the development, and the Wabasha County Planning Commission considered this request during a meeting on February 11, 2002. According to the minutes of the meeting, a representative of Lake Township stated that "the Lake Township Board has requested [Slater] to come to the Township with his proposals to develop and [Slater] never has come to them." The minutes indicate that the Lake Township representative went on to note that while the map indicated the presence of public roads, "they are not existing public roads . . . [Slater] may have proposed them as public roads but . . . [Slater] has never been to the township to discuss taking over the roads as public roads." In response, the minutes indicate that Slater stated that "the township does not have any laws and going to the township was irrelevant."

In March 2019, Slater petitioned Wabasha County to take over maintenance of the roads in Phase 2. Wabasha County responded to Slater's petition and indicated that Lake Township maintains one road, Lake City maintains another, and that "263rd Avenue and 708th Street were never established as county, city or township roads." Wabasha County informed Slater that he could petition Lake City or Lake Township to maintain the roads pursuant to Minn. Stat. §§ 164.07 and 164.15 (2018).

Slater and ten other landowners (collectively plaintiffs) then filed the present action in district court, seeking a writ of mandamus directing Wabasha County to maintain the roads in Phase 2 and recognize them as public rights-of-way. Plaintiffs also brought a claim for damages related to the county's failure to maintain the roads.

Slater moved the district court for summary judgment on the mandamus claim only.[1] The district court denied Slater's motion for partial summary judgment and sua sponte granted summary judgment to the county and dismissed the complaint. This appeal followed.

D E C I S I O N

Slater argues that the district court erred by granting the county summary judgment sua sponte on all claims and dismissing the complaint. This court reviews the grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). This court reviews "whether there are any genuine issues of material fact and whether the district court erred in its application of the law. [This court] view[s] the evidence in the light most favorable to the party against whom summary judgment was granted." *STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

"When a decision on a writ of mandamus is based solely on a legal determination, we review that decision de novo." *Breza v. City of Minnetrista*, 725 N.W.2d 106, 110 (Minn. 2006). This court reviews the interpretation of a statute de novo. *Cocchiarella v. Driggs*, 884 N.W.2d 621, 624 (Minn. 2016).

[1] Initially, all of the plaintiffs were represented by the same counsel in district court, but Slater subsequently proceeded pro se. Slater filed his briefs to this court pro se, but is now represented by different counsel.

Mandamus

Slater first argues that the district court erred by granting the county summary judgment sua sponte on plaintiffs' request for a writ of mandamus directing the county to maintain the roads in Phase 2. "Mandamus is an extraordinary legal remedy that courts issue only when the petitioner shows that there is a clear and present official duty to perform a certain act." *Kramer v. Otter Tail Cty. Bd. of Comm'rs*, 647 N.W.2d 23, 26 (Minn. App. 2002) (quotation omitted). In order to receive mandamus relief, Slater "must show that: 1) the [county] failed to perform an official duty clearly imposed by law; 2) he suffered a public wrong and was specifically injured by the [county's] failure; and 3) he has no other adequate legal remedy." *Breza*, 725 N.W.2d at 109-10 (quotations omitted).

The district court determined that plaintiffs had an adequate legal remedy and therefore sua sponte granted summary judgment for the county on plaintiffs' request for mandamus relief. The district court relied on Minn. Stat. § 163.16 (2018), which provides a statutory procedure for landowners to compel the maintenance of a described town road. Under that statutory scheme, five or more landowners may bring a complaint before the county board identifying the improperly maintained road, which then obligates the county board to hold a hearing on the complaint. Minn. Stat. § 163.16, subd. 1. If the county board determines that the complaint is well-founded, it shall direct the town board to perform necessary improvements. *Id*., subd. 3. If the town fails to perform the work, the county may cause the work to be done. *Id*. "Any decision of the county board acting under the authority of § 163.16 would be subject to judicial review by certiorari." *Town of Red*

Rock v. County of Mower (*In re Maint. of Road Areas Shown on the Plat of Suburban Estates*), 250 N.W.2d 827, 831 (Minn. 1977).

Because the present action involved more than five plaintiffs, the district court determined that they possessed an adequate legal remedy to seek road maintenance under section 163.13, and therefore determined that they were not entitled to mandamus relief. *See Breza*, 725 N.W.2d at 110. Since plaintiffs were not entitled to mandamus relief as a matter of law, the district court sua sponte granted the county summary judgment on this claim.

Slater asserts that his dedication of the roads to "the public" in the plat of Phase 2 approved by the county board was sufficient to obligate the county to maintain the roads, but this argument is not supported by precedent. When the plat of Phase 2 was approved, "every donation to the public . . . shall operate to convey the fee of all land so donated, for the uses and purposes named or intended . . . . Land donated for any public use in any municipality shall be held in the corporate name in trust for the purposes set forth or intended." Minn. Stat. § 505.01 (2000).[2]

However, "the mere platting of the land did not instantly create an obligation upon the town board to open and maintain the dedicated streets . . . the municipality may determine the time it will open a street and assume the maintenance thereof." *Town of Red Rock*, 250 N.W.2d at 831. In other words, dedication of a road to the public does not itself obligate a governmental subdivision to maintain it. The supreme court stated that prior to

[2] In 2007, section 505.01, subd. 1, was amended to make the dedication of a road in a plat the conveyance of an easement only. 2007 Minn. Laws ch. 73, § 1.

bringing an action before the county board under section 163.16, "the property owners should formally present a request to their town board to open and maintain the roads." *Id*. The county board has jurisdiction to consider a complaint that the township improperly failed to maintain a town road. *Id*.

Slater also asserts, without citation to authority, that section 163.13, and the statements of the supreme court in *Town of Red Rock*, are limited by their plain language to petitions to maintain *town* roads. Because Slater contends that the roads in Phase 2 are *county* roads, he argues that section 163.13 and *Town of Red Rock* are inapplicable. However, in *Town of Red Rock*, as here, the roads were constructed according to specifications obtained from the county engineer. *Id*. at 829. And the county accepted the final plat, including the public dedication, for filing. *Id*. It was the filing of the plat that brought road-maintenance complaints within the statutory process provided by section 163.16. *Id.* at 831. The supreme court went on to state that "[a]ny attempt to differentiate between a 'public road' and a 'town road' operates to improperly construe the more inclusive term 'described town road' and we reject such a subtle distinction." *Id*. On this basis, Slater's contention that the dedication of the roads in the plat of Phase 2 "to the public" operated to remove them from the scope of section 163.16 is inconsistent with the supreme court's statements in *Town of Red Rock*.

Slater next argues that even if he was not entitled to partial summary judgement, the district court erred by granting summary judgment sua sponte to the county on plaintiffs' mandamus claim. Under Minn. R. Civ. P. 56.06, the district court may, "[a]fter giving notice and a reasonable time to respond . . . (a) grant summary judgment for a nonmovant."

Slater argues that the district court erred because it did not provide him with notice or a reasonable time to respond.

Slater moved for partial summary judgment on his request for a writ of mandamus. The county took the position in its responsive memorandum that Slater's request for mandamus should be denied and dismissed, and noted that under rule 56 the district court may enter summary judgment for either party.[3] Slater filed a reply memorandum, wherein he responded to the county's arguments regarding the availability of mandamus relief, but did not address the county's request to dismiss the claim. During the hearing on Slater's motion, the county took the position that summary judgment should be entered for the county if the district court found that mandamus relief was inapplicable. Neither Slater nor the attorney for the other plaintiffs noted any opposition to the county's position.

Under similar circumstances, this court determined that sua sponte summary judgment for the nonmoving party was appropriate. *See W. Circle Props. L.L.C. v. Hall*, 634 N.W.2d 238, 244 (Minn. App. 2001), *review denied* (Minn. Dec. 19, 2001) (stating that the moving party—against whom summary judgment was entered—was not prejudiced by a lack of notice or opportunity to respond when the matter turned on a single legal issue and the moving party filed a reply brief). While *W. Circle Props.* was decided before the 2018 amendments to rule 56, Slater has not established that he lacked notice of

[3] It appears that the county relied upon a previous version of Minn. R. Civ. P. 56.03, but as discussed above, rule 56.06(a) authorizes the district court to enter summary judgment for a nonmovant.

the basis for the county's request to dismiss the complaint, and therefore sua sponte summary judgment was appropriate under rule 56.06(a).

Damage claim

Slater next argues that the district court erred by sua sponte granting the county summary judgment on plaintiffs' damage claim. The district court did not specifically address this aspect of plaintiffs' complaint, but found that dismissal of the entire complaint was warranted because "[p]laintiffs are to pursue another remedy available to them prior to seeking the [w]rit of [m]andamus." While plaintiffs' complaint sets forth two separate counts—the first for a writ of mandamus, the second for damages—the second claim does not raise any substantive cause of action. Because plaintiffs' second count is not an independent cause of action, the district court's sua sponte dismissal of the entire complaint was appropriate. Plaintiffs were not entitled to mandamus relief, which was their sole cause of action.

Motion to supplement record

As a final matter, during the pendency of this appeal, Slater moved this court to supplement the record pursuant to Minn. R. Civ. App. P. 103.04 with two documents he asserts constitute orders affecting the district court's summary judgment order. The first document is the minutes of a November 19, 2019 meeting of the Lake Township Board. The second document is a January 8, 2020 letter from the Wabasha County Attorney.

The district court's summary-judgment order was filed on October 16, 2019. At a minimum, the documents submitted by Slater do not constitute orders affecting the judgment because they came into existence after the order from which Slater appeals. *See*

Konkel v. Fort, 73 N.W.2d 613, 614 (Minn. 1955) ("An appeal from a judgment does not bring up for review orders entered subsequent to its rendition but only prior orders and rulings which result in the judgment."). Accordingly, Slater's motion to supplement the record is denied.

Affirmed; motion denied.