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2012 IL App. (3d) 091016-U

Order filed February 29, 2012

IN THE
APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

ROBERT WHITE and REBECCA)	Appeal from the Circuit Court
WHITE,)	of the 9th Judicial Circuit,
)	McDonough County, Illinois
Plaintiffs-Appellants,)	
)	
v.)	Appeal No. 3-09-1016
)	Circuit No. 09-CH-19
CITY OF BUSHNELL,)	
)	Honorable William D. Henderson,
Defendant-Appellee.)	Judge, Presiding.

JUSTICE SCHMIDT delivered the judgment of the court.

Justice Holdridge concurred in the judgment.

Justice McDade dissented.

ORDER

¶ 1 *Held:* City's ordinance regulating mobile homes was not unconstitutional as applied to the plaintiffs because there was a rational basis to prohibit new purchasers of mobile homes from renting their property. In addition, plaintiffs failed to plead sufficient facts to maintain a cause of action for inverse condemnation.

¶ 2 Plaintiffs, Robert and Rebecca White, filed a complaint against defendant, City of Bushnell (the City), seeking injunctive relief and a declaratory judgment that City of Bushnell Ordinance No. 2005--8, §15.24.140 (approved Dec. 5, 2005) (the Ordinance) was void. The trial court granted the City's motion to dismiss pursuant to section 2--615 of the Code of Civil Procedure. 735 ILCS 5/2--615 (West 2008). Plaintiffs argue that the Ordinance is unconstitutional or, in the alternative, constitutes a regulatory taking without just compensation in violation of the Eminent Domain Act. 735 ILCS 30/10--5--5 (West 2008). We affirm.

¶ 3 **FACTS**

¶ 4 We note at the outset that because plaintiffs' complaint was dismissed pursuant to a section 2--615 motion, we take all facts alleged in the complaint as true. *Connick v. Suzuki Motor Co., Ltd.*, 174 Ill. 2d 482 (1996).

¶ 5 On December 5, 2005, the City passed the Ordinance which amended the regulations concerning mobile homes and house trailers located in the City. Section 15.24.140 of this ordinance states:

"15.24.140. MOBILE HOUSING UNLAWFUL. It shall be unlawful for any person to possess or maintain any mobilized or immobilized mobile home on any lot or parcel of ground in the City except in a licensed mobile home park or licensed trailer camp. *Any such units that were already in place within the City prior to December 31, 2005, shall be exempt from this provision. However, if such prior existing units are ever replaced or removed, they shall only be replaced in accordance with the provisions of*

this Chapter.

A. Exceptions to the prohibition of 15.24.140 shall

be as follows:

1. Immobilized mobile homes over 24 feet wide shall be allowed in the City outside of a mobile home park.

2. Existing owner occupied single wide mobile homes, by City Council approval, can be upgraded, on its existing lot only, to a newer model owner occupied single wide mobile home, no older than 5 years old. If an existing owner occupied single wide mobile home, and the lot on which it sits, is sold to a new owner who will occupy the mobile home, this exception continues. *If sold to a new owner who will not occupy the mobile home, this exception will not apply as any such mobile home cannot be used as a rental property.* In such cases of non-owner occupied, the mobile home must be removed from the City of Bushnell within sixty (60) days of the date of said sale and cannot be replaced." (Emphases added.) City of Bushnell Ordinance No. 2005--8, §15.24.140 (approved Dec. 5, 2005).

¶ 6 Plaintiffs own two properties in the City that currently support mobile homes. These mobile homes were located on the properties prior to December 31, 2005. Plaintiffs purchased the first property in September 2007 with the intention of making it a rental property. After the

purchase, they first leased the property to renters, who lived there for approximately four months, and then leased it to another couple, who lived in the mobile home at least until the time the complaint was filed. Plaintiffs purchased the second property in April 2008 and rented the mobile home to their daughter.

¶ 7 On February 3, 2009, an attorney working for the City wrote the plaintiffs and informed them that, because the rental properties violated the Ordinance, the mobile homes had to be removed. Plaintiffs subsequently filed a complaint for declaratory judgment and injunctive relief, which was dismissed pursuant to a section 2--615 motion with leave to refile.

¶ 8 The plaintiffs then filed a first amended complaint and alleged that the Ordinance constituted a regulatory taking, constituted a tortious interference with a prospective business expectancy, that the Ordinance was unconstitutionally vague, and that the Ordinance was arbitrary and capricious as applied to the plaintiffs. The plaintiffs also added a count alleging inverse condemnation. The trial court again dismissed the complaint, and the plaintiffs appealed.

¶ 9 ANALYSIS

¶ 10 Plaintiffs assert that the Ordinance is unconstitutional, violates the Eminent Domain Act (735 ILCS 30/10--5--5 (West 2008)), constitutes a regulatory taking without just compensation, and tortiously interferes with a prospective business expectancy. We address each of these arguments in turn. We review the trial court's dismissal *de novo*. *Napleton v. Village of Hinsdale*, 229 Ill. 2d 296 (2008).

¶ 11 A. Constitutionality

¶ 12 Plaintiffs argue that the Ordinance is unconstitutionally vague or, in the alternative, it is arbitrary and capricious as applied to them. With regard to the first argument, plaintiffs are barred from asserting a facial challenge to the Ordinance. As our supreme court stated, "[t]he right to challenge a statute as being vague on its face where the statute clearly applies to the conduct of the party making the challenge does not exist unless first amendment concerns are involved." *People v. Jihan*, 127 Ill. 2d 379, 386 (1989). No first amendment issue is involved in the present case, and the Ordinance clearly applies to the plaintiffs' conduct. The Ordinance prohibits new purchasers of nonowner occupied mobile homes from renting their property, and the plaintiffs were renting their mobile homes in violation of the Ordinance. City of Bushnell Ordinance No. 2005--8, §15.24.140 (approved Dec. 5, 2005). As a result, plaintiffs can only mount an as-applied challenge to the Ordinance.

¶ 13 Statutes are presumed to be constitutional, and the party challenging the statute must clearly show that a constitutional violation exists. *Napleton*, 229 Ill. 2d 296. A court "has [the] duty to uphold the constitutionality of a statute when reasonably possible." *Napleton*, 229 Ill. 2d at 306-07. Ordinarily, a court will apply the rational basis test when analyzing the constitutional validity of a statute. *Napleton*, 229 Ill. 2d 296. This means that the statute must bear a rational relationship to a legitimate legislative purpose and is neither arbitrary nor unreasonable. *Napleton*, 229 Ill. 2d 296. In an as-applied challenge "a plaintiff protests against how an enactment was applied in the particular context in which the plaintiff acted or proposed to act, and the facts surrounding the plaintiff's particular circumstances become relevant." *Napleton*,

229 Ill. 2d at 306. Accordingly, in order for plaintiffs to succeed, we must find that the Ordinance is unconstitutional when applied to plaintiffs' situation.

¶ 14 Although it is unclear from their brief, plaintiffs appear to challenge the statute on equal protection grounds. They argue that new purchasers of mobile homes are being unjustly targeted. Plaintiffs propose several hypotheticals where a nonowner may be able to lease a mobile home under the statute, and they claim that, because such situations exist, the Ordinance is therefore arbitrary and capricious as applied to them.

¶ 15 We find no violation of equal protection. U.S. Const., amend. XIV, §1. It must be remembered that "[e]qual protection does not prohibit the State from enacting legislation that distinguishes between categories of people; rather, it forbids the State from enacting legislation that puts people into different categories on the basis of criteria that are wholly unrelated to the purpose of the legislation." *In re Estate of Muldrow*, 343 Ill. App. 3d 1148, 1152 (2003). When reading the Ordinance in its entirety, it is clear that the City is attempting to limit the number of mobile homes outside of mobile home parks or campgrounds. City of Bushnell Ordinance No. 2005--8, §15.24.140 (approved Dec. 5, 2005). The reason may be as simple as aesthetics, which has been held to be a legitimate government interest. See *City of Champaign v. Kroger Co.*, 88 Ill. App. 3d 498 (1980).

¶ 16 At the same time, the City also does not want to force individuals out of their homes, and therefore the City incorporated a number of exceptions into the Ordinance. City of Bushnell Ordinance No. 2005--8, §15.24.140 (approved Dec. 5, 2005). However, new purchasers of

mobile homes who have no intention of occupying the homes are not being deprived of a place to live. New purchasers of mobile homes are simply being deprived of potential income, which is a rational distinction. Moreover, the City only places this restriction on new purchasers.

Individuals who were renting their property prior to the enactment of the Ordinance are not deprived of their rental income. This distinction is again rational because new purchasers, or their title companies, should research any applicable law. See *First Midwest Bank, N.A., v. Stewart Title Guaranty Co.*, 355 Ill. App. 3d 546 (2005). Based on all of the above, we find that it is rational for the City to impose stricter restrictions on new purchasers of mobile homes who do not intend on occupying those homes. Therefore, the statute is not arbitrary and capricious as applied to the plaintiffs.

¶ 17 B. Eminent Domain and Regulatory Taking

¶ 18 Plaintiffs next argue that the Ordinance is a violation of the Eminent Domain Act (735 ILCS 30/10--5--5 (West 2008)) and that it constitutes a regulatory taking. Because the claims are related, we review them together.

¶ 19 Plaintiffs' claims are best construed as an inverse condemnation claim. See *Lamar*, 355 Ill. App. 3d 352. The difference between eminent domain and inverse condemnation is that inverse condemnation "describes the manner in which a landowner recovers compensation for a taking of its property when [eminent domain] proceedings have not been instituted." *Lamar*, 355 Ill. App. 3d at 367. A "taking" can occur in two ways. *Stahelin v. Forest Preserve Dist. of Du Page County*, 376 Ill. App. 3d 765, 771 (2007), quoting *Forest Preserve of District of Du Page*

County v. West Suburban Bank, 161 Ill. 2d 448, 456 (1994). The first is when there is an actual physical intrusion on the property. *Stahelin*, 376 Ill. App. 3d 765. The second is when government regulation is so severe that it amounts to a taking. *Stahelin*, 376 Ill. App. 3d 765.

Although the amount of regulation required in order for a taking to have occurred is still unclear, at the very minimum the landowner must be substantially deprived of an economically beneficial use of his land. *Tim Thompson, Inc., v. Village of Hinsdale*, 247 Ill. App. 3d 863 (1993).

¶ 20 The City argues that we should not consider plaintiffs' inverse condemnation argument because plaintiffs bought their property in 2007 and the Ordinance was passed in 2005.

Therefore, the City asserts, there can be no taking of property because the property was already subject to the Ordinance. However, the Supreme Court has held that acquiring title to property after the effective date of a regulation does not bar regulatory taking claims. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

¶ 21 Plaintiffs' only argument on this issue is that requiring them to move the mobile homes will force them to spend a significant amount of money, which will deprive them of the value of the mobile homes. However, in order to survive a section 2--615 motion to dismiss, the plaintiffs had to assert sufficient facts which, if true, would entitle them to relief. *Thompson*, 247 Ill. App. 3d 863. After reviewing the pleadings in this case, plaintiffs failed to allege any facts supporting their statements. Instead, plaintiffs only offer conclusory remarks such as "[r]equiring Plaintiffs to remove an existing mobile home without compensation will deprive them of the value of the mobile home" and "[r]efusing to allow Plaintiffs to lease the mobile homes and [r]equiring

Plaintiffs to remove the mobile homes deprives Plaintiffs of all economic value of the mobile homes." Without any facts whatsoever, such as the current value of the mobile homes, the cost of moving the homes, the value of the property without a mobile home, or the development potential of the property, dismissal under section 2--615 was proper. See *Harvey v. Mackay*, 109 Ill. App. 3d 582 (1982) (holding that dismissal with prejudice was proper where plaintiff had pled only conclusory allegations in fourth amended complaint).

¶ 22 In addition, the trial court did not issue a written order explaining its decision, nor is there a transcript of the hearing on the motion to dismiss the first amended complaint. Therefore, it is unclear whether the trial court considered the inverse condemnation argument. Nonetheless, we may affirm the trial court's decision because an adequate legal ground exists to sustain the trial court's dismissal. *Thompson*, 247 Ill. App. 3d 863.

¶ 23 C. Tortious Interference with Business Expectancy

¶ 24 Plaintiffs raise this issue in their brief, but they do not make any argument or provide any citations to authority. Therefore, this issue is forfeited. *People v. Ward*, 215 Ill. 2d 317 (2005).

¶ 25 CONCLUSION

¶ 26 In conclusion, the Ordinance is not unconstitutional as applied to the plaintiffs because there is a rational reason to prevent new owners of mobile homes from leasing those homes. Moreover, plaintiffs failed to allege any facts which, if true, would establish a regulatory taking.

¶ 27 The judgment of the circuit court of McDonough County is affirmed.

¶ 28 Affirmed.

¶ 29 JUSTICE McDADE, dissenting:

¶ 30 Before addressing the constitutionality of the statute, I would first consider whether the statute clearly applies to the plaintiffs' conduct. Neither party has argued the applicability of the Ordinance to the plaintiffs' conduct, thereby waiving the issue. *Reed v. Retirement Board of Fireman's Annuity and Benefit Fund of Chicago*, 376 Ill. App. 3d 259 (2007). However, waiver is a limitation on the parties, not the court. *Id.* In addition, Illinois Supreme Court Rule 366(a) (eff. Feb. 1, 1994) allows us to enter any judgment that should have been entered below.

¶ 31 While I recognize that our supreme court has cautioned reviewing courts against raising unbriefed issues *sua sponte*, the court has also held that "a reviewing court may sometimes raise and consider unbriefed issues in order to provide 'for a just result and for the maintenance of a sound and uniform body of precedent.'" *People v. Givens*, 237 Ill. 2d 311, 325 (2010) (quoting *Hux v. Raben*, 38 Ill. 2d 223, 225 (1967)). In the instant case, I would find that the City's belief that the Ordinance applied to the plaintiffs was an "obvious error" that needs to be addressed in order to provide for a just result. *Givens*, 237 Ill. 2d at 328.

¶ 32 Moreover, whether the Ordinance applies to the plaintiffs' conduct is an issue of statutory interpretation, which is a pure question of law. *Benbenek v. Chicago Park District*, 279 Ill. App. 3d 930 (1996). The issue at hand does not require any determinations of fact or assessments of credibility. *Federal Insurance Co. v. St. Paul Fire and Marine Insurance Co.*, 271 Ill. App. 3d 1117 (1995). Instead, it is a question of law, "the determination of which lies *exclusively* with the court." (Emphasis added.) *Benbenek*, 279 Ill. App. 3d at 932. Accordingly, consideration of the issue does not require speculation as to the arguments of the parties because all that is at issue

is the plain language of the Ordinance.

¶ 33 Upon examining the plain language of the Ordinance, I would conclude that the plaintiffs' conduct was not barred by the statute. The Ordinance exempts "units that were already in place within the City prior to December 31, 2005[.]" City of Bushnell Ordinance No. 2005–8, § 15.24.140 (approved Dec. 5, 2005). The exemption is lost "if such prior existing units are ever replaced or removed[.]" City of Bushnell Ordinance No. 2005–8, § 15.24.140 (approved Dec. 5, 2005).

¶ 34 The plaintiffs in this case bought two mobile homes that were already on their respective lots prior to December 31, 2005. They never removed or replaced those mobile homes. Thus, the statute never became applicable to them, and the City is not authorized to penalize them for the leasing conduct at issue. See *Manuel v. Red Hill Community Unit School District No. 10 Board of Education*, 324 Ill. App. 3d 279 (2001) (statute granting immunity was not applicable to the defendants because their actions were not covered by the plain language of the statute).

¶ 35 The City used language in subsection (2) to argue that this exemption does not apply to new owners who use their mobile homes as rental properties. However, the plain language of subsection (2) discusses the conditions under which a mobile home can be upgraded. Since the plaintiffs did not attempt to upgrade the existing mobile homes, subsection (2) does not apply.

¶ 36 Having decided that the Ordinance does not apply to the plaintiffs, there is no need to consider the remainder of the plaintiffs' arguments. To explain, the plaintiffs filed a declaratory judgment complaint seeking a judgment that the Ordinance was invalid as applied to them. Upon

reviewing the plain language of the statute, I would agree. Since the City cannot possibly prevail against the plaintiffs under the current wording of the Ordinance, I would reverse the trial court's judgment in its entirety and grant the plaintiffs their requested relief. See Ill. S. Ct. R. 366(a) (eff. Feb. 1, 1994).