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2011 IL App (3d) 100819-U

Order filed November 1, 2011

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT
A.D., 2011

CITY OF PEORIA,)	Appeal from the Circuit Court
)	of the 10th Judicial Circuit,
Plaintiff-Appellee,)	Peoria County, Illinois,
)	
v.)	Appeal No. 3-10-0819
)	Circuit No. 10-OV-736
WARREN DANZ,)	
)	Honorable
Defendant-Appellant.)	Albert L. Purham, Jr.
)	Judge, Presiding

JUSTICE O'BRIEN delivered the judgment of the court.
Justices McDade and Wright concurred in the judgment.

ORDER

¶ 1 *Held:* Peoria ordinance requiring property owner to evict tenants engaged in drug activities or to abate the illegal action does not unconstitutionally deprive property owner of due process. Estoppel does not apply under the circumstances. The trial court's finding that property owner violated ordinance was supported by the evidence.

¶ 2 Defendant Warren Danz appeals the trial court's order finding him in violation of an ordinance enacted by plaintiff City of Peoria which requires a landlord to evict tenants who engage in illegal drug activities. We affirm.

¶ 3 **FACTS**

¶4 On March 1, 2010, plaintiff City of Peoria filed a complaint charging defendant Warren Danz with violating section 20–207 of the Peoria Code of Ordinances (City Code), on property he owned located at 1011 East Frye in Peoria. Peoria Code of Ordinances §20–207 (eff. Jan. 1, 2008). Section 20–207 prohibits the owner of real estate located within Peoria from knowingly allowing the property to be used as a site for any use or sale of illegal drugs. Peoria Code of Ordinances §20–207(b) (eff. Jan. 1, 2008). The ordinance provides that notice be given to the property owner informing him that he has 30 days to initiate legal action to abate the suspected illegal activity, including but not limited to, filing an eviction action. Peoria Code of Ordinances §20–207(e)(3) (eff. Jan. 1, 2008). If the illegal activity is not abated or an eviction action is not filed within the 30-day period, a second notice provides an additional 10 days for the property owner to begin an abatement action before legal proceedings are initiated against him. Peoria Code of Ordinances §20–207(e)(4) (eff. Jan. 1, 2008). When the property owner receives notice from the city, he is deemed to have knowledge of the illegal activity. Peoria Code of Ordinances §20–207(b), (c) (eff. Jan. 1, 2008).

¶5 The ordinance provides the property owner a means to appeal whether the determination of illegal activity made by law enforcement is sufficient to permit eviction. Peoria Code of Ordinances §20–207(e)(3) (eff. Jan. 1, 2008). During the appeal process, enforcement is stayed. Peoria Code of Ordinances §20–207(e)(3) (eff. Jan. 1, 2008). A property owner who violates section 20–207 is subject to a fine of \$750 per day for the first violation, \$1,500 per day for the second violation, and \$2,500 per day for subsequent violations for the same dwelling unit. Peoria Code of Ordinances §20–207(m) (eff. Jan. 1, 2008). The ordinance provides limited indemnification and legal assistance to the property owner if his tenant challenges the legality or constitutionality of the ordinance, or alleges negligence of the police department in providing information to the property owner that was

the basis of bringing forth the eviction action. Peoria Code of Ordinances §20–207(o) (eff. Jan. 1, 2008).

¶ 6 Danz was initially cited for unlawful drug activities that occurred on the premises on June 26, 2009. The complaint against Danz was amended on April 29, 2010, to add additional violation dates of November 29, 2009 through December 16, 2009. Danz filed a motion to dismiss, asserting that the ordinance was unconstitutional. The trial court denied the motion to dismiss and a bench trial was set. On the date of trial, Danz filed a motion to vacate and a motion for rehearing. Following a hearing, the trial court denied as premature the motion to vacate and granted the motion for rehearing. The trial court then held that the ordinance was constitutional because it provided due process through the appeal mechanism and court process. A trial on the alleged violation took place and the following evidence was presented.

¶ 7 On June 26, 2009, Peoria police officers Heath Armentrout, Steven Cover, Kevin Slavens, and Joshua Allenbaugh executed a search warrant for the property at 1011 East Frye Avenue, owned by Danz, based on complaints of illegal cocaine sales from the property. Officers found tenant Margaret Mitchell, her husband Michael Hill, and their son, Jessie Mitchell, inside the house. All three individuals were arrested. Jessie was found sleeping in a bedroom. When he stood up, Armentrout and Cover saw a baggy containing what appeared to be crack cocaine drop from Jessie's underwear or shorts. The substance tested positive for cocaine. Slavens observed Margaret in the kitchen attempting to discard a crack pipe with residue that he believed to be crack cocaine. Other items discovered during the search included plastic baggy corners, a spoon with crack cocaine residue, a second crack pipe, and 1.4 grams of crack cocaine found on a coffee table in the living room. Officers also found a letter from the secretary of state addressed to Jessie at the 1011 East Frye

address. Based on the surveillance and information from file reports and LEADS, the officers assumed that Jessie lived at that address.

¶ 8 Elizabeth Hermacinski, the nuisance abatement officer for the Peoria police department, testified that after the search warrant was executed, she sent a first notice under section 20–207 of the City Code to Danz on June 29, 2009. The notice included the police department’s determination that the property was used for the use or sale of illegal drugs, the owner’s requirement to abate the nuisance within 30 days of the notice, and the owner’s ability to request an appeal of the sufficiency of the police department’s determination of illegal activity. She issued a second notice under section 20–207 of the City Code on November 19, 2009, informing Danz that if he did not take remedial action, including eviction, within 10 days from the date of the letter, Peoria would initiate legal proceedings against him for violating the City Code.

¶ 9 Danz testified that he talked with Margaret and Hill after the June 2009 search, who denied any illegal drugs were used or sold at the property. He also called the police department and monitored the premises. Based on Margaret's denials and his follow-up investigation, he did not pursue an eviction after receiving the first or second notices from Peoria. He believed the issues had been resolved. After he received the second notice informing him of the November 16 arrests at the premises, he sent a letter dated November 30, 2009, to Peoria, disputing his tenants’ involvement in illegal drug activities but stating that he would ask the tenants to vacate the premises. He received a letter in response dated December 2, 2009, informing him that enforcement of the ordinance was based on an arrest for drug offenses, not a conviction. The letter also stated that Hill, who had been arrested on the June 26 search warrant, was again arrested on November 16, 2009, again at 1011 East Frye, again for possession of a controlled substance. Danz asked Margaret and Hill about the new

arrest and they again denied involvement in illegal drug activity. Based on their denials, he assumed that the new information he received in the December 2 letter was incorrect. On December 10, 2009, he asked his property manager, Jill Dunaway, to initiate eviction proceedings against the tenants for failure to pay rent. The eviction action was filed on December 16, 2009. Margaret and Hill moved out of the house in the middle of January 2010. Dunaway, Danz's property manager, testified that Margaret was the named tenant and Hill was not named on the lease, although she was aware that he lived at the premises. She was not aware that Jesse lived there.

¶ 10 Margaret testified and denied that Jessie lived at the premises. He would visit on occasion because he lived down the street. She did not know his address. On June 26, 2006, Jessie was sleeping there because he had fought with his girlfriend with whom he lived. She did not know he was there. The November 16, 2009, incident at the premises involved a visiting neighbor who was intoxicated and hit her husband. Margaret denied any involvement in illegal drug activity, including the use or sale of drugs at the premises. She acknowledged she was criminally charged for drug offenses after the June 2009 raid on the premises.

¶ 11 Following the two-day trial, the trial court found that the notices sent by the police department to Danz were properly served and that the first notice provided knowledge to Danz of the illegal drug activity as discovered during the search on June 26. The trial court found Danz in violation of section 20–207, from December 12, 2009, to December 16, 2009, and ordered him to pay a fine of \$3,000 plus costs. He appealed.

¶ 12

ANALYSIS

¶ 13 The issues on appeal are whether Peoria ordinance section 20–207 is an unconstitutional deprivation of due process, whether Peoria is estopped from enforcing the ordinance against Danz,

and whether the trial court erred in finding that Danz violated the ordinance.

¶ 14 We turn first to Danz’s constitutional challenge to section 20–207 of the City Code. Danz argues that the provision is an unconstitutional deprivation of due process. He contends that section 20–207 is unconstitutional in two ways. First, he argues that the ordinance allows Peoria to declare a nuisance without providing substantive due process in the taking of property rights. Secondly, he argues that the 10-day time limit for filing an eviction action is unreasonably short and amounts to an unconstitutional deprivation of property rights.

¶ 15 Statutory enactments are presumed to be constitutional and courts must construe them so as to affirm their constitutionality, if such construction is reasonable. *People v. Cornelius*, 213 Ill. 2d 178, 189 (2004). Legislation should only be declared unconstitutional when the party challenging its validity has borne its burden to clearly establish a constitutional violation. *Cornelius*, 213 Ill. 2d at 189. Any doubts about legislation’s construction should be resolved in favor of its validity. *Cornelius*, 213 Ill. 2d at 189-90. In assessing the constitutionality of an ordinance, the same rules are applied that govern statutory interpretation. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296, 306 (2008). We review the constitutionality of a ordinance *de novo*. *Cornelius*, 213 Ill. 2d at 188.

¶ 16 Due process protections prevent a local government from depriving a person of property without due process of law. *Mann v. Calumet City*, 588 F. 3d 949, 952 (7th Cir. 2009). A citizen’s right to use his property according to his own will is both a liberty and a property right. *Western Theological Seminary v. City of Evanston*, 325 Ill. 511, 521 (1927). However, the right is subject to “the restraint necessary to secure the common welfare” through the government’s exercise of its police powers. *Hannifin Corp. v. City of Berwyn*, 1 Ill. 2d 28, 35 (1953). The government may assert its police power to promote the health, comfort, safety and welfare of society and may enact

legislation to promote such welfare, even when the prohibition invades a citizen's liberty or property rights. *Booth v. People*, 186 Ill. 43, 48-49 (1900). That an ordinance imposes burdens or restrictions on property is not determinative of its validity. *Decatur v. Chasteen*, 19 Ill. 2d 204, 210-11 (1960). Ordinances that impose controls on land use of private property are valid to the extent they promote the public welfare. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

¶ 17 Danz asserts that ordinance 20–207 violates his substantive rights as a landlord in that it fails to require specificity as to the illegal activities in a manner that would aid him in maintaining an eviction action; that there is no requirement that the tenants be convicted of drug-related charges; that the instigating officer does not investigate the alleged nuisance before issuing violation letters to the landlord; and that there is no criteria in the ordinance regarding how, when and where the illegal activities are clarified or identified. He emphasizes that in the instant action, all charges against the tenants were dismissed. According to Danz, these failings in the ordinance serve to deprive a property owner of due process in taking his property rights.

¶ 18 Danz relies on *Cook v. City of Buena Park*, 126 Cal. App. 4th 1 (2005) as support for his claim that the ordinance is unconstitutional. Initially, we note that the case is persuasive, not binding authority. *Board of Managers of Eleventh Street Loftominium Ass'n v. Wabash Loftominium, L.L.C.*, 376 Ill. App. 3d 185, 194 (2007). Moreover, the ordinance deemed an unconstitutional deprivation of due process rights in *Cook* is distinguished from the Peoria ordinance at issue here. *Cook*, 126 Cal. App. 4th at 10. The *Cook* court pointed to three deficiencies in the ordinance that are not present in the Peoria ordinance. *Cook*, 126 Cal. App. 4th at 8-9. First, the *Cook* ordinance required landlords to evict tenants when the police chief suspected they were engaging in or permitting illegal drug or gang activity in or near the property. *Cook*, 126 Cal. App. 4th at 3. The reviewing court determined

that the ordinance allowed notice of criminal activity by law enforcement that was insufficient to assure the landlord a reasonable chance of success in an eviction proceeding. *Cook*, 126 Cal. App. 4th at 7-8 (“predicate nuisance or illegal purpose must be ‘documented by the observations of a peace officer’”). Danz contends that the Peoria ordinance is similarly infirm in that it does not require evidence of criminal behavior with specificity sufficient to aid him in eviction proceedings. To the contrary, the Peoria ordinance requires:

“a determination by the police department that such suspected illegal activity is taking place at a particular premises based upon lawfully obtained evidence, including, but not limited to, personal knowledge of a police officer, information obtained from a reliable source, evidence obtained pursuant to an arrest or physical evidence obtained by a search warrant or other lawful means.” Peoria Code of Ordinances §20–207(e)(3) (eff. Jan. 1, 2008).

¶ 19 The June 2009 search of the premises at 1101 E. Frye resulted in the arrest and conviction of Jessie Mitchell, whom officers testified was found sleeping in a bedroom at the premises and in possession of crack cocaine. Danz submits that Jessie was not a resident but offers no evidence contradicting the officers’ testimony that they discovered mail addressed to him at the premises. In addition, there was testimony presented that Margaret, the named tenant, was seen disposing of a crack pipe, and 1.4 grams of cocaine and other drug paraphernalia were found on a table in the living room. The record also establishes that Hill, who was not named on the lease but undisputedly lived at the premises, was arrested there in November on drug-related charges.

¶ 20 The second deficiency in *Cook* was the ordinance’s “onerous requirement” that eviction proceedings be initiated by the landlord within 10 days of receiving notice of the illegal activity. *Cook*, 126 Cal. App. 4th at 9. The *Cook* court voiced its concern that the 10-day period was inadequate for the landlord to garner evidence to support its eviction action in the case of insufficient detail from the city. *Cook*, 126 Cal. App. 4th at 9. In contrast, under the Peoria ordinance, a landlord is provided 30 days to abate the illegal activity or initiate eviction proceedings. Significantly, we consider that because the Peoria ordinance requires specificity of evidence against the tenants before notice to the landlord, as discussed above, the concerns raised in *Cook* are not at issue.

¶ 21 The final deficiency in the *Cook* ordinance was its requirement that the landlord prevail in the eviction proceeding. *Cook*, 126 Cal. App. 4th at 9. Under the *Cook* ordinance, a landlord who is not successful in his eviction action was subjected to penalties. *Cook*, 126 Cal. App. 4th at 9. The Peoria ordinance requires only that the landlord abate the illegal activity or initiate eviction proceedings. Peoria Code of Ordinances §20–207(e) (3) (eff. Jan. 1, 2008). There is no requirement that the landlord prevail in evicting the tenants. The ordinance requires only that the landlord proceed “with reasonable diligence in the prosecution of said eviction proceedings.” Peoria Code of Ordinances §20–207(g) (2) (eff. Jan. 1, 2008). Moreover, if the illegal activity is abated, eviction proceedings are not necessary under the ordinance. Peoria Code of Ordinances §20–207(e) (3) (eff. Jan. 1, 2008). Because *Cook* is distinguished, we conclude that it is not helpful to Danz’s argument.

¶ 22 Moreover, a due process analysis of the Peoria ordinance demonstrates that it does not unlawfully deprive Danz of his property rights. The analysis involves consideration of three factors: (1) the private interest affected by the official action; (2) the risk of an erroneous deprivation of the interest through the required procedures and the probable value, if any, of additional or other

procedural safeguards; and (3) the government's interest, including its function, and fiscal and administrative burdens that additional procedures would entail. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). Regarding the first factor and third factors, as landlord and property owner, Danz has a property interest in collecting rent under the lease and in avoiding penalties that could be assessed under the ordinance, while Peoria has an equally compelling interest in combating illegal drug activities within the municipality. Under the second factor, the risk of erroneous deprivation of Danz's property rights is low, considering the specificity of evidence required before he is served notice to abate the illegal activity or to evict the tenants.

¶23 The instant circumstances support a low risk of erroneous deprivation. The search uncovering illegal activity was executed at the subject premises in June 2009. Danz testified that he investigated and was informed by Margaret, the legal tenant, that she was not involved in the illegal activity, and that her son possessed the drugs but did not live there. He understood that all charges against the tenants, namely Margaret and Hill, were dismissed. Danz was sent a second notice to abate or evict after a second arrest of Hill was made in November. In addition, the ordinance includes an appeal process which stays enforcement of the ordinance until the hearing officer determines whether there was sufficient evidence to require abatement or eviction. Given Peoria's compelling interests, we conclude that the risk of erroneous deprivation of Danz's interests under the ordinance's procedures does not rise to a constitutional dimension. We find that Danz's substantive due process rights were not unconstitutionally affected by the statute.

¶24 Danz also complains that the 10-day deadline of the second notice to abate or evict is unreasonably short and unconstitutionally deprives him of his procedural due process and property rights. He further submits that the 10-day clock should not begin running until he received the

second notice, as opposed to the date the notice was issued.

¶ 25 The Peoria ordinance, which provides that the landlord must take remedial action “within 10 days,” is reasonably interpreted to begin the clock when the notice is sent, rather than received. Unlike the *Cook* ordinance, Danz had already been provided notice with 30 days to abate when he received the second notice with the lesser 10-day time limit that merely reiterated information Danz was already provided in the first notice. As such, we determine that the 10-day notice was not unreasonably short. Moreover, per the 30-day notice, Danz had an opportunity to appeal Peoria’s determination of illegal activity at the premises, which would serve to stay enforcement of the ordinance until the appeal was resolved. Procedural due process requires only notice and an opportunity to be heard. *Mann*, 588 F. 3d at 954 (citing *Tarantino v. City of Hornell*, 615 F. Supp. 2d 102, 120 (W.D. N.Y. 2009)) (“All that is required is *** notice and an opportunity to be heard before being *deprived* of a protected liberty or property interest”) (emphasis in original). Because the ordinance satisfies both requirements, we find that Danz was not unconstitutionally deprived of procedural due process or his property rights. Accordingly, we hold that the ordinance is not unconstitutional.

¶ 26 The second issue is whether Peoria is estopped from enforcing the ordinance against Danz. He maintains that his conduct to abate any drug activity at the subject premises should serve to estop any action by Peoria under the ordinance.

¶ 27 Equitable estoppel arises when a party by his statements or conduct leads another to do something he would not have done but for the conduct of the other, and where the one who performed the affirmative act should not be allowed to deny his acts to the detriment of the other party. *Bank of Pawnee v. Joslin*, 166 Ill. App. 3d 927, 938 (1988). To invoke estoppel against a municipality, two

prerequisites are necessary: (1) an affirmative act by the municipality; and (2) the inducement of substantial reliance by the affirmative act. *Joslin*, 166 Ill. App. 3d at 939. Estoppel should only be invoked against a municipality “under compelling circumstances” where it would not defeat the operation of public policy. *Joslin*, 166 Ill. App. 3d at 939 (citing *People ex rel. Brown v. Illinois State Troopers Lodge No. 41*, 7 Ill. App. 3d 98, 105 (1972)). This court reviews *de novo* whether estoppel applies. *Illinois Health Maintenance Organization Guaranty Ass'n v. Dept. of Insurance*, 372 Ill. App. 3d 24, 31 (2007).

¶ 28 Danz’s estoppel argument fails. He does not identify any affirmative act taken by Peoria on which he relied to his detriment. Rather, he asserts that because he investigated and ensured that the illegal activity was abated, his conduct should estop Peoria’s enforcement of the ordinance. We find that estoppel does not apply under the circumstances to prevent Peoria from enforcing the City Code.

¶ 29 The third issue on appeal is whether the trial court erred in finding that Danz violated the ordinance. Danz argues that Peoria improperly used evidence of the drug activities of Jessie, a non-tenant, as evidence in its enforcement action against him for violating the ordinance.

¶ 30 The trier of fact is in the best position to hear the evidence and assess the credibility of the witnesses. *Samour, Inc. v. Board of Election Commissioners*, 224 Ill 2d 530, 548 (2007). This court will not disturb a trial court’s factual findings unless they are against the manifest weight of the evidence. *City of Peru v. Bernardi*, 81 Ill. App. 3d 227, 233 (1980).

¶ 31 The June 2009 search at the premises resulted in the arrests of Jessie, Margaret, and Hill. Although the record is not definitive on this point, it appears that only Jessie was convicted of any drug offenses stemming from the search, and charges against Margaret and Hill were dismissed. However, contrary to Danz’s claims, he failed to establish that Jessie did not live at the premises.

Peoria introduced evidence that officers executing the search warrant found mail addressed to Jessie at the premises. He was sleeping in a bedroom when the search was executed. The only contradicting evidence was Margaret's unsupported testimony that Jessie lived down the street and not at the subject premises. The trial court assessed the credibility of the witnesses and determined that Jessie was a resident. The mail found there, as well as Danz's failure to present additional evidence that Jessie lived elsewhere, supports the trial court's determination. Also subject to the fact finder's determination was the testimony at trial that officers saw Margaret attempt to dispose of a crack pipe and that cocaine was found on a living room table. Additionally, the evidence demonstrates that Hill was arrested at the premises in November 2009 for drug-related offenses. Accordingly, Peoria did not institute the enforcement action based solely on Jessie's conviction for drug offenses but relied also on the conduct of both Margaret and Hill, who were undisputed residents. We find that the trial court's findings that Danz violated the ordinance were not against the manifest weight of the evidence.

¶ 32 For the foregoing reasons, the judgment of the circuit court of Peoria County is affirmed.

¶ 33 Affirmed.