

¶ 2 Defendant, Evanger's Dog and Cat Food Co. (Evanger's), appeals from the court's September 19, 2011, order granting summary judgment in favor of plaintiff, The Village of Wheeling (the Village). On appeal, Evanger's contends that summary judgment was improper and alleges numerous additional errors relating to the court's judgment. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 Background

¶ 4 This is the second time this case has come before this court. In 2010, we found the trial court's order placing Evanger's on supervision unauthorized by the Village's municipal code and vacated the trial court's order and remanded the cause to the trial court. *Village of Wheeling v. Evanger's Dog and Cat Food Co., et. al.*, 399 Ill. App. 3d 304 (2010). Upon remand, the Village filed a motion for summary judgment, which the trial court granted.

¶ 5 We briefly set forth the facts and procedural history relevant to this appeal. Throughout the summer of 2006, the Village received numerous odor complaints emanating from Evanger's production of dog and cat food. As set forth in our prior opinion, the Village issued citations to Evanger's on August 24, 2006, for violating several ordinances. The citations alleged: failure to provide tight-fitting garbage can lids - containers of food waste not covered with tight-fitting lids; failure to provide approved containers - food waste held in unapproved containers; failure to remove refuse - accumulation of refuse stored on exterior property; and failure to abate stagnant water - accumulated stagnant water on exterior property.

1-11-3100

¶ 6 A hearing was held on September 12, 2006, which Evanger's failed to attend. The court entered an order finding in favor of the Village and finding Evanger's in default. The court ordered Evanger's to pay the Village a fine of \$168,000. The fine was comprised of \$500 a day for 84 days for each violation, which amounted to \$42,000 per violation, times the four violations alleged. Subsequently, Evanger's filed a motion to vacate the default judgment. The court continued the motion.

¶ 7 The Village filed a four-count second amended complaint on January 29, 2007. At the next several hearings, the court continued the motion to vacate. On March 14, 2008, the court entered an order in which it vacated the default judgment, placed Evanger's on supervision and ordered Evanger's to pay restitution.

¶ 8 Subsequently, the Village filed a petition to revoke the court's order of supervision. The petition alleged that Evanger's had failed to comply with the terms of supervision because it had permitted waste materials to accumulate on the property.

¶ 9 The court held a hearing on the petition to vacate over several days in November 2008. Tim Walsh, the community outreach and events manager for the Wheeling park district, testified that in the summer of 2007, a smell emanated from Evanger's similar to that of a dead animal. He had to relocate a nearby kids sports camp because of the smell. The smell occurred frequently throughout the summer and continued throughout the summer of 2008. During the 2008 summer, Walsh was in charge of outdoor concerts at the park district and received numerous odor complaints during the concerts. He stated that the smell was coming from the direction of Evanger's.

1-11-3100

¶ 10 Jeff Wolfgram, a water operator with the Village, testified about an incident that occurred on the evening of July 3, 2008, involving Evanger's. That night, he received a call about a liquid with a bad odor leaking onto the road. The liquid had a sewer or dead animal smell to it. He traced the liquid back to Evanger's. At Evanger's, he noticed a lot of liquid on the ground as well as several pieces of chicken. Wolfgram also saw a red liquid that looked like blood being drained into the storm sewer from a semi-trailer. Towards the back of the property, there were pumps that were discharging a greasy liquid that smelled like the liquid on the road. He also noticed that the grease interceptors that help filter the waste from the manufacturing process were full and needed to be cleaned. He further noticed that many of the storage totes that were used for storing raw materials or trash did not have lids.

¶ 11 Beverly Slaby, a health officer for the Village, testified that she became involved in the Evanger's case in June 2006. The Village had received complaints about Evanger's, so Slaby first went to Evanger's in September 2006. She observed open containers of chicken, flies, maggots, refuse and unsanitary conditions on the property. When she inspected the grease interceptors, they were heavily full of grease and there were maggots inside. Slaby also noticed a strong rotting meat smell. In 2008, she continued to receive complaints about the smell. There was also a complaint from the asphalt company next door that water and grease were leaking onto its property. On numerous occasions during the summer of 2008, Slaby went to Evanger's and observed open containers of food and the same rotting meat smell. She saw plastic

1-11-3100

crates without tight fitting lids and flies and maggots around the crates. There were maggots in the grease interceptors, which meant that they were not well maintained. She further stated that the last time she went to property on Nov. 7, 2008, there were a few bins of chicken that were left open.

¶ 12 Joel Sher, the vice-president of Evanger's, explained that on the night of July 3, 2008, Evanger's sewer backed up, which was responsible for the liquid being discharged onto the road. He stated that the pumps were not discharging the liquid onto the road, rather, they were pumping it into an empty grease interceptor. The liquid on the road was caused by the sewer backup, which he believed was caused by a large rock from the asphalt company next door. Sher further explained that the air-conditioning unit on one of the trailers had failed, due to the heavy dust coming from next door, which is why there was liquid dripping from the trailer. Sher also claimed that the grease interceptors were well maintained and were cleaned out weekly. He denied that any raw material had been left in bins or totes outside and added that they all have tight fitting lids.

¶ 13 After the hearing, the court entered an order granting the Village's petition to revoke the order of supervision. The court entered an order on January 28, 2009, imposing the same fine as it had originally imposed on Evanger's of \$168,000. When Evanger's appealed, we found that the Village's municipal code did not provide for supervision as an authorized disposition. In placing Evanger's on supervision, the trial court had exceeded its authority. Therefore, the court's March 14, 2008, order placing

Evanger's on supervision as well as the court's January 28, 2009, order terminating Evanger's supervision and imposing the \$168,000 fine, were void. We remanded the cause to the trial court for further proceedings.

¶ 14 Upon remand, the Village filed a motion for summary judgment, which the trial court granted. The court's September 19, 2011, order provided that: (1) judgment was entered on counts I and II, and counts III and IV were voluntarily dismissed; (2) a fine totaling \$316,500 was imposed on Evanger's (\$250 per day for 633 days for counts I and II); (3) Evanger's motion to strike Serena Fried's affidavit was denied; and, (4) Evanger's \$168,000 deposit with the clerk of the court was to be turned over to the Village. Evanger's now appeals.

¶ 15 Analysis

¶ 16 Summary Judgment

¶ 17 On appeal, Evanger's contends that summary judgment was improper. Evanger's first argues that the trial court erred in relying on an affidavit submitted by Serena Fried, a health inspector for the Village.

¶ 18 Summary judgment is proper if the pleadings, depositions, affidavits, admissions, and other matters on file demonstrate that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Smith v. Armor Plus Co., Inc.*, 248 Ill. App. 3d 831, 839 (1993). The court should construe the evidence strictly against the movant and liberally in favor of the opponent. *Richter v. Burton Investment Properties, Inc.*, 240 Ill. App. 3d 998, 1001 (1993). If reasonable persons could draw

different inferences from undisputed facts, an issue of fact exists. *Armor*, 248 Ill. App. 3d at 839. Appellate review of an order granting summary judgment is *de novo*. *Outboard Marine Corp. v. Liberty Mutual Insurance Co.*, 154 Ill. 2d 90, 102 (1992).

¶ 19 In support of its motion for summary judgment, the Village submitted the affidavit of Serena Fried. Fried's affidavit is six pages long and detailed the results of inspections she conducted at Evanger's from June 2006 to March 2008. Approximately 143 pages of pictures were attached to the affidavit. Evanger's sought to strike the affidavit. When the trial court granted the Village's motion for summary judgment, it denied Evanger's motion to strike the affidavit, but stated that the affidavit was "not necessary to this case," and "it doesn't matter if it's there or it isn't there."

¶ 20 Evanger's argues that the affidavit was improper and should have been stricken because it failed to comply with Illinois Supreme Court Rule 191 (eff. July 1, 2002). Rule 191 provides that affidavits in support of a motion for summary judgment shall: be made on the personal knowledge of the affiants; set forth with particularity the facts upon which the claim is based; and, consist of facts admissible in evidence and not conclusions.

¶ 21 We find that Fried's affidavit complied with Rule 191. Fried stated that she personally performed numerous inspections at Evanger's and detailed her observations on specific dates. For example, she noted that on March 5, 2007, she observed: debris and junk stored in the rear of the property; rusted and unused equipment in the rear of the property stored dangerously high, unused equipment and debris in the rear of

1-11-3100

property; pallets piled up in the rear of property; rusted trailers with debris inside and stored underneath; rusted trailers being used for storage; piping and conduit laying against a shed; rusted equipment and plastic totes for chicken product stored in the rear of the property; storage inside the trailers; wildlife tracks in and around trailers - possible wildlife harborage under and in damaged trailers; and, rusted trailers used for storage. Further, on June 21, 2007, she observed: "thousands" of maggots on rotten decaying animal parts; flies all over the property and open and exposed rotting animal parts; flies and maggots over unknown rotting substances. She also referenced the attached pictures in her affidavit. We find that the affidavit complies with Rule 191 because Fried's observations consist of specific facts rather than conclusions, which were based on her personal knowledge. Although it appears from the trial court's comments that the court did not consider the affidavit, we find it proper.

¶ 22 Evanger's next argues that there were material issues of fact that should have precluded summary judgment. Evanger's relies on an affidavit submitted by Joel Sher, Evanger's vice-president, and argues that Sher's affidavit challenged the Fried affidavit and raised material issues of fact. However, Sher's affidavit contains conclusory statements that do not raise a material issue of fact. For example, Sher states in his affidavit "Evanger's makes every effort to prevent any of its raw materials from going to waste." Sher also states "Evanger's makes every effort to clean the plant of the garbage and waste, such as boxes, containers, unused raw materials, fat and grease." These statements are general and vague and do not call into question the statements

in Fried's affidavit. Sher's affidavit also attempts to explain the "debris," "junk" or "waste" that Fried observed as "spare parts" or machinery used by Evanger's, which he claimed was valuable to Evanger's operations. However, labeling "debris" as "spare parts" and explaining its purpose does not call into question its presence as noted in Fried's affidavit. We find that Sher's affidavit did not raise material issues of fact.

¶ 23 Evanger's next argues that the trial court erred in denying Evanger's motion for discovery. After Fried's affidavit was submitted, Evanger's attempted to depose Fried, but the trial court refused. Evanger's argues that the trial court abused its discretion in denying its request.

¶ 24 Illinois Supreme Court Rule 201(h) (eff. July 1, 2002) governs discovery in ordinance violation cases and provides in part: "[i]n suits for violation of municipal ordinances where the penalty is a fine only no discovery procedure shall be used prior to trial except by leave of court." We review discovery orders for an abuse of discretion. *Janousek v. Slotky*, 2012 IL App (1st) 113432, ¶13.

¶ 25 Here, since discovery is not normally permitted in ordinance violation cases such as this one, we find no abuse of discretion by the trial court's denial of Evanger's motion for discovery. Moreover, the trial court stated that it did not consider Fried's affidavit in its ruling granting the Village's motion for summary judgment. Therefore, Evanger's cannot be prejudiced by the trial court's denial of its motion to depose Fried.

¶ 26 II. Judgment Errors

¶ 27 Evanger's next contends that the trial court erred in finding violations for 633

1-11-3100

days and in imposing a fine of \$250 per violation per day. Evanger's first argues that the fine imposed was outside the scope of the pleadings. Evanger's maintains that the Village's second amended complaint limited the time frame of the violations between June 19, 2006, and January 29, 2007, when the second amended complaint was filed. Evanger's points to paragraph 18 of count I of the second amended complaint which stated, "as of the filing of this action, above-cited violations continue to exist on the Subject Property." Evanger's argues that it was error for the court to consider any violations occurring after January 29, 2007.

¶ 28 We do not view the language in the second amended complaint as limiting the time frame of the alleged violations. The trial court's order found Evanger's had violated the Village's ordinances for 633 days, from June 19, 2006, to March 14, 2008. We note that paragraph 18 of the second amended complaint also provided that the Village sought an order imposing a fine against Evanger's for each and every day the violations persisted beginning from June 19, 2006, and granting the Village any further relief the court deems just and necessary. The allegations in the second amended complaint were not limited to a specific time frame. The violations were alleged to have begun as of June 19, 2006, but no end date was ever alleged. Taken as a whole, paragraph 18 of the second amended complaint merely alleged that the violations were ongoing as of the date of filing, not that the violations ended as of that date.

¶ 29 Evanger's also argues that there was no evidence to support a finding of violations for each of the 633 days, from June 19, 2006 to March 14, 2008. We

1-11-3100

disagree. The testimony from the Village at the November 2008, hearings established that since June 2006 when the Village first started to investigate Evanger's, the Village continuously received complaints throughout 2007 and 2008 about Evanger's. The testimony also established that as of the date of the hearing, Evanger's was still not using tight-fitting lids on its plastic totes and there was an offensive odor emanating from the property. The testimony further established that throughout that time period, Evanger's still had not fully complied with the Village's ordinances. We find the trial court's order finding 633 days of violations supported by the evidence.

¶ 30 Evanger's also contends that the trial court's order was erroneous because the Village submitted transcripts from prior proceedings that were irrelevant and contained inadmissible hearsay and that failed to provide evidence Evanger's violated the Village's ordinances. Here, as previously noted, there was sufficient evidence to establish Evanger's violations. The testimony from the November 2008 hearing established that the violations were ongoing and continuous since 2006. We find no error with the judge's order.

¶ 31 Evanger's further contends that the fine amount was arbitrary. However, Evanger's does not argue that the fine was not within the range of fines allowable for ordinance violations. The Village's second amended complaint sought \$1,000 per day for violations of Count I and \$1,000 per day for violations of Count II. The Court stated that it was mindful of all the problems that were created by Evanger's and what the Village went through as a result. The Court then imposed a fine of \$250 per day, per

Count, for 633 days, which totaled \$316,500. We find that the fine was not arbitrary.

¶ 32

III. Due Process

¶ 33 Lastly, Evanger's contends that its due process rights were violated for numerous reasons. Evanger's first contends that its due process rights were violated when it was fined twice for the same conduct. Evanger's argues that its underlying conduct, which formed the basis of the ordinance violations in Counts I and II of the second amended complaint, was the same, so it was essentially fined twice for the same conduct.

¶ 34 Here, we find no due process violation. Count I of the second amended complaint was titled "Accumulation of Litter and Refuse" and Count II was titled "Public Nuisance." Each count alleged the specific ordinance or ordinances Evanger's was alleged to have violated. The accumulation of litter and refuse ordinances are different from the public nuisance ordinance. The ordinances exist independently of one another and Evanger's could have violated one or several or none of them. Therefore, we do not find that Evanger's was fined twice for the same conduct.

¶ 35 Evanger's further argues that its due process rights were violated because the ordinances as applied to Evanger's were unconstitutionally vague. However, we disagree. The Village first issued citations to Evanger's based on violations of the Village's code in August 2006. The citations detailed that Evanger's was not using the proper containers or tight fitting lids to dispose of waste and that there was refuse on the property. Throughout the next two years, the Village inspected Evanger's property

1-11-3100

and communicated with Evanger's about what Evanger's needed to do to remedy the ordinance violations. The court also noted throughout the litigation that Sher made repeated assurances to the court that he was taking specific action to remedy the violations. We find no support for Evanger's contention that the Village's ordinances were so vague or indefinite that they failed to provide notice to Evanger's of what constituted a violation.

¶ 36 Evanger's next contends that the trial court erred in refusing to return Evanger's funds. After the hearing on the Village's petition to revoke the order of supervision, the trial court imposed a fine on Evanger's of \$168,000. Subsequently, the Village obtained \$168,000, in funds from Evanger's bank accounts in satisfaction of the judgment. After we reversed and vacated the trial court's orders imposing and revoking supervision, the Village successfully moved to have the money deposited with the Clerk of the Circuit Court. Evanger's argues that this was error and Evanger's was "deprived of its property without due process." However, Evanger's fails to argue how the court's order lacked due process. In sum, we conclude that the proceedings did not deprive Evanger's of its due process rights.

¶ 37 Accordingly, the judgment of the circuit court is affirmed.

¶ 38 Affirmed.