

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Jackson Township, a Second-Class :  
Township of the Commonwealth of :  
Pennsylvania :  
 :  
v. : No. 1941 C.D. 2010  
 : Submitted: October 14, 2011  
Dizzy Dottie, LLC, a Pennsylvania :  
Limited Liability Company, :  
Appellant :

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge  
HONORABLE ROBERT SIMPSON, Judge  
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION  
BY SENIOR JUDGE FRIEDMAN

FILED: December 2, 2011

Dizzy Dottie, LLC, a Pennsylvania Limited Liability Company (Property Owner), appeals from the June 16, 2010, order of the Court of Common Pleas of Monroe County, Forty-Third Judicial District (trial court), which granted the petition of Jackson Township (Township) to preliminarily enjoin Property Owner from using its property as an adult cabaret. We affirm.

Property Owner opened a business known as Thrills at the corner of Route 715 and Doll Road in the Township's commercial zoning district. The Township's zoning ordinance permits adult cabarets only in the industrial zoning district. When Property Owner began advertising for bikini dancers, the Township suspected that Property Owner might be planning to operate an adult cabaret in

violation of the zoning ordinance. Thus, the Township hired Glen Miller, a private investigator, to visit Thrills.

Based on Miller's investigation, the Township filed with the trial court a petition for a preliminary and permanent injunction, arguing that Property Owner was operating an adult cabaret in a commercial zoning district in violation of the Township's zoning ordinance. At the preliminary injunction hearing, the Township presented a video recording made by Miller during his visit to Thrills. Miller also testified that he spoke with a dancer named Autumn, who invited Miller to purchase a lap dance in the VIP room, a private room in the upstairs section of the premises. Miller paid \$20 "to the house" and \$40 to Autumn for two fifteen-minute lap dances.

In the VIP room, Autumn removed her bra and the bottom of her costume, leaving only a g-string covering the vaginal and anal areas of her body. Autumn informed Miller that he could touch everything except the "cookies," by which she meant her vagina. During the dance, Autumn put her nude breasts in Miller's mouth. She also allowed Miller to suck, lick and caress her breasts and to squeeze and caress her bare buttocks while she gyrated and thrust her covered vagina against his groin area.

After considering the video recording and Miller's testimony, the trial court concluded that Property Owner was operating an adult cabaret in a commercial zoning district in violation of the Township's zoning ordinance.<sup>1</sup> Accordingly, on

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<sup>1</sup> The zoning ordinance defines the term "adult cabaret" as "an establishment . . . which features live entertainment distinguished or characterized by emphasis on sexual conduct, sexually **(Footnote continued on next page...)**

June 16, 2010, the trial court granted the Township's petition for a preliminary injunction. In its supporting opinion, the trial court indicated that Property Owner had raised constitutional questions. However, the trial court stated that those issues would be "reserved for future proceedings" and that the only issue before the court at the time was whether Property Owner violated the zoning ordinance. (Trial Ct. Op., 6/16/10, at 11.)

Property Owner filed an appeal. In its concise statement of errors complained of on appeal, Property Owner asserted, *inter alia*, that the Township's zoning ordinance is unconstitutional on its face because it vests the Township with unfettered discretion over the exercise of free speech, because it is too vague to be enforceable and because it is overbroad. The trial court, in its statement pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure, again indicated that Property Owner had raised constitutional issues, but the trial court stated that the only issue before the trial court at the time was whether Property Owner violated the zoning ordinance. (Trial Ct. Op., 8/16/10, at 6.)

On October 19, 2010, the trial court granted the Township a permanent injunction, and, in its opinion, the trial court addressed the constitutional issues raised by Property Owner, concluding that the Township did not violate Property Owner's

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**(continued...)**

explicit nudity and/or activities such as mud wrestling and dancing." (R.R. at 24a.) The trial court concluded that, although Thrills does not feature live entertainment emphasizing "sexually explicit nudity," Thrills features live entertainment emphasizing "sexual conduct" in the VIP room. (Trial Ct. Op., 6/16/10, at 13-18.)

constitutional right to free speech. After the issuance of the permanent injunction and Property Owner's appeal of the permanent injunction to this court, the Township filed a motion to quash this appeal as moot. The Township asserted that, because a preliminary injunction is superseded by a decision on the merits and terminates upon the issuance of a permanent injunction, this appeal is moot. *See Sasinowski v. Cannon*, 696 A.2d 267, 270 (Pa. Cmwlth. 1997) (holding that an appeal from a preliminary injunction is moot once a permanent injunction is issued because relief can no longer be given from the preliminary injunction). This court denied the Township's motion without explanation.<sup>2</sup>

Turning to the issues now before us, Property Owner argues that the definition of "adult cabaret" in the Township's zoning ordinance is unconstitutional on its face because it is so vague and overbroad that it vests the Township with unfettered discretion over the exercise of free speech.

However, the Township argues that Property Owner has waived any constitutional issues because Property Owner failed to argue in its concise statement of matters complained of on appeal that the trial court improperly reserved those issues for the permanent injunction proceedings. Thus, according to the Township, there is no question on appeal that the trial court properly deferred ruling on the constitutional issues. The Township is correct. Having failed to challenge the trial court's decision not to address the constitutional issues at the preliminary injunction

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<sup>2</sup> In its brief, the Township reiterates its claim that this appeal is moot. However, the Township does not specifically request that we reconsider our prior ruling.

stage of the proceedings, the constitutional issues are not properly before us in this appeal. *See* Pa. R.A.P. 1925(b)(4)(vii) (stating that issues not included in the statement of errors complained of on appeal are waived).

Moreover, our scope of review of a trial court order granting a preliminary injunction is limited to whether any apparently reasonable grounds support the trial court's determination. *Commonwealth ex rel. Preate v. Danny's New Adam & Eve Bookstore*, 625 A.2d 119, 121 (Pa. Cmwlth. 1993). "We may only interfere with the trial court's order if no grounds exist to support the injunction or the rule of law relied upon was erroneous or misapplied."<sup>3</sup> *Id.* Here, the trial court concluded that Property Owner was operating an "adult cabaret" in a commercial zoning district, a violation of the zoning ordinance. Property Owner does not dispute that conclusion in this appeal. The violation constitutes reasonable grounds for the trial court's granting of the preliminary injunction.

Accordingly, we affirm.

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ROCHELLE S. FRIEDMAN, Senior Judge

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<sup>3</sup> We note that Property Owner does not frame any argument in the context of this court's scope of review. Thus, Property Owner does not argue that there are no grounds for the preliminary injunction, that the trial court erroneously relied on the zoning ordinance or that the trial court misapplied the zoning ordinance. Only by implication does Property Owner argue that the trial court erroneously relied upon the definition of "adult cabaret" in the zoning ordinance because it is unconstitutional on its face. However, as indicated above, Property Owner did not challenge the trial court's decision not to rule on the constitutional issues at the preliminary injunction stage of the proceedings.

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Appellant	:	

ORDER

AND NOW, this 2<sup>nd</sup> day of December, 2011, the June 16, 2010, order of the Court of Common Pleas of Monroe County, Forty-Third Judicial District, is hereby affirmed.

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ROCHELLE S. FRIEDMAN, Senior Judge