STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0696

Ernest Tuff, individually and d/b/a Ernie Tuff Museum,
Appellant,

vs.

Winona County,
Respondent.

Filed December 30, 2008
Affirmed
Larkin, Judge

Winona County District Court
File No. CV-07-3408

Thomas M. Manion, Jr., Manion & Wheelock, PLLP, 204 Parkway Avenue North, P.O. Box 420, Lanesboro, MN 55949 (for appellant)

Joseph M. Bromeland, Wendland Sellers Bromeland, P.A., 825 East Second Street, P.O. Box 247, Blue Earth, MN 56013 (for respondent)

Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and Collins, Judge.*

* Retired judge of the district court, serving as judge of the Minnesota Court of Appeals by appointment pursuant to Minn. Const. art. VI, § 10.

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

LARKIN, Judge

Appellant challenges the district court's grant of summary judgment in favor of respondent-county. The district court held that (1) appellant's due process challenge was barred by Minn. Stat. § 599.13 (2006), (2) appellant's takings claims were barred by the six-year limitations period, and (3) appellant did not raise a genuine issue of material fact as to appellant's discriminatory-enforcement claim. Because the district court properly applied the law, we affirm.

FACTS

In March 1976, appellant Ernest Tuff purchased a tract of land (Centerville parcel) for the purpose of advertising the "Ernie Tuff Museum." When appellant purchased the Centerville parcel it was zoned R-2 residential. Between 1976 and 1984, appellant placed temporary signs on the parcel, including a semi-trailer that was painted with an advertisement for the museum. Because the parcel was not zoned for commercial use, appellant never placed permanent signage on the Centerville parcel prior to 1984. In 1984, appellant successfully petitioned respondent Winona County to rezone the Centerville parcel to C-3 commercial. But appellant never erected permanent signage on the parcel.

In December 1988, the Winona County Board of Commissioners enacted a new comprehensive zoning ordinance. At that time, almost every property in the unincorporated areas of Winona County was rezoned. The new ordinance designated the

Centerville parcel as part of the agricultural/natural-resource zoning district, which remains the parcel's current zoning classification.

In 1994, appellant discontinued all advertising on the Centerville parcel. In 1995, appellant learned that the Centerville parcel was no longer zoned for commercial use. Appellant unsuccessfully pursued efforts to rezone his parcel from agricultural/natural resources to commercial through informal administrative channels. Subsequently, appellant filed suit against respondent, alleging (1) illegal taking by wrongful enforcement of a zoning ordinance (a due-process claim); (2) unconstitutional taking; (3) discriminatory enforcement; and (4) wrongful taking of nonconforming use. The district court granted summary judgment in favor of respondent on all counts, reasoning that (1) the due-process claim was barred by Minn. Stat. § 599.13 (2006); (2) the takings claims were barred by the statute of limitations; and (3) appellant failed to raise a genuine issue of material fact as to the discriminatory-enforcement claim. This appeal follows.

D E C I S I O N

"[S]ummary judgment is appropriate when the evidence, viewed in the light most favorable to the nonmoving party, shows that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008) (quotation omitted). The moving party has the burden of showing the absence of a genuine issue of material fact. *Anderson v. State Dep't of Natural Res.*, 693 N.W.2d 181, 191 (Minn. 2005). Once the moving party has met its burden, to survive a motion for summary judgment, the nonmoving party must establish that there is a genuine issue of material fact through substantial evidence, which

refers to legal sufficiency and not quantum of evidence. *Osborne*, 749 N.W.2d at 371. It is not enough for the nonmoving party to show "some metaphysical doubt." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 70-71 (Minn. 1997) (quotation omitted). "Mere speculation, without some concrete evidence, is not enough to avoid summary judgment." *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993).

On appeal, we review a grant of summary judgment "to determine (1) if there are genuine issues of material fact and (2) if the district court erred in its application of the law." *K.R. v. Sanford*, 605 N.W.2d 387, 389 (Minn. 2000). When summary judgment is granted based on application of the law to undisputed facts, as is the case here, the result is a legal conclusion that we review de novo. *Lefto v. Hoggsbreath Enters., Inc.*, 581 N.W.2d 855, 856 (Minn. 1998).

Due-Process Claim

Appellant argues that the 1988 comprehensive zoning ordinance was enacted "without the proper procedural, legal, and statutory safeguards, and was in violation [of appellant's] right to due process." Specifically, appellant challenges respondent's adherence to the notice requirement in Minn. Stat. § 462.357, subd. 3 (1988) and the publication requirement in Minn. Stat. § 375.51, subd. 3 (1988). The district court granted summary judgment for respondent on this claim because under Minn. Stat. § 599.13, the 1988 zoning ordinance was conclusively regular in its adoption and publication.

Minn. Stat. § 599.13 states:

> Copies of the ordinances, . . . of any . . . county, certified by the . . . president of the council, and . . . by the county auditor or chair of the county board in the case of a county, and copies of the same printed in any newspaper, book, pamphlet, or other form, and which purport to be published by authority of the council of such city or county board, shall be prima facie evidence thereof and, after three years from the compilation and publication of any such book or pamphlet, shall be conclusive proof of the regularity of their adoption and publication.

Minn. Stat. § 599.13. The word "conclusive" within this statute means "'decisive' or 'irrefutable'—an inference which the law makes so peremptory that it cannot be overcome by any contrary proof, however strong." *W. H. Barber Co. v. City of Minneapolis*, 227 Minn. 77, 84-85, 34 N.W.2d 710, 714 (1948) (discussing prior version of the statute).

The record before the district court included a copy of the zoning ordinance, which was signed by the chairman of the Winona County Board of Commissioners and the county clerk, and an affidavit from the county auditor, which stated that the zoning ordinance had been compiled in the official ordinance books at the county auditor's office since 1989. Appellant's complaint was not filed until 2007. Thus the record demonstrates that at the time appellant filed suit, the ordinance was conclusively valid under section 599.13 and not subject to challenge based on alleged notice and publication defects. Minn. Stat. § 599.13.

Appellant contends that the district court erred in its interpretation of the law, arguing that the statute's presumptions only extend to "adoption" and "publication";

whereas appellant challenges respondent's adherence to the notice requirement within Minn. Stat. § 462.357, subd. 3 and the publication requirement in Minn. Stat. § 375.51, subd. 3. We disagree. In *City of Bemidji v. Beighley*, the district court found that the City of Bemidji failed to follow the notice requirements of section 462.357, subdivision 3, but that the city ordinance at issue was nonetheless constitutionally valid under section 599.13. 410 N.W.2d 338, 341-42 (Minn. App. 1987). Affirming, we held that if the requirements of section 599.13 are met an ordinance is "conclusively valid, [and therefore] the procedural defect in the notice requirement [does] not render the ordinance void." *Id.* at 343; *see also Pilgrim v. City of Winona*, 256 N.W.2d 266, 270 (Minn. 1977) (analyzing Minn. Stat. § 462.357, subd. 3 after first concluding that the ordinance in question did not enjoy conclusive validity under Minn. Stat. § 599.13). As to appellant's argument that respondent failed to abide by the publication requirement of Minn. Stat. § 375.51, subd. 3, because Minn. Stat. § 599.13 establishes conclusive proof of the regularity of publication in this case, section 599.13 bars appellant's challenge under section 375.51, subdivision 3.

Because the record demonstrates that the 1988 zoning ordinance is conclusively valid under Minn. Stat. § 599.13, we affirm the district court's grant of summary judgment on appellant's due-process claim.

Takings Claims

The district court granted summary judgment in favor of respondent on appellant's takings claims, concluding that the claims were barred by the statute of limitations. The supreme court has recognized a six-year limitations period for inverse-condemnation

claims. *Beer v. Minnesota Power & Light Co.*, 400 N.W.2d 732, 736 (Minn. 1987) (applying Minn. Stat. § 541.05, subd. 1 (1986)). Appellant admits that as of 1995, he knew that the Centerville parcel had been rezoned. But appellant did not bring his takings claims until 2007. Because appellant failed to bring his takings claims within the six-year limitations period, we affirm the district court's grant of summary judgment on these claims.

Discriminatory-Enforcement Claim

> A zoning ordinance must operate uniformly on those similarly situated. . . . [T]he equal protection clauses of the Minnesota Constitution and of the Fourteenth Amendment of the United States Constitution require that one applicant not be preferred over another for reasons unexpressed or unrelated to the health, welfare, or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances.

Northwestern College v. City of Arden Hills, 281 N.W.2d 865, 869 (Minn. 1979) (citations and quotations omitted).

Appellant's discriminatory enforcement claim is based on his allegation that other similarly situated properties did not lose their commercial zoning status as a result of the 1988 comprehensive zoning ordinance. Appellant also alleges that commercial signs are present on other properties near the Centerville parcel, suggesting that appellant's property is being regulated in a discriminatory fashion.

The district court granted summary judgment based on its conclusion that appellant failed to present evidence of a genuine issue of material fact regarding discriminatory enforcement. We agree.

Appellant failed to show anything more than "[m]ere speculation," *Bob Useldinger & Sons*, 505 N.W.2d at 328, that similarly situated property owners have been treated differently by respondent. *DLH*, 566 N.W.2d at 70–71 (stating that party resisting summary judgment must do more than rest on mere averments). Appellant's allegation that similarly situated properties were not rezoned by the 1988 comprehensive zoning ordinance and appellant's observation of commercial signage near the Centerville parcel are legally insufficient to sustain a discriminatory-enforcement claim. Appellant offered no evidence that similarly situated properties were not rezoned by the 1988 comprehensive zoning ordinance. And while there may be other properties with billboards near the Centerville parcel, appellant offered no evidence that those properties are similarly situated to the Centerville parcel in terms of size, zoning classification, or governing regulation.

Because appellant failed to raise a genuine issue of material fact regarding discriminatory enforcement, we affirm the district court's grant of summary judgment on this claim.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals