STATE OF MICHIGAN

COURT OF APPEALS

DENNIS DUBUC,

Plaintiff-Appellant,

v

GREEN OAK TOWNSHIP, ZONING BOARD OF APPEALS, DALE BREWER, RAYMOND CLEVENGER, and MICHAEL VALLIE,

Defendants-Appellees.

UNPUBLISHED
January 5, 1999

No. 191293
Livingston Circuit Court
LC No. 92-012517 CZ

Before: Holbrook, Jr., P.J., and O'Connell and Whitbeck, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's dismissal of his mandamus action and the trial court's order adjudicating him in contempt of court for violating various trial court orders. We affirm.

I. Basic Facts And Procedural History

A. Introduction

A federal district court judge has characterized this matter as a "quagmire," and our review of the record convinces us that this characterization was not only factually accurate but perhaps overly generous. Litigation is, of course, inevitable in a complex society; the protracted, bitter and occasionally senseless litigation that has occurred with respect to this matter has exceeded all sense of proportion and reflects no credit on any of the parties involved. The brief summary that we provide below illustrates this point perhaps better than any further commentary on our part.

B. The 1986 Consent Judgment

Plaintiff owns four acres of land in defendant Green Oak Township (the "Township"). The industrial property is comprised of a north parcel and a south parcel. There are several buildings located on these parcels but the precise building at issue is referred to as the "collision shop" or the "quonset hut building." In a prior lawsuit, plaintiff sought mandamus to compel the Township to issue a

building permit for the completion of a building known as "N-2." That suit ended with a consent judgment filed in May, 1986, that provided, among other things, that the development of the north and south parcels comply with applicable zoning ordinances and building codes.

C. Plaintiff's 1992 Litigation

The instant litigation arises out of building/construction work performed at the collision shop. In April, 1991, it came to the attention of the Township that plaintiff was making changes to the roof of the collision shop without a permit. The Township then wrote to plaintiff and asked him to obtain a permit for, and submit written plans detailing, the work he was doing on the roof. Plaintiff then submitted a hand drawn sketch of the roof work and asked for a permit. The Township informed plaintiff that his sketch was inadequate, that a permit would not be issued and that he was to stop work on the roof until permits were issued. The next day, plaintiff submitted a letter to the Township from Munzel Engineering stating that, in Munzel's opinion, submission of plans was not necessary for the roof work. Relying on this letter, plaintiff informed the Township that, "[i]t appears as if I was correct in determining that the work being performed on the [collision shop] should be considered repairs, and not in need of engineered drawings. . . . Therefore, no further drawings will be supplied, and no permit application will be necessary."

In November, 1992, plaintiff evicted a tenant from the collision shop. Plaintiff sought to relocate four tenants from another of his buildings into the collision shop. According to plaintiff, the Township informed those tenants that they could not occupy the collision shop. A December 2, 1992 letter from the Township to plaintiff states that, "[b]efore this building may be occupied, it must comply with the Building Code and a Certificate of Use and Occupancy must be issued to you." The letter then set forth requirements necessary for plaintiff to obtain such a certificate. In general, the letter required plaintiff to obtain permits and submit sealed plans for any alterations that had been made to the building (such as the roof work), submit site plan amendments, and submit a verification from the health department that the building's septic system complies with the state code. On December 7, 1992, plaintiff responded to the letter and disputed its contents. On December 8, 1992, plaintiff filed a mandamus action, seeking (1) "An order permitting Plaintiff to use said building," and (2) "An order requiring Green Oak Township to immediately issue a permit to allow repairs of the septic system."

D. The Injunctive Relief

(1) The January 29, 1993 Temporary Restraining Order

In January, 1993, the Township moved for an ex parte temporary restraining order. In part because, "[d]espite general and specific notice of the necessity [to] obtain [a] permit to alter the premises, Plaintiff, has in the past, and is attempting to now alter his building without deference to building code requirements and in violation of Township ordinances and the previously entered Consent Judgment." According to the motion, plaintiff was in the process of completing and "covering-up" work, such that immediate and irreparable harm would result from the delay required to effect notice or from "the risk that notice will precipitate adverse action." On January 29, 1993, the trial court issued the temporary restraining order stating that, "Plaintiff, his agents and employees, be and they are hereby

restrained and enjoined from performing or permitting any others to perform construction, alteration, or building work" at the collision shop.

(2) The August 31, 1993 Preliminary Injunction

Following several hearings on the injunction issue between February and August 1993, the trial court issued a preliminary injunction on August 31, 1993. The injunction, among other things, continued the restrictions of the temporary restraining order, vacated the collision shop, and prevented any further alteration, repair, addition or modification to the collision shop without the presence of a Township building inspector.

E. The 1993-1995 Delay

In September, 1993, plaintiff filed a motion to disqualify the trial judge. That motion was not perfected until October, 1994, and appeals of the motion's denial and submission of motions for reconsideration delayed the trial until September, 1995. During the time the trial was delayed, plaintiff filed complaints against defendants with the state construction commission and motions in federal court. As a result, in June, 1994, following an inspection of the collision shop, the state construction commission issued a "Special Inspection Report," that outlined numerous violations of the construction code that plaintiff needed to correct. Also in June, 1994, in federal court, in a case that dates back to 1991, plaintiff filed a motion for injunctive relief in the form of an order compelling the Township to issue a temporary certificate of occupancy. Initially, that motion was denied. However, plaintiff subsequently renewed that motion and in November, 1994, the federal court ordered the Township to issue plaintiff a temporary certificate of occupancy conditioned on plaintiff complying with certain listed requirements.

F. The Contempt Proceedings

In August, 1995, the Township filed a motion to hold plaintiff in contempt for violating the 1986 consent judgment, the January 29, 1993 temporary restraining order, and the August 31, 1993 preliminary injunction. Following testimony and argument, the trial court in an opinion and order issued November 30, 1995 (the "November 30, 1995 Order") found plaintiff to be in contempt of the 1986 consent judgment, the January 29, 1993 temporary restraining order, and the August 31, 1993 preliminary injunction

G. The Mandamus Trial

Testimony began on September 15, 1993 at the trial on plaintiff's complaint for mandamus. In the November 30, 1995 Order, the trial court entered a judgment in favor of the Township on the complaint for mandamus and found plaintiff's claim to have been frivolous.

II. Standard Of Review

A. The Mandamus Action

A trial court's finding with regard to whether a claim is frivolous will not be disturbed on appeal unless the finding is clearly erroneous. *State Farm Fire & Casualty Co v Johnson*, 187 Mich App 264, 268-269; 466 NW2d 287 (1990). A claim is frivolous if it is devoid of arguable merit, or the primary purpose in initiating the claim is to harass, embarrass, or injure the prevailing party. MCL 600.2591(3); MSA 27A.2591(3).

B. The Injunctive Relief

The propriety of the grant of injunctive relief is reviewed for an abuse of discretion. See e.g., *Senior Accountants, Analysts & Appraisers Assoc v Detroit*, 218 Mich App 263, 269; 553 NW2d 679 (1996); *Fruehauf Trailer Corp v Hagelthorn*, 208 Mich App 447, 449; 528 NW2d 778 (1995).

C. The Contempt Adjudication

A trial court's findings in a contempt proceeding must be affirmed on appeal if there is competent evidence to support them. *Cross Co v UAW Local No. 155*, 377 Mich 202, 217-218; 139 NW2d 694 (1966). The issuance of an order of contempt rests in the sound discretion of the trial court, and is reviewed only for an abuse of discretion. *Mason v Siegel*, 301 Mich 482, 484; 3 NW2d 851 (1942).

III. The Mandamus Action

Plaintiff argues that the trial court incorrectly found that his mandamus action was frivolous. We disagree. We conclude that the trial court did not clearly err in finding that plaintiff's action was frivolous. First, a requirement before mandamus can be sought is that there is no other adequate legal remedy. *Keaton v Village of Beverly Hills*, 202 Mich App 681, 683; 509 NW2d 544 (1993). Here, plaintiff concedes that he had an available legal remedy, e.g., an appeal. Accordingly, we agree with the trial court that plaintiff's complaint for mandamus was devoid of arguable merit. Also, based on the previous bitter history of litigation and confrontation between the parties, the lack of even arguable entitlement to mandamus and the haste with which the instant action was filed, the trial court would not have clearly erred in concluding that the primary purpose in initiating the action was to harass, embarrass, or injure the Township.

IV. The Injunctive Relief

Plaintiff argues that the trial court improperly granted injunctive relief to defendants. We again disagree. Plaintiff initially argues that the injunctive relief must be vacated because defendants did not file a counterclaim seeking injunctive relief. However, plaintiff did not raise this argument in this context in the trial court. Because this issue is raised for the first time on appeal, we need not address it. *Burgess v Clark*, 215 Mich App 542, 548; 547 NW2d 59 (1996).

Next, we note that it could be argued that the temporary restraining order and preliminary injunction have been superseded by the grant of permanent injunctive relief. Therefore, any claims regarding the propriety of the temporary restraining order or preliminary injunction would appear to be moot. However, we will briefly address plaintiff's arguments.

We have reviewed the affidavit in support of the ex parte temporary restraining order and find that it sufficiently complied with MCR 3.310(B)(1). We also disagree with plaintiff's claim that the order is contrary to the construction code. Rather, we believe that the order is authorized by MCL 125.1512(4); MSA 5.2949(12)(4), which provides that "[w]ithout limitation on other available remedies, an interested person may apply for an order, enjoining the continuation of construction undertaken in violation of a building permit, this act, the code or other applicable laws or ordinances, to the circuit court for the county in which the premises are located."

Plaintiff's challenges to the propriety of the preliminary injunction are likewise without merit. The injunction did not improperly destroy the status quo. Plaintiff would define the status quo as the building being suitable for occupancy. However, that was precisely the contested status at issue; thus, it is *not* the status quo. See *Attorney General v Thomas Solvent Co*, 146 Mich App 55, 61; 380 NW2d 53 (1985) (citation omitted) (defining status quo as "the last actual, peaceable, noncontested status which preceded the pending controversy"). Although it may be difficult to determine what the last actual, peaceable, noncontested status of the collision shop was, we find no abuse of discretion in the trial court's decision to issue the injunction and not to allow the disputed occupancy and activity to continue, especially in light of the fact that it was clear that plaintiff was not complying with court orders, building codes, and township ordinances. Further, we do not view the grant of the injunction as granting complete relief to defendants. There is no indication that, had the trial court opined after trial that plaintiff was entitled to occupy the building, the injunction would not have been vacated. This was not a case where the injunction granted relief that could not be sufficiently "unwound." See *Psychological Services of Bloomfield, Inc v Blue Cross and Blue Shield of Michigan*, 144 Mich App 182, 185; 375 NW2d 382 (1985). In any event, we find that when all relevant factors are considered, the trial court did not abuse its discretion in granting the preliminary injunction. *Freuhauf Trailer*, *supra*.

Regarding the permanent injunctive relief, we find that the testimony created a credibility contest as to whether the collision shop was safe to occupy, and we will not resolve credibility questions anew on appeal. We agree that justice required an injunction to insure the safety of the buildings, occupants and invitees and to compel plaintiff to comply with the prior orders of the trial court and the building code. Moreover, plaintiff's disregard of such requirements and failure to involve the Township in the activities taking place at the collision shop could have resulted in irreparable harm. The Township had no other adequate remedy. See *Senior Accountants, supra*. Thus, we find no abuse of discretion in the grant of permanent injunctive relief.

V. The Contempt Adjudication

Plaintiff argues that the trial court improperly held him in contempt for violating the January 29, 1993 temporary restraining order, the August 31, 1993 preliminary injunction and the 1986 consent judgment. We once again disagree. First, plaintiff claims that he could not be held in contempt for

violating the temporary restraining order because it expired as a matter of law after fourteen days. However, hearings on the injunctive relief lasted for months, but at no point did plaintiff make this argument below. As a result, we conclude that plaintiff has waived this claim and may not raise it for the first time on appeal. See *Garavaglia v Centra, Inc*, 211 Mich App 625, 628; 536 NW2d 805 (1995). Regarding the merits of the trial court's finding that plaintiff violated the temporary restraining order, the evidence indicates that plaintiff did perform work at the collision shop in violation of that order. Thus, we find no abuse of discretion in the finding of contempt.

We also find no error in the trial court's finding that plaintiff violated the preliminary injunction. The evidence clearly indicates that work was performed at the collision shop in the absence of a building inspector. Plaintiff has provided no authority for his claim that the violation was excused by the state construction commission or the federal court's order. Plaintiff was aware of the injunction and violated it anyway. Moreover, in civil contempt, an intent to defy is not necessary, *Catsman v Flint*, 18 Mich App 641, 646; 171 NW2d 684 (1969), and we find no excuse for plaintiff's conduct.

Regarding the trial court's finding that plaintiff violated the 1986 consent judgment, we also find no error. First, although Green Oak Auto, and not plaintiff individually, was the party to the prior consent judgment, because plaintiff was a shareholder of Green Oak Auto and was aware of the consent judgment and the restrictions it placed on the development of the land at issue, plaintiff may not hide behind the corporate fiction to attempt to avoid legal obligations or subvert justice. See *Foodland Distributos v Al-Naimi*, 220 Mich App 453, 456; 559 NW2d 379 (1996). We have considered plaintiff's other challenges to the contempt finding and find them to be without merit. We will not presume error; it must be demonstrated by the appellant. *Flint v Trahey*, 270 Mich 534, 541; 259 NW 146 (1935). Plaintiff's cursory arguments have not convinced us that the trial court's findings were clearly erroneous or an abuse of discretion. As for plaintiff's claim that the trial court should have recused itself from hearing the contempt claim, we conclude that plaintiff failed to preserve this issue for appeal and, in any event, has abandoned the issue on appeal because of his failure to argue the claim.

Last, plaintiff challenges the trial court's ruling finding his attorney in contempt. We refuse to address this issue because plaintiff is not the aggrieved party. Furthermore, plaintiff's attorney previously attempted to appeal that contempt finding and has effectively abandoned the issue by failing to proceed in accordance with this Court's prior order dated January 17, 1996, in Docket No. 190382.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Peter D. O'Connell
/s/ William C. Whitbeck