STATE OF MICHIGAN

COURT OF APPEALS

TAMERA M. WINKELBAUER,

Plaintiff-Appellant,

v

KEVIN BRALEY, DEBBIE BRALEY, PRESQUE ISLE HARBOR ASSOCIATION, INC. and STEVEN R. LANG,

Defendant-Appellees.

UNPUBLISHED
September 26, 1997

No. 195549
Presque Isle Circuit
LC No. 96-002084-CK

Before: Saad, P.J., and Neff and Reilly, JJ.

PER CURIAM.

Plaintiff alleges that a fence constructed on her residential property line by her neighbor constitutes a "spite fence" and violates a restrictive covenant. The circuit court granted summary disposition to defendants Braley, Presque Isle Harbor Association ("Harbor Assoc.") and Steven R. Lang (president of the Harbor Assoc.). Plaintiff now appeals by right and we affirm.

In early 1992, Lot 195 in the Harbor View subdivision was owned by Barbara Lauinger-Charbel. In April, 1992, plaintiff submitted an offer to purchase Lot 195, but the offer was rejected. Charbel also received a higher offer from the McClains, and while their offer was pending, the McClains moved into the home on Lot 195.

On October 2, 1992, the Braleys, who own the lot adjoining Lot 195, obtained approval of the Presque Isle Harbor architectural control committee for the proposed design, height and plan of a fence to be erected between the Braley property and Lot 195. Sometime prior to March, 1993, the Braleys erected a six foot high fence along the property line between their property and Lot 195; it is undisputed that this fence substantially obscures Lot 195's view of the water. The Charbel-McClain deal then fell through and in March, 1993, Charbel ultimately sold Lot 195 to plaintiff for a lower amount. Plaintiff complained about the new fence to the Harbor Assoc. and was told by Paula Lang that the Braleys had been given "special consideration" because they were "good friends."

Plaintiff filed suit alleging that the fence was a "spite fence" and that it violated the Harbor Assoc.'s restrictive covenant. She also asked that the law firm representing the Braleys be disqualified, due to a conflict of interest. The trial court granted summary disposition (without specifying the basis) for defendants Lang and Harbor Assoc., and pursuant to MCR 2.116(C)(8) for defendants Braley. The trial court did not rule on the motion for disqualification.

I

The elements of a "spite fence" nuisance case are that a defendant (1) erected a fence or other obstruction, (2) which serves no useful purpose or advantage to himself, and (3) did so with malicious intent. See *Burke v Smith*, 69 Mich 380, 382; 37 NW 838 (1888); *Kuzniak v Kozminski*, 107 Mich 444, 445-446; 65 NW 275 (1895); 1 Am Jur 2d, Adjoining Landowners, §§ 106, 111. See also *Hasselbring v Koepke*, 263 Mich 466, 475-476; 248 NW 869 (1933). Where erection of a fence is motivated by *both* a purpose useful to defendant *and* by spite, a cause of action cannot be maintained. *Kuzniak*, 107 Mich at 446; 1 Am Jur 2d, Adjoining Landowners, § 112.

Here, plaintiff *alleged* that the fence served no useful purpose to the Braleys. However, *by affidavit*, Kevin Braley stated that he and his wife erected the fence for the following reasons:

(1) to protect their privacy;

(2) for the safety of their children (stating that the adjoining property had glass and debris throughout the yard);

(3) to teach their children to stay in their yard;

(4) to help prevent further thefts from their yard; and

(5) for aesthetic purposes.

Critical to this appeal is the fact that *plaintiff provided no evidence to dispute this affidavit* by Braley. Thus, on the record here, plaintiff has failed to establish a dispute of material fact as to the second required element (i.e. that the fence serves no useful purpose or advantage to defendant). Thus, although the circuit court granted summary disposition pursuant to MCR 2.116(C)(8), we affirm the grant of summary disposition pursuant to MCR 2.116(C)(10) to defendants.[1]

II

Plaintiff also asserts that the trial court erred by denying her the opportunity to amend her complaint to include an action for subrogation based on her land contract with Charbel. However, such an amendment would have been futile, because a neighboring landowner's decision to erect a privacy fence that neither invades plaintiff's land nor completely shields her from sunlight is not actionable as a private nuisance. See *Adkins v Thomas Solvent Co*, 440 Mich 293, 302-303; 487 NW2d 715 (1992). Thus, the trial court did not abuse its discretion in denying plaintiff's request to amend her complaint.

III

Finally, plaintiff requests that the law firm that represents defendants Braley be disqualified due to a conflict of interest. While our review of the record strongly suggests that a conflict of interest occurred, and that the trial court failed to squarely address the issue, we cannot see any benefit to remanding this matter for further consideration in light of our disposition of the merits.

Affirmed.

/s/ Henry William Saad
/s/ Janet T. Neff
/s/ Maureen Pulte Reilly

[1] Plaintiff also alleges that the height of the fence (or portions of it) exceeds the subdivision zoning ordinance maximum of six feet. However, an action to enforce a zoning ordinance must be brought by one of the municipality's city officials pursuant to MCL 125.294; MSA 5.2963(24). *Towne v Harr*, 185 Mich App 230, 232; 460 NW2d 596 (1990). The only time a private citizen has standing to enforce a city ordinance is when a citizen alleges a public nuisance and suffers a harm differently from the public generally. *Id*. at 232. Since plaintiff does not allege a public nuisance by which she suffers a harm different from the public generally, MCL 125.294; MSA 5.2963(24) and *Towne* are dispositive, and her only remedy is to seek enforcement of the ordinance through city officials. *Id.* at 233.