STATE OF MICHIGAN

COURT OF APPEALS

CHARTER TOWNSHIP OF YPSILANTI,

Plaintiff/Counterdefendant-Appellee,

v

GROVE PARK HOME IMPROVEMENT ASSOCIATION,

Defendant/Counterplaintiff/Cross-Plaintiff/Third-Party Plaintiff-Appellant,

and

GROVE PARK HOMES, LLC, GOOD HOME SOLUTIONS, LLC, JIMAR ENTERPRISE, LLC, GARY COWARD, ANNIE M. KELLAS, JAG PROPERTIES & INVESTMENT, LLC, WILLIAM PARKER, GLORIA PARKER, LISA HICKS, WILLIAM J. HICKS, GWENDOLYN A. HICKS, CAROLYN Y. CHADWICK, AUNE MANUPELLI-HAMILTON, JAMES MOORE, a/k/a JIMMY MOORE, JOSEPH SECORE, and STATE STREET PROPERTIES & INVESTMENT, LLC,

Defendants/Counterplaintiffs/Third-Party Plaintiffs-Appellants,

and

CALE STREETER,

Defendant-Appellant,

and

JOSEPH L. KOENIG,

Defendant/Counterplaintiff/Third-

UNPUBLISHED
March 26, 2013

No. 305990
Washtenaw Circuit Court
LC No. 10-001407-CZ

Party Plaintiff,

and

ADAMS A. ALIYU; BROTHERS AND SISTERS HOMES, LLC, THOMAS CHADWICK, ELIZABETH DURR, GARY DURR (deceased), ABEL EKPUNOBI, FEDERAL NATIONAL MORTGAGE ASSOCIATION, KINCAID FRYE, SHANTEL GIBBS, TIA GIBBS, GMAC MORTGAGE, LLC, DELORES HARDRICK, KEY PROPERTIES, LLC, BEN LASTER, STEPHANIE LASTER, MELVIN LEWIS, BETTY LEWIS, LINDA MCGUIRE, ANTHONY MCGUIRE, MONICA A. MCKIVENS, VARNESSA PATTERSON, WILLIE POWELL, GERALDINE POWELL, VIRLEY W. REED, and GAIL D. REED,

Defendants,

and

WASHTENAW COUNTY TREASURER,

Defendant/Cross-Defendant-Appellee,

and

RON FULTON,

Third-Party Defendant-Appellee.

Before: SAWYER, P.J., and MARKEY and M. J. KELLY, JJ.

PER CURIAM.

Defendants-appellants appeal by right the trial court's opinion and order declaring that a condominium-like residential townhouse development, Liberty Square, was a public nuisance and ordering its abatement by demolition, MCL 600.2940. Defendants-appellants also appeal the trial court's dismissal of their counter-claims, cross-claims, and third-party claims because the court found appellants' claims were without merit. We affirm.

I. SUMMARY OF FACTS AND PROCEEDINGS

Liberty Square is comprised of 17 buildings with 151 separate residential units and was incorporated in 1971 as the Grove Park Home Improvement Association (GPHIA). Although built before the Michigan's condominium act, the complex is governed by a recorded declaration

of covenants, conditions and restrictions. The GPHIA was established as the legal representative of all unit owners and is responsible for the maintenance and preservation of the common areas and the exterior of the buildings. Each unit owner was required to join the GPHIA and pay an annual assessment to fund the maintenance and improvements for which the GPHIA was responsible. Problems developed over the years as the occupancy rate declined, assessments increased, and maintenance stopped.

A 2006 "Market and Feasibility Study Summary Report" was prepared by a private consulting firm and was admitted during the proceedings in the trial court as plaintiff's Exhibit 9. The report in its first paragraph documents problems at Liberty Square leading up to plaintiff's building code enforcement actions.

> Liberty Square Townhomes has long been considered one of Ypsilanti Township's worst neighborhoods. The townhome community has experienced severe decline in the form of conversion of owner-occupied homes to rental units, deterioration of existing housing stock, and reputation as a high crime area. Moreover, in 2005 Flagstar Bank foreclosed upon 58 of the 151 units at Liberty Square. Over one-half of all units at Liberty Square are currently vacant.

In addition to bank foreclosure, in 2010 the Washtenaw County treasurer foreclosed on 63 units owned by Grove Park Homes, LLC, a company owned by the spouse of Joseph Koenig, GPHIA's resident agent and manager, because property taxes went unpaid. The treasurer testified that Koenig admitted stripping these units of appliances and cabinets sometime before the tax foreclosure. The treasurer transferred the 63 units to plaintiff after they were not purchased at a tax sale. After the initiation of this action in December 2010, foreclosure of Liberty Square units for non-payment of taxes continued: 32 additional units were foreclosed for delinquent taxes in 2011 and another 27 were in the process of foreclosure proceedings.

Plaintiff initiated building code enforcement action in 2008, issuing notice of violations (NOV) to 68 units, which produced no maintenance action. The units were in the hands of a receiver as part of mortgage foreclosure proceedings and included the initial 63 units foreclosed on for non-payment of property taxes. On April 23, 2010, plaintiff issued a NOV to GPHIA and Koenig its resident agent and property manager, with respect to all 17 buildings of Liberty Square, citing numerous violations of plaintiff's property maintenance code. GPHIA's attorney, Mariah Fink, responded in a letter on May 21, 2010, asserting that the NOV was vague, overbroad and should be addressed to the actual owners of Liberty Square units. In response, on June 1, 2010, plaintiff mailed notice to all listed property owners. Also, its building official, Ron Fulton, posted each unit with a copy of the letter and a notice that the unit was "unsafe to live in" and "condemned." On April 16, 2010, township officials inspected Liberty Square and took extensive photographs of the exteriors of the seventeen buildings. These photographs were included in an addendum to the prior NOV, which was posted at each unit on August 20, 2011. Only one unit owner, Tom Chadwick, responded to the August 2011 addendum to the NOV.

On December 22, 2010, plaintiff filed its complaint pursuant to MCL 600.2940 and MCR 3.601, seeking an order declaring that the Liberty Square property was a public nuisance. Some of the named defendants (appellants) filed counter-claims and third-party complaints for damages pursuant to 42 USC 1983, alleging violations of procedural and substantive due

process, inverse condemnation, and intentional torts of interference with contract and an advantageous business relationship or expectancy. Defendant GPHIA filed a cross-complaint against the Washtenaw County treasurer asserting a claim for accounts stated with respect to non-payment of association maintenance fees regarding units that had been foreclosed for non-payment of taxes. Defendant Cale Streeter filed a counter-claim against plaintiff alleging violations of procedural and substantive due process, unconstitutional taking and inverse condemnation, as well as a third-party complaint against plaintiff's building official, Ronald Fulton, alleging gross negligence and tortious interference with contractual relations.

The trial court conducted three hearings on plaintiff's complaint: a show cause hearing on January 26, 2011, and evidentiary hearings on June 16, 2011 and July 29, 2011. The trial court also entered other ancillary orders, including authorizing alternative service on some defendants by publication and posting and entering an order permitting plaintiff to enter and inspect all vacant units and those not lawfully occupied. On June 24, 2011, after the first evidentiary hearing and before the second, the trial court conducted a view of the property. None of the parties objected. The trial court issued its opinion and order on August 19, 2011, declaring the 17 structures (151 units) of Liberty Square a public nuisance to be abated by demolition.

II. STANDARD OF REVIEW

Although nuisance proceedings are equitable in nature, MCL 600.2940(5), whether a condition is a nuisance in fact presents a question of fact. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 269; 761 NW2d 761 (2008). Thus, the trial court's findings of fact are reviewed for clear error. *Id*. at 270. In the application of this standard of review, "regard shall be given to the special opportunity of the trial court to judge the credibility of the witnesses who appeared before it." MCR 2.613(C). A finding of fact is clearly erroneous if the Court is left with the definite and firm conviction that a mistake has been made. *Capitol Properties Group, LLC v 1247 Center St, LLC*, 283 Mich App 422, 430; 770 NW2d 105 (2009). The trial court's ultimate equitable decision is reviewed de novo. *Kircher*, 281 Mich App at 270.

This Court reviews de novo constitutional issues and any other question of law that arises on appeal. *Cummins v Robinson Twp*, 283 Mich App 677, 690; 770 NW2d 421 (2009).

III. ANALYSIS OF QUESTIONS PRESENTED

The first question appellants present is whether there must be a separate nuisance determination as to each of the individual units comprising Liberty Square. Appellants have abandoned this issue by not properly presenting it for review. Contrary to the requirements of MCR 7.212(C)(7), appellants present no statement as to the preservation of this issue, the standard of review, or any argument with citation to authority to support their position. As such, appellants have waived appellate review. See *Woods v SLB Property Mgt LLC*, 277 Mich App 622, 626-627; 750 NW2d 228 (2008).

Appellants next contend that the evidence presented does not support the trial court's finding of a public nuisance where at most only building code violations were established. We disagree. Giving due regard to the trial court's credibility determinations, its assessment of the

weight to be assigned to the evidence, and reasonable inferences to be drawn from the evidence, we conclude that the trial court did not clearly err in finding that "conditions on the property both as to their severity and their location have a natural tendency to create danger and inflict injury to person or property . . . that the Liberty Square housing complex is a public nuisance in fact." Moreover, the evidence supported the trial court's equitable remedy of demolition.

MCL 600.2940 provides for abatement of nuisances but does not define the term.

> (1) All claims based on or to abate nuisance may be brought in the circuit court. The circuit court may grant injunctions to stay and prevent nuisance.
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> * * *
>
> (5) Actions under this section are equitable in nature unless only money damages are claimed. [MCL 600.2940.]

There are two categories of nuisance, which is a condition: nuisances per se and nuisances in fact. *Martin v Michigan*, 129 Mich App 100, 107-108; 341 NW2d 239 (1983). "A nuisance per se is an act, occupation, or structure which is a nuisance at all times and under any circumstances." *Id*. at 108. Plaintiff alleged here a nuisance in fact, which "is a nuisance by reason of circumstances and surroundings, and [has a] . . . natural tendency . . . to create danger and inflict injury to person or property." *Id*. Such a nuisance is also referred to as a public nuisance because the condition "must affect an interest common to the general public, rather than peculiar to one individual, or several." *Garfield Twp v Young*, 348 Mich 337, 342; 82 NW2d 876 (1956). But a nuisance need not affect the entire community "so long as the nuisance will interfere with those who come in contact with it in the exercise of a public right." *Id*. As explained in *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 190; 540 NW2d 297 (1995), "[a] public nuisance is an unreasonable interference with a common right enjoyed by the general public." An "unreasonable interference" includes a condition that "significantly interferes with the public's health, safety, peace, comfort, or convenience . . . ." *Id*.

Appellants argue that at best the evidence showed mere building code violations that did amount to a public nuisance. The *Kircher* Court noted minor building code violations, "such as chipped paint, dripping faucets, improperly caulked bathtubs, improperly caulked windows, missing roof flashing, and small holes in the drywall simply did not rise to the level of public nuisance conditions." The conditions were not a nuisance because they "did not immediately endanger the health and safety of the public or the tenants" of the property. *Kircher*, 281 Mich App at 277. However, "examples of the types of major property maintenance code violations that constituted bona fide nuisance conditions" included "exposed live electrical wires, significant accumulations of trash and rubbish, insect and vermin infestations, falling bricks and windows, collapsing walls, and sanitary sewer leakages certainly posed substantial risks to the general health, safety, and welfare of the tenants" at the property. *Id*., n 7. Contrary to appellants' argument, the evidence here supports the trial court's findings because the conditions were closer to those found to be a nuisance in *Kircher* than the minor violations that were not.

The trial court found the conditions at Liberty Square included: none of the units were weather tight; the majority of roofs of the several buildings were in disrepair and needed to be

replaced; fascia throughout the complex had decayed; there was extensive vandalism throughout the complex; more than 50% of the windows were broken—the units were open to the elements; vermin, rodents, and birds had infiltrated many vacant units; and a structural engineer testified improper crawl space construction with lack of ventilation had caused wood rot at the thresholds of many units, which was aggravated by the units not being weather tight. The trial court also described its view of the property revealed that Liberty Square was a "dilapidated and essentially deserted housing area." The trial court found that the "buildings all appeared to be in a significant state of disrepair, with portions of the roofs, fascia and siding missing or falling down." The court also reported that "[t]he foundations at the front and rear entrances of the units appeared to be water damaged and failing." As to the interior of the units, the trial court found that although "the conditions varied from unit to unit, all of the units showed water damage to some extent." This damage "was apparently from leaking roofs with signs of water in virtually every second floor ceiling." In addition, most of the units were deserted and appeared "to have been stripped, either by prior owners or by vandals." Thus, the testimonial and photographic evidence, expert testimony, and the court's own view of the premises support the court's finding of a public nuisance. The trial court wrote in its opinion and order:

> As shown by the evidence, the dilapidated and crumbling conditions at Liberty Square pose a continuing, impending danger to the general public, and to the legitimate property or personal rights of persons living or even entering upon the complex. The conditions on the property both as to their severity and their location have a natural tendency to create danger and inflict injury to person or property. Based on the evidence, the Court finds that the Liberty Square housing complex is a public nuisance in fact.

Appellants argue that the evidence was insufficient to support the trial court's findings because plaintiff's building official, Ron Fulton, admitted he did not inspect appellants' units, and because the court's findings were mere speculation based on an examination of one unit. The record and the trial's reasoning do not support this argument. First, although Fulton did not inspect the interior of appellants' units, which were a minority of the complex, he did inspect the interior of a fair percentage of units that had been seized for non-payment of taxes. Second, the trial court relied on more than just Fulton's testimony; it considered expert testimony, photographic evidence and its own inspection of the premises. Rather than speculation, the trial court's findings were reasonable inferences logically deducible from evidence the court found credible. See *Yoost v Caspari*, 295 Mich App 209, 228; 813 NW2d 783 (2012) (discussing the distinction between speculation and reasonable inference). Finally, appellants' argument is essentially that Fulton was not credible and that the testimony that appellants presented to the contrary was. But the trial court found Fulton's testimony credible and the testimony to the contrary submitted by appellants incredible. This Court will generally defer to the fact-finder's determinations regarding credibility and reasonable inferences to be drawn from the evidence. MCR 2.613(C); *Augustine v Allstate Ins Co*, 292 Mich App 408, 424-425; 807 NW2d 77 (2011); *People v Schumacher*, 276 Mich App 165, 167; 740 NW2d 534 (2007).

Appellants also argue that the evidence failed to show that the conditions at Liberty Square affected the general public; consequently, the building code violations could not be considered a public nuisance. This argument is without merit. The trial court credited expert

testimony that because of the way the buildings were constructed, it was impossible for a single pristine unit to stand alone. Further, the testimony showed that most units were held as rental properties offered to the general public. In addition, even if a unit were owner occupied, the owner would be a member of the general public as to the other Liberty Square units. Moreover, contrary to appellants' argument, abundant evidence demonstrated that the vacant properties were frequently visited by vandals and trespassers. This evidence supports the conclusion that the conditions at Liberty Square affected the general public that would come in contact with the structures. *Garfield Twp*, 348 Mich at 342 (a nuisance affects the public when it "will interfere with those who come in contact with it in the exercise of a public right"). The evidence supported the trial court's finding that "the dilapidated and crumbling conditions at Liberty Square pose a continuing, impending danger to the general public[] and to the legitimate property or personal rights of persons living or even entering upon the complex."

Next, appellants argue that the trial court should have only considered the circumstances as they existed on June 1, 2010 in determining whether the conditions at Liberty Square were a nuisance in fact. Apparently, this argument is intended to suggest that the trial court's view of the premises and consideration of the results of that viewing were improper. This argument also fails. First, appellants cite no authority for the proposition that the existence of a nuisance must be determined based on conditions as they exist at a particular point in time. Consequently, this argument must be deemed abandoned because of appellants' failure to cite supporting authority. *Woods*, 277 Mich App at 626-627. Furthermore, conducting a view is within the discretion of the trial court. *People v Mallory*, 421 Mich 229, 245; 365 NW2d 673 (1984). Here, when the trial court announced its intention to view the premises, none of the parties, including appellants, expressed any objection. "A party may not waive objection to an issue and then argue on appeal that the resultant action was error." *Bonkowski v Allstate Ins Co*, 281 Mich App 154, 168; 761 NW2d 784 (2008).

Appellants present no argument that the trial court abused its discretion by imposing the equitable remedy of abatement by demolition. See, e.g., *Orion Charter Twp v Burnac Corp*, 171 Mich App 450, 460-461; 431 NW2d 225 (1988) (where it was argued that "demolition is too drastic a remedy" to abate a partially completed housing complex determined to be a nuisance). Therefore, because the trial court did not clearly err in finding that Liberty Square had become a public nuisance in fact, because demolition is a proper remedy in appropriate circumstances, *id.* at 460-462, and because appellants present no argument that demolition is inappropriate in this case, we affirm the trial court's order.

Last, appellants contend the trial court violated their right to due process by dismissing appellants' counter-claims, cross-claims, and third-party claims "[w]ithout motion, argument, or hearing of any kind." We disagree.

At a minimum, appellants have failed to preserve for appeal their claim that the trial court's dismissal of their counter-claims, cross-claims and third-party claims violated appellants' right to due process. Generally, an issue is not properly preserved if it is not raised before, addressed and decided by the trial court or administrative tribunal. *Gen Motors Corp v Dep't of*

Treas, 290 Mich App 355, 386; 803 NW2d 698 (2010). Appellants never presented this issue to the trial court. If the trial court acted under MCR 2.116(I)(1)[1] and the dismissal of appellants' claims was akin to an order granting summary disposition, appellants never moved the trial court for reconsideration. MCR 2.119(F). Assuming this rule inapplicable because the trial court's decision was not a "decision on a motion," appellants still failed to seek relief from judgment on the grounds of "[m]istake, inadvertence, surprise, or excusable neglect," MCR 2.612(C)(a) or "[a]ny other reason justifying relief from the operation of the judgment." MCR 2.612(C)(f).

More fundamentally, appellants' complete lack of presentation regarding the merits of their claims both in the trial court and on appeal in this Court constitutes abandonment. See *Mitcham v Detroit*, 355 Mich 182, 203, 94 NW2d 388 (1959). Appellants presented no evidence or arguments in the trial court on the merits of their claims, either before or after the trial court dismissed them as without merit, and present no argument or authority to this Court that their claims have merit. Appellants' only argument on appeal asserts that the trial court's dismissal of their claims violates procedural due process.

Due process is a flexible concept, requiring in a civil case notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker. *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005). Here, appellants were on notice of the nature of the proceedings where plaintiff sought a determination that appellants' property interest in Liberty Square had become a nuisance in fact subject to abatement. Appellants also had ample opportunity to present evidence and argument both opposing plaintiff's action and supporting their counter-claims, cross-claims, and third-party claims. That appellants failed to present any evidence or arguments, either before or after the trial court's decision, does not alter that they had the opportunity to do so. The fundamental requisite of due process is the opportunity to be heard, *Bullington v Corbell*, 293 Mich App 549, 556; 809 NW2d 657 (2011), and appellants had that opportunity before and after the trial court's decision dismissing their claims.

In sum, appellants' due process claim fails because appellants failed to seek relief in the trial court and never presented any argument or authority regarding the underlying merits of their counter-claims, cross-claims, and third-party claims. Moreover, appellants were accorded due process: they were provided notice of the nature of the proceedings and had an opportunity to be heard in a meaningful time and manner by an impartial decision maker. Appellants failed to take

[1] "If 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."

advantage of the opportunity to be heard both before and after the trial court's decision. Consequently, appellants were, in fact, accorded due process.

We affirm.

/s/ David H. Sawyer
/s/ Jane E. Markey
/s/ Michael J. Kelly