STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1350

John Strouth, et al.,
Appellants,

vs.

Town of Lorain,
Respondent,

Union Pacific Railroad Company,
Respondent.

Filed March 23, 2010
Affirmed
Johnson, Judge

Nobles County District Court
File No. 53-CV-08-113

James E. Malters, Malters, Shepherd & Von Holtum, Worthington, Minnesota (for appellants)

Paul D. Reuvers, Susan M. Tindal, Iverson Reuvers, LLC, Bloomington, Minnesota (for respondent Town of Lorain)

Dan J. Gendreau, Donna Law Firm, P.C., Eagan, Minnesota (for respondent Union Pacific Railroad Company)

Considered and decided by Hudson, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

JOHNSON, Judge

In 2007, the Town of Lorain closed part of a town road at the place where it intersected a railroad crossing, thereby closing the railroad crossing. In 2008, John Strouth and Ron Luitjens, two nearby landowners, commenced this action against the town and the Union Pacific Railroad Company, alleging that the town did not follow the proper statutory procedures when considering the matter. Strouth and Luitjens sought damages or, in the alternative, a writ of mandamus requiring the town board to reconsider the matter according to the statutory procedures they have identified. The district court granted the town's and Union Pacific's respective motions for summary judgment. We affirm.

FACTS

In the southwestern part of the state, U.S. Highway 60 runs in a northeast-southwest direction, intersecting Interstate Highway 90 near the city of Worthington. Approximately three miles northeast of I-90, in the Town of Lorain, Town Avenue runs in a north-south direction, intersecting Highway 60. The Union Pacific Railroad Company operates railroad tracks that run parallel to Highway 60 on its southeast side. Until 2007, Town Avenue crossed the railroad tracks at grade.

In 2006, Union Pacific developed plans to install additional tracks and to build a switching yard near the railroad crossing at Town Avenue. Union Pacific proposed to the town that the railroad crossing at Town Avenue be vacated. The town board discussed Union Pacific's proposal at several public meetings in the fall of 2006 and winter of

2007. In July 2007, the town board passed a resolution in which it consented to the vacation of the grade crossing. At the same time, the town entered into a Grade Crossing Closure Agreement with Union Pacific. The agreement provided, in part, that Union Pacific would reimburse the town for $125,000 in costs associated with the vacation and would defend and indemnify the town for "any loss or liability which the Township may sustain by reason of having consented to the vacation and elimination of the Crossing."

In September 2007, the Minnesota Department of Transportation (MnDOT) determined, pursuant to Minn. Stat. § 219.074, subd. 1 (2006), and Minn. R. 8830.2720 (2007), that it would be appropriate to vacate the railroad crossing at Town Avenue. A deputy commissioner of MnDOT issued a written order stating that Union Pacific shall remove the roadway approaches, erect barricades, remove crossing devices, and build a turnaround on the south side of the crossing, within the existing right-of-way. The order also stated that the town shall remove signs on the road near the crossing. The order required Union Pacific and the town to complete the closure within one year and to inform MnDOT in writing when the work is complete. Later that month, the town board passed a resolution adopting MnDOT's order.

Strouth owns a triangular parcel of property on the west side of Town Avenue alongside the railroad tracks. Similarly, Luitjens owns a parcel of property on the east side of Town Avenue alongside the railroad tracks. In February 2008, after Town Avenue and the railroad crossing had been closed and barricaded, Strouth and Luitjens commenced this action against the town and Union Pacific. Strouth and Luitjens alleged that the town did not follow certain statutory procedures in chapter 164 of the Minnesota

Statutes before consenting to the vacation of the grade crossing. Strouth and Luitjens also alleged that Union Pacific was negligent in allowing the town to neglect statutory procedures and conspired to deprive them of valuable property rights. Strouth and Luitjens sought damages or, in the alternative, a writ of mandamus instructing the town to follow the statutory procedures of chapter 164, even though Town Avenue and the crossing already had been vacated.

The town and Union Pacific filed separate answers and alleged crossclaims against one another. In May 2008, the town moved for summary judgment on Strouth's and Luitjens's claims. At the same time, the town moved for summary judgment on its crossclaim against Union Pacific, arguing that Union Pacific was required to defend and indemnify the town pursuant to the parties' agreement. In June 2008, Union Pacific moved for summary judgment on Strouth's and Luitjens's claims. In October 2008, the district court granted the two motions for summary judgment directed at Strouth's and Luitjens's claims. The district court concluded that, as a matter of law, the town board followed all applicable statutory procedures by complying with the provisions of chapter 219 of the Minnesota Statutes. The district court also granted the town's motion for summary judgment on its crossclaim against Union Pacific, concluding that Union Pacific was contractually obligated to defend and indemnify the town with respect to the claims alleged by Strouth and Luitjens. Strouth and Luitjens appeal.

D E C I S I O N

Strouth and Luitjens argue that the district court erred by granting summary judgment in favor of the town. A district court must grant a motion for summary

judgment "when the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993); *see also* Minn. R. Civ. P. 56.03. A genuine issue of material fact exists if a rational trier of fact, considering the record as a whole, could find for the party against whom summary judgment was granted. *Frieler v. Carlson Mktg. Group, Inc.*, 751 N.W.2d 558, 564 (Minn. 2008). We apply a *de novo* standard of review to the district court's decision to grant summary judgment, viewing the evidence in the light most favorable to the non-moving party. *Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

Strouth and Luitjens contend that the town board did not follow the correct procedures when considering whether the town road and the railroad crossing should be vacated. Specifically, they contend that the town board should have followed the procedures in Minn. Stat. § 164.07 (2008). In response, the town contends that section 164.07 does not apply because the matter is governed by Minn. Stat. § 219.074, subd. 1 (2008). In their complaint, Strouth and Luitjens prayed for two forms of relief: damages or, in the alternative, a writ of mandamus. For the reasons stated below, Strouth and Luitjens do not possess viable legal theories that would justify either form of relief pleaded in their complaint.

We first address the alternative form of relief pleaded by Strouth and Luitjens, a writ of mandamus that would direct the town board to follow the procedures specified in chapter 164. Although a writ of mandamus may have been appropriate at an earlier time,

it no longer is an appropriate remedy. In their memorandum opposing the town's motion for summary judgment, Strouth and Luitjens essentially disclaimed any interest in a writ of mandamus by conceding that reopening Town Avenue "at this point is not feasible." The memorandum states flatly, "The closing is a fait accompli." The memorandum further states, "The best that the [town] can do is pay the damages suffered by those harmed . . . ."

Given these concessions, the district court properly denied Strouth's and Luitjens's request for a writ of mandamus. A writ of mandamus "'will be denied where it is obvious that it will prove to be futile, unavailing, and ineffective.'" *Winnetka Partners Ltd. P'ship v. County of Hennepin*, 538 N.W.2d 912, 915 (Minn. 1995) (quoting *Briggs v. Chicago Great W. Ry.*, 243 Minn. 566, 569, 68 N.W.2d 870, 872 (1955)). Strouth and Luitjens admit that no practical purpose would be served by a writ of mandamus requiring the town board to follow the procedures of section 164.07. Even if those procedures might lead to the conclusion that the vacation of Town Avenue was not warranted, such a conclusion would be inconsequential because it now is too late. The road and the crossing have been closed, and Strouth and Luitjens agree that they cannot be reopened. Furthermore, the complete futility of a writ of mandamus is clear from Strouth's and Luitjens's brief to this court, which states, "It appears the crossing would have been closed [even] if the proper procedures had been followed."

Furthermore, Strouth's and Luitjens's alternative request for a writ of mandamus is inconsistent with MnDOT's September 2007 order that the railroad crossing be vacated. Any challenge to MnDOT's order must have been made by way of a petition for

a writ of certiorari to this court, filed within 30 days of MnDOT's decision. *See* Minn. Stat. § 14.63 (2008). Because Strouth and Luitjens did not seek judicial review of MnDOT's decision, that decision is final. *See Reynolds v. Minnesota Dep't of Human Servs.*, 737 N.W.2d 367, 369 (Minn. App. 2007). At this point in time, the town board may not take any action with respect to the railroad crossing that would be inconsistent with MnDOT's order.

We next address the other form of relief pleaded by Strouth and Luitjens, an award of money damages. Strouth's and Luitjens's requests for damages are based on section 164.07, but the provisions of that statute that relate to damages are inapplicable in light of the procedural posture of this case. Generally, chapter 164 grants authority to a town to "establish, alter, or vacate a town road." Minn. Stat. §§ 164.06, subd. 1, .07, subd. 1 (2008). Such action may be initiated by the town board "when authorized by a vote of the electors at the annual meeting, or at a special meeting called for that purpose," Minn. Stat. § 164.06, subd. 1, or by "a petition of not less than eight voters of the town, who own real estate, or occupy real estate . . . within three miles of the road proposed to be established, altered, or vacated," Minn. Stat. § 164.07, subd. 1. In either event, a town board must comply with statutory procedures that include a hearing and notice to affected landowners. Minn. Stat. § 164.07, subds. 2, 3. If a town board decides to establish, alter, or vacate a town road, the board shall determine the value of the "damages" and benefits to nearby properties and award compensation to owners of affected properties. Minn. Stat. § 164.07, subd. 5. An owner or occupant of an affected property may seek review by a district court of a town board's compensation decision, Minn. Stat. § 164.07, subd.

7, in which event the matter shall be tried to the district court "in the same manner as an appeal in eminent domain proceedings under chapter 117." Minn. Stat. § 164.07, subd. 8.

Stroth's and Luitjens's requests for damages, to the extent that they are based on section 164.07, must be based on subdivisions 7 and 8 of section 164.07. But subdivisions 7 and 8 permit a district court to award damages only after a town board has made a compensation determination pursuant to subdivision 5. *See* Minn. Stat. § 164.07, subd. 7 (providing that "owner or occupant may appeal from the award [described in subdivisions 5 and 6] by filing a notice of appeal with the court administrator of the district court"). And subdivision 5 permits a town board to award compensation only after the town board has conducted the procedures specified in subdivisions 2 and 3. *See* Minn. Stat. § 164.07, subd. 5 (providing for award of "damages sustained by reason of establishing, altering, or vacating any road"). In essence, the events described in subdivisions 2 through 6 of section 164.07 are prerequisites for a district court's award of damages pursuant to subdivisions 7 and 8. Given that the town board did not conduct any proceedings pursuant to subdivisions 2 through 4, the town board did not err by not awarding compensation pursuant to subdivisions 5 and 6. And given that the town board did not make a compensation decision pursuant to subdivisions 5 and 6, the district court did not err by refusing to award damages pursuant to subdivisions 7 and 8.

Stroth's and Luitjens's argument that the town board was required to follow the procedures of chapter 164 should have been presented to the town board or to a district court at an earlier time, before the town entered into the agreement with Union Pacific, before MnDOT issued its order, or before the town road and railroad crossing actually

were closed. By failing to file a petition for a writ of mandamus when it could have been efficacious, Strouth and Luitjens failed to exhaust their administrative remedies. *See Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 74-76 (Minn. App. 2002) (holding that landowner failed to exhaust administrative remedies concerning repair of ditch by failing to invoke "extensive statutory scheme" of chapter 103E), *review denied* (Minn. Apr. 16, 2002). Section 164.07 does not create a private cause of action that may be pleaded in district court independently of a town board's decision to award or not award compensation pursuant to subdivision 5. Furthermore, Strouth and Luitjens do not argue that an award of damages is available pursuant to chapter 219, and they did not plead a claim based on the takings clauses of the United States Constitution or the Minnesota Constitution. *See* U.S. Const. amend. V; Minn. Const. art. 1, § 13. Thus, in light of the procedural posture of this case, Strouth and Luitjens do not presently possess a viable theory for obtaining damages in the district court.

Before concluding, we briefly mention three remaining issues raised by the parties' briefs that need not be analyzed. First, we need not consider the town's argument that it is entitled to statutory immunity or its alternative argument that the district court lacked jurisdiction to issue a writ of mandamus. Second, we need not consider Union Pacific's arguments for affirming the district court's grant of summary judgment on Strouth's and Luitjens's claims against Union Pacific. As noted by Union Pacific, Strouth and Luitjens did not properly appeal from that portion of the district court's order. Third and finally, we need not consider Union Pacific's conditional challenge to the district court's grant of summary judgment to the town on the town's crossclaim

against Union Pacific. Union Pacific elected to waive the argument if we affirmed the district court's summary judgment on Strouth's and Luitjens's claims against the town. In addition, Union Pacific did not properly raise the issue in a notice of review. *See* Minn. R. Civ. App. P. 106; *In re Estate of Barg*, 752 N.W.2d 52, 74 (Minn. 2008), *cert. denied*, 129 S. Ct. 2859 (2009).

In sum, Strouth and Luitjens are not entitled to a writ of mandamus or an award of damages pursuant to chapter 164, and the district court did not err by granting summary judgment to the town.

Affirmed.