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2016 IL App (3d) 160152-UB

Order filed September 15, 2016
Modified Upon Denial of Rehearing November 1, 2016

RICHARD MARONDE and DIANA MARONDE,)	Appeal from the Circuit Court
)	of the 14th Judicial Circuit,
)	Whiteside County, Illinois.
Plaintiffs-Appellees,)	
)	
v.)	
)	Appeal No. 3-16-0152
WHITESIDE COUNTY, ILLINOIS, a)	Circuit No. 15-MR-28
municipal corporation, and E. STUART)	
RICHTER, in his official capacity as)	
Planning and Zoning Administrator,)	
)	Honorable
Defendants-Appellants.)	Norma Kauzlarich,
)	Judge, Presiding.

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

ORDER

- ¶ 1 *Held:* Trial court did not error in denying the defendant's motion to dismiss. Landowners stated a claim for declaratory relief against a county and its zoning administer that the building they erected on their property was proper under the zoning code. The claim was not an appeal of a denial of a request for a zoning variance. The trial court's grant of injunction in favor of the landowners was reversed as premature.
- ¶ 2 The defendants, Whiteside County and E. Stuart Richter, in his official capacity as Planning and Zoning Administrator of Whiteside County, appealed from a trial court order denying their motion to dismiss and granting the plaintiffs, Richard and Diane Maronde, a declaratory judgment and a permanent injunction "prohibiting, restraining, and enjoining" the

defendants or their agents from enforcing a "stop work" order or otherwise interfering with or preventing the completion of construction of a building located on the plaintiffs' property.

¶ 3

FACTS

¶ 4

The plaintiffs owned two adjacent properties in Prophetstown, Illinois, in Whiteside County. Their residence was located on one lot, and they sought to build a garage or storage building on the adjacent lot. The adjacent lot had previously contained an abandoned, fire-damaged residence. The plaintiffs purchased this lot and began the process to secure the appropriate permits through the Army Corps of Engineers, the Illinois Department of Natural Resources, and Whiteside County for the construction of a garage-type structure. Richter issued a Temporary Flood Zone Permit to the plaintiffs on April 21, 2014. The Temporary Flood Zone Permit stated that "This temporary permit is issued to assure that: the first floor is constructed at an elevation of _____ or above." The elevation was left blank. Richter told the plaintiffs that they needed to have a Flood Elevation Certificate prepared.

¶ 5

On April 22, 2014, the building's footings were poured and finished. On April 23, 2014, a licensed surveyor issued a Flood Elevation Certificate, establishing that the bottom floor was at a height of 603.8 feet and that the top of the next higher floor was at 607.8 feet. According to the verified complaint, on April 25, 2014, the concrete walls were poured in the presence of Richter, who made no effort to stop the pour, and, in fact, indicated that he was fine with what was being done. Construction continued through most of June 2014, including the pouring of the concrete floor, the installation of the prefabricated walls, and the delivery of the roof trusses.

¶ 6

After all that had been completed, on June 23, 2014, Richter issued a "stop work" order, citing violations of Chapter 11, Article 1, section 11-7(6)(H) (the Flooding and Stormwater Regulations) and Chapter 19, Article IV, Division 3, Sections 19-5501 and 19-9802 (the

Planning and Development Code) of the Whiteside County Code. The plaintiffs' attorney sent a letter to the Whiteside County Board (Board) requesting a variance from the county flood regulations, noting that the plaintiffs had the required permits but acknowledging that the building was 3.1 feet below the base flood elevation and seeking a variance to allow construction at the present elevation.

¶ 7 On July 15, 2014, the plaintiffs presented their request for a flood variance to the Board. On August 19, 2014, Richter explained his recommendations and conditions, and the Board discussed the variance request. The plaintiffs' attorney was allowed to address the Board. The Board then voted to deny the requested variance. On December 19, 2014, the plaintiffs received a letter from the county demanding that the building be removed or demolished prior to January 31, 2015.

¶ 8 On March 3, 2015, the plaintiffs filed their complaint for a declaratory judgment and injunctive relief. The plaintiffs alleged that the statutory sections cited in the "stop work" order were no longer in effect or not applicable to their structure because it was an "accessory structure" as defined by section 19-8.2 of the Whiteside Planning and Development Code (Whiteside County Code § 19-8.2 (adopted August 19, 2014)) and not a garage or shed constructed "ancillary to residential use" under section 11-7(6)(H) of the Flooding and Stormwater Regulations (Whiteside County Code § 11-7(6)(H) (added May 18, 1993)). On March 27, 2015, the defendants filed a motion to dismiss, arguing that the complaint was untimely and that the trial court lacked jurisdiction because the plaintiffs did not seek judicial review of the denial of the variance request. The trial court denied the motion to dismiss, finding that the plaintiffs were denied due process in the variance process and that the defendants were estopped from availing themselves of the limitations of the Administrative Review Act when

they failed to abide by its own statutory process. The trial court also granted the plaintiffs' complaint for declaratory judgment and found the structure to be in conformity with all applicable state and local provisions of law. The trial court issued an order to serve as an injunction against Whiteside County, Illinois, and any or all of its agents prohibiting, restraining, and enjoining them from enforcing the "stop work" or otherwise interfering with or preventing the completion of construction of the building. The defendants appealed.

¶ 9

ANALYSIS

¶ 10

As an initial matter, we must address the question of appellate jurisdiction. Our jurisdiction is limited to reviewing final judgments, subject to certain exceptions. *In re Marriage of Verdung*, 126 Ill. 2d 542, 553 (1989). "A judgment is final for appeal purposes if it determines the litigation on the merits or some definite part thereof so that, if affirmed, the only thing remaining is to proceed with the execution of the judgment." *Id.* A circuit court's denial of a motion to dismiss is an interlocutory order, not a final and appealable order. *Van Der Hooning v. Board of Trustees of University of Illinois*, 2012 IL App (1st) 111531, ¶ 6. However, the trial court also granted the plaintiffs an injunction, which was a final judgment, giving us jurisdiction pursuant to Illinois Supreme Court Rule 303 (eff. Jan. 1, 2015).

¶ 11

The defendants argue that the trial court erred in granting judgment and permanent injunctive relief in favor of the plaintiffs prior to the defendants answering the complaint, the parties conducting discovery, or holding any evidentiary hearing. A proceeding seeking a temporary restraining order only requires a summary showing of irreparable harm and an inadequate remedy at law. *Stanton v. City of Chicago*, 177 Ill. App. 3d 519, 525 (1988). On the other hand, Illinois courts have held that, when the defendant is not in default, a permanent injunction may not be entered without an opportunity to be heard, which usually involves a trial,

with the opportunity to present witnesses and evidence. *Kengott v. County of Lake*, 42 Ill. App. 3d 621, 622 (1976) (citing *James B. Beam Distilling Co. v. Foremost Sales Promotions, Inc.*, 13 Ill. App. 3d 176, 178 (1973)); see also *Pfeffer v. Lebanon Land Development Corp.*, 46 Ill. App. 3d 186, 194 (1977). In this case, the trial court held that the verified complaint was sufficient as a matter of law to establish the plaintiffs' right to permanent injunctive relief. However, the complaint alleged disputed factual issues that need to be proven. Thus, while the plaintiffs assert that the trial court's decision granting declaratory judgment and enjoining the defendants from enforcing the "stop work" order is ultimately the correct decision, they concede that the only issue before the trial court on September 25, 2015, was the defendants' motion to dismiss and that the declaratory judgment and permanent injunction were premature.

¶ 12 Next, the defendants argue that the trial court erred in denying their motion to dismiss, which was a combined motion to dismiss brought pursuant to section 619.1 of the Code of Civil Procedure (735 ILCS 5/2-619.1 (West 2012)). We review *de novo* the trial court's order. *Schloss v. Jumper*, 2014 IL App (4th) 121086, ¶ 15. The defendants contended in their motion to dismiss that the plaintiffs' complaint was untimely under section 15-1202.1 of the Counties Code (55 ILCS 5/5-1202.1 (West 2012)), which requires that judicial review of a county's zoning decision be commenced not later than 90 days after the date of the decision. Alternatively, the defendants argued that the decisions of the county board were subject to judicial review under the Administrative Review Law, and the commencement of such actions had to be filed within 35 days from the date of decision under the Code of Civil Procedure. 55 ILCS 5/1-6007 (West 2012); 735 ILCS 5/3-103 (West 2012). Lastly, the defendants argued that the complaint failed to state a claim for declaratory judgment and failed to allege facts showing that the plaintiffs were entitled to injunctive relief.

¶ 13 In reaching our decision we reject the defendant's arguments that the plaintiff's *action* was time-barred under either the Administrative Review Law, the Code of Civil Procedure or the Counties Code. The plaintiffs do not challenge the county board's denial of the variance. Instead, the plaintiffs filed this action seeking a declaration that the building they constructed was of a type that met all of the local, state and federal regulations and, as such, there was no need to be granted a variance prior to the construction of the building. The plaintiffs sought such a declaration in order to enjoin the county from continuing its efforts to require the plaintiffs to remove the structure. We find this action is not an appeal of the denial of the variance request, but is a separate action. Considering the relief sought in the complaint, we find that the trial court properly denied the defendants' motion to dismiss on those grounds.

¶ 14 Finally, the defendants argue that the plaintiffs failed to state a claim for declaratory judgment. A complaint for a declaratory judgment must allege: (1) a plaintiff with a legal tangible interest; (2) a defendant having an opposing interest; and (3) an actual controversy between the parties involving such interests. *Brandt Construction Co. v. Ludwig*, 376 Ill. App. 3d 94, 101 (2007). In their verified complaint, the plaintiffs asserted a legal tangible interest: the right of free and lawful use of their property. The county has asserted an opposing interest by issuing its "stop work" order. An actual controversy exists between the parties concerning these interests as the county demands that the plaintiffs tear down the storage building and the plaintiffs assert that the storage building meets all requirements of the Whiteside Planning and Development Code.

¶ 15 The defendants argue that the plaintiffs did not attempt to learn the consequences of their actions before acting and that the plaintiffs ignored the plain language of the permit by continuing with construction. However, the facts as alleged in the verified complaint indicate

that the plaintiffs had some basis for proceeding with construction: they had obtained necessary permits from the United States Army Corps of Engineers and the Illinois Department of Natural Resources, they had received a flood elevation certificate from a licensed surveyor, they obtained the temporary permit, and Richter had not objected to the project even after being present at the scene when the size of the building was evident. Thus, the plaintiffs' complaint properly stated a claim for a declaratory judgment.

¶ 16 The defendants argue that, upon remand, the case should be assigned to a new trial court judge. A trial judge is presumed to be impartial and the burden of overcoming this presumption rests on the party making the charge of prejudice, who must present evidence of personal bias stemming from an extra-judicial source and evidence of prejudicial trial conduct. *In re Marriage of Petersen*, 319 Ill. App. 3d 325 (2001). Proving prejudice so as to justify a substitution of a judge for cause is a heavy burden and the conclusion of prejudice will not be made lightly. 735 ILCS 5/2-1001(a)(2)(i) (West 2012). "Opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Eychaner v. Gross*, 202 Ill. 2d 228, 281 (2002) (quoting *Liteky v. United States*, 510 U.S. 540, 555 (1994)).

¶ 17 The county does not allege that the trial court had a personal bias against them but rather argues that this court should reassign the case to a new trial judge because the trial court "abandoned its role as neutral arbiter by raising issues *sua sponte* and entering judgment for [the] [p]laintiffs when only a motion to dismiss was before the court." The county cannot show any evidence of prejudice or bias. The fact that a judge ruled adversely to a party does not disqualify that judge from sitting in subsequent civil or criminal cases in which the same person is a party.

Eychaner, 202 Ill. 2d at 280. Therefore, upon remand, assignment to a new judge would be inappropriate.

¶ 18 In conclusion, the court did not err in denying the defendants motion to dismiss. However, the granting of a declaratory judgment and injunctive relief was premature and is reversed. The matter is remanded for further proceedings on the plaintiffs' complaint.

¶ 19 CONCLUSION

¶ 20 That part of the judgment of the circuit court of Whiteside County denying the defendants' motion to dismiss is affirmed. The part of the judgment granting the plaintiffs' judgment on their complaint and permanent injunctive relief is reversed and remanded.

¶ 21 Affirmed in part, reversed in part, remanded.