

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Spencer Township Board of Trustees

Court of Appeals No. L-09-1188

Appellant

Trial Court No. CI0200702885

v.

Dad's Auto Parts, LLC, et al.

DECISION AND JUDGMENT

Appellee

Decided: May 21, 2010

* * * * *

David J. Simko, for appellant.

Richard R. Malone, for appellee.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} Appellant, Spencer Township Board of Trustees ("Township"), appeals a judgment of the Lucas County Court of Common Pleas in civil litigation against Dad's Auto Parts, LLC ("Dad's"), appellee. The dispute is a zoning dispute over use of property

on S. Meilke Road in Spencer Township by Dad's as a salvage yard. In April 2007, the Township filed a "Complaint for Preliminary and Permanent Injunction" against Dad's for asserted violations of the Spencer Township Zoning Resolution. After trial to the court, the Lucas County Court of Common Pleas issued judgment on June 15, 2009, including findings of fact and conclusions of law.

{¶ 2} The judgment was largely favorable to appellant. The trial court issued a series of orders granting injunctive relief:

{¶ 3} 1. The trial court held that west-of-ditch salvage yard operations by Dad's at the property constituted an improper expansion of a non-conforming use and ordered Dad's to "cease all salvage operations and remove all salvage related materials from that portion within sixty days * * *."

{¶ 4} 2. The trial court held that salvage operations being conducted by Dad's on the house/yard area of the north part of the property was also an improper expansion of a non-conforming use. The trial court ordered that Dad's "must cease all salvage operations and remove all salvage related materials from that portion within sixty days * * *."

{¶ 5} 3. The trial court held that "Dad's improperly erected the New Fence around the improperly-expanded salvage operations in the west-of-ditch portion and in the house/yard area." The court ordered that Dad's "must remove the sections of New Fence in these areas within sixty days * * *."

{¶ 6} 4. The trial court further ordered "that Dad's must erect all fencing required by the Zoning Resolution to surround the proper salvage operations (as addressed in this Entry) within sixty days * * *."

{¶ 7} 5. The trial court ordered that Dad's must make all fencing, both newly erected and existing, "comply with the height, screening, foliage, buffer, set-back and any other relevant requirements of Zoning Resolution within sixty days * * *."

{¶ 8} 6. The trial court concluded that "Dad's has conducted its salvage operations outside of the permitted hours * * * as regularly as several times per week." The court ordered: "Dad's must immediately cease operating its salvage operations outside of * * * permitted hours."

{¶ 9} 7. The trial court concluded that "Dad's impermissibly conducted Superior's towing operations from the parcel." The court ordered: "Dad's immediately must cease all Superior (and any other independent business) operations and, remove all Superior signage from the parcel." The court permitted Dad's to occasionally leave an individual Superior tow-truck in the parking lot overnight.

{¶ 10} 8. The trial court concluded that salvage operations conducted in the east-of-ditch portion of the south part of the property was a "permitted non-conforming use which Dad's may continue" and that Dad's did not improperly expand its parking lot.

{¶ 11} The trial court also ordered Dad's to pay a triple application fee to the Township pursuant to Section 2103(F) of the Spencer Township Zoning Resolution, because Dad's failed to secure a permit prior to erecting fencing on the site.

{¶ 12} The Township has appealed the June 15, 2009 judgment. In a single assignment or error, it claims that the trial court erred in failing to award damages and fees:

{¶ 13} "The trial court erred in failing to award damages and fees as required by the Ohio Revised Code after it found in favor of the Appellant."

{¶ 14} The Township claims that the trial court erred in failing to impose daily fines and legal fees as sanctions under R.C. 519.23, R.C. 519.99, and Section 2103(E) of the Spencer Township Zoning Resolution. In response, Dad's argues that R.C. 519.23, R.C. 519.99 and Section 2103(E) of the Spencer Township Zoning Resolution apply to criminal prosecutions, not to civil actions for injunctive relief. It argues that the Township "wants this Court to do what the trial court below had no authority to do – impose a criminal sanction in a civil enforcement action and without the benefit of any criminal proceeding."

{¶ 15} Under R.C. 519.23, violation of a zoning resolution constitutes an "offense." The statute provides:

{¶ 16} "No building shall be located, erected, constructed, reconstructed, enlarged, changed, maintained, or used, and no land shall be used in violation of any resolution, or

amendment or supplement to such resolution, adopted by any board of township trustees under sections 519.02 to 519.25, inclusive, of the Revised Code. Each day's continuation of a violation of this section may be deemed a separate *offense*." (Emphasis added.)

{¶ 17} R.C. 519.99 provides:

{¶ 18} "Whoever violates sections 519.01 to 519.25 of the Revised Code shall be fined not more than five hundred dollars for each *offense*." (Emphasis added.)

{¶ 19} This court has previously recognized that townships may enforce their zoning ordinances either by civil action or by criminal prosecution. *State v. McNulty* (1996), 111 Ohio App.3d 828, 830-832; accord, *West Chester Twp. Zoning v. Fromm* (2001), 145 Ohio App.3d 172, 176-177. Criminal proceedings for violation of zoning ordinances are maintained under R.C. 519.23 and require proof beyond a reasonable doubt:

{¶ 20} "A violation of a township zoning regulation can be the subject of a criminal prosecution. R.C. 519.23. In such a prosecution, the state is required to prove, beyond a reasonable doubt, that the defendant does not fall within one of the exceptions contained in the regulations describing the offense. *Strongsville v. McPhee* (1944), 142 Ohio St. 534, 27 O.O. 466, 53 N.E.2d 522, paragraph two of the syllabus (municipality); *State v. Breidenbach* (1964), 5 Ohio App.2d 52, 55, 34 O.O.2d 135, 137, 213 N.E.2d 745, 747 (county); *State v. Desatnik* (Jan. 16, 1979), Mahoning App. No. 78-CA-123,

unreported (township)." *State v. McNulty* at 830; see *Twp. of Perry v. O'Rourke* (Aug. 24, 2001), 2d Dist. No. 18676 (township).

{¶ 21} Civil actions for violation of township zoning ordinances can be maintained under R.C. 519.24. "R.C. 519.24 expressly states that 'in addition to any other remedies,' a board of township trustees may institute a civil action against a person who violates a township zoning regulation." *Id.* at 832. Civil actions for injunctive relief may be brought under R.C. 519.24 and require proof by clear and convincing evidence. *Swan Creek Twp. v. Wylie & Sons Landscaping*, 168 Ohio App.3d 206, 2006-Ohio-584, ¶ 23; *Baker v. Blevins*, 162 Ohio App.3d 258, 2005-Ohio-3664, ¶ 12; *Azar v. Baughman* (June 21, 1978), 9th Dist. No. 8686.

{¶ 22} Here we are dealing with a civil action. The trial court issued findings of fact in its judgment, determining disputed issues of fact by clear and convincing evidence. It found violations by Dad's of the Spencer Township Zoning Resolution under that standard. Appellant sought and received injunctive relief. Dad's was neither charged with nor convicted of committing any criminal offense. We conclude that the trial court did not err in failing to impose sanctions upon Dad's pursuant to R.C. 519.23 as the statute does not apply to these proceedings.

{¶ 23} The township zoning ordinance relied upon by appellant is equally inapplicable. Spencer Township Zoning Resolution 2103(E) provides:

{¶ 24} "E. Any person, firm, or corporation violating any provision of this Resolution shall be deemed guilty of a *misdemeanor* and, *upon conviction thereof*, shall be fined not more than five hundred dollars (\$500.00). Each and every day, during which illegal location, erection, construction, reconstruction, enlargement, change, maintenance, or use continues, may be deemed a separate offense." (Emphasis added.)

{¶ 25} By its express terms, Section 2103(E) sanctions apply where the defendant is "deemed guilty of a misdemeanor" and "upon conviction." The ordinance does not apply to civil proceedings.

{¶ 26} Accordingly, we find appellant's Assignment of Error is not well-taken.

{¶ 27} Upon due consideration, we find that appellant was not prejudiced or prevented from having a fair trial, and the judgment of the Lucas County Court of Common Pleas is affirmed. Appellant is ordered to pay costs pursuant to App.R. 24.

JUDGMENT AFFIRMED.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27.
See, also, 6th Dist.Loc.App.R. 4.

Peter M. Handwork, J.

JUDGE

Mark L. Pietrykowski, J.

JUDGE

Arlene Singer, J.
CONCUR.

JUDGE

This decision is subject to further editing by the Supreme Court of Ohio's Reporter of Decisions. Parties interested in viewing the final reported version are advised to visit the Ohio Supreme Court's web site at:
<http://www.sconet.state.oh.us/rod/newpdf/?source=6>.