

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Fred Ivory,	:	
	:	
Appellant	:	
	:	
v.	:	No. 238 C.D. 2011
	:	Submitted: May 13, 2011
City of Pittsburgh, Bureau of Building	:	
Inspection	:	

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JOHNNY J. BUTLER, Judge

OPINION NOT REPORTED

**MEMORANDUM OPINION
BY JUDGE SIMPSON**

FILED: July 1, 2011

Fred Ivory (Ivory), representing himself, asks whether the Court of Common Pleas of Allegheny County (trial court) erred in denying his request for a preliminary injunction. Through his petition for injunctive relief, Ivory sought to prevent the City of Pittsburgh, Bureau of Building Inspection (City) from demolishing an unsafe dwelling on his property. Ivory asserts the trial court erred in failing to consider the irreparable harm and economic loss that would result if his dwelling is demolished. Concluding Ivory waived this assertion, we affirm.

In 1997, Ivory acquired the property located at 424 Eureka Street in the City of Pittsburgh (subject property). The subject property was improved with a residential dwelling and an attached garage.

In early-March 2009, a mudslide occurred that caused the collapse of Ivory's garage. Shortly thereafter, the City issued Ivory a notice of condemnation

that identified 10 unsafe conditions of the garage and the dwelling on the subject property. The notice informed Ivory he had 30 days to obtain a building permit to rehabilitate the dwelling or the City could demolish it.

In August 2009, Ivory obtained a building permit for the purpose of “abat[ing] [the City’s] condemnation notice,” with work to begin “immediately until complete.” Reproduced Record (R.R.) at 9a.

In December 2009, the City sent Ivory notice of the revocation of the building permit on the ground that “dangerous conditions exist and the work was not started immediately and/or was not carried through to completion.” R.R. at 10a.

Several weeks later, Ivory filed a petition seeking injunctive relief to enjoin the City from refusing to reissue or reinstate the building permit and to prevent the City from demolishing his dwelling. A hearing ensued before the trial court.

At hearing, the City presented the testimony of its demolition inspector, Richard Weaver (Demolition Inspector), and its senior building inspector, Ken Seisek (Building Inspector). Ivory, who appeared without counsel, testified briefly on his own behalf. Additionally, both the City and Ivory presented photographs depicting the condition of the dwelling on the subject property.¹

¹ These photographs are not included in the certified record. It is unclear whether the photographs were formally admitted into evidence.

Based on his inspection of the subject property in March 2009, Demolition Inspector testified the dwelling on the subject property was uninhabitable. Specifically, he testified:

At that point the garage and front had collapsed, there was a lot of debris that existed at that point in time. ... I did see brick that had mortar eroding, starting to push out from the house, rotted wood front porch pillars subject to porch and roof collapsing at some point, side concrete block walls with missing mortar, starting to push in against support for the front porch, solid concrete floor throughout the side rear structure there was a lot of wood rot and decay. But it was to the point where the house was not habitable at that point and that's why we did condemn the structure.

R.R. at 37a. Demolition Inspector also testified extensively regarding photographs he took of the subject property in March 2010, which depicted the poor conditions of the dwelling and the fact that it remained uninhabitable and unsafe. Demolition Inspector testified, as of the date of the hearing, the dwelling contained serious structural deficiencies that required significant work to abate. Further, based on his lengthy work history with the City and his experience reviewing engineers' reports and contractors' estimates, Demolition Inspector testified it would cost a minimum of \$30,000 to \$40,000 to abate all of the unsafe conditions on the subject property.

In addition, Building Inspector explained he revoked Ivory's building permit approximately four months after it was issued because Ivory did not abate the dwelling's structural deficiencies and the dwelling remained a "hazard to public safety, children." R.R. at 57a. Among other things, Building Inspector noted that Ivory's front porch, which provides support for the front of the dwelling,

was supported by concrete blocks. He testified the condition of the dwelling was such that “it could have [fallen] on somebody, particularly kids if they were playing around the property.” Id.

For his part, Ivory disagreed with Demolition Inspector’s testimony regarding the degree of difficulty and costs associated with the work necessary to rehabilitate the dwelling. He also disagreed that several of the items cited by the Demolition Inspector constituted dangerous conditions. Further, Ivory testified he knew how to personally perform the work required to rehabilitate the dwelling because his father was a brick mason who taught him how to perform such work. Ivory also testified, although he suffers some physical disabilities, he could perform the necessary work with the help of family members.

After hearing, the trial court issued an order denying Ivory’s request for a preliminary injunction. Ivory filed a motion for reconsideration, which the trial court denied. Ivory then filed a notice of appeal.² In response, the trial court issued an order directing Ivory to file a concise statement of matters complained of on appeal pursuant to Pa. R.A.P. 1925(b). Ivory filed a timely 1925(b) Statement.

In his 1925(b) Statement, Ivory asserted the trial court erred in: (1) refusing to consider his photographs, which show the repairs he performed after the City issued the condemnation notice; (2) relying on unsubstantiated testimony as to the estimated repair costs; (3) relying on improper testimony concerning

² Ivory filed his notice of appeal to the Superior Court. The City subsequently filed a motion to transfer the appeal to this Court; the Superior Court granted the City’s unopposed motion.

Ivory's ability to personally perform the necessary repairs; (4) refusing to consider Ivory's unrefuted testimony that mudslides from an adjoining neighbor's property caused the delay in making the necessary repairs; and, (5) refusing to consider that by the time the City revoked the building permit, Ivory repaired and cleared debris from the collapse of the garage.

The trial court subsequently issued an opinion pursuant to Pa. R.A.P. 1925(a) in which it rejected each of the issues Ivory raised. Among other things, the trial court noted, "[i]n the nine months following the [n]otice of [c]ondemnation, Mr. Ivory had done little to rehabilitate the property" R.R. at 76a. The trial court further explained that it credited the testimony of the City's witnesses over that presented by Ivory. In sum, the trial court concluded the issues raised in Ivory's 1925(b) Statement lacked merit. This matter is now before us for disposition.

On appeal,³ Ivory asserts the trial court erred in failing to consider the irreparable harm and economic loss he would suffer by virtue of denial of the

³ Our review of a trial court order granting or denying preliminary injunctive relief is highly deferential and is limited to determining whether the trial court abused its discretion. Commonwealth ex rel. Corbett v. Snyder, 977 A.2d 28 (Pa. Cmwlth. 2009), appeal denied, 606 Pa. 700, 999 A.2d 1247 (2010). "An abuse of discretion is not merely an error in judgment." Ambrogi v. Reber, 932 A.2d 969, 974 (Pa. Super. 2007). "Rather, an abuse of discretion exists if the trial court renders a judgment that is [plainly] unreasonable, arbitrary or capricious, fails to apply the law, or was motivated by partiality, prejudice, bias or ill will." Id. "If the record supports the trial court's reasons and factual basis, the court did not abuse its discretion." Id. In addition, the facts are to be viewed in a light most favorable to the winner at the trial court level. Snyder.

In reviewing the grant or denial of a preliminary injunction, we will not inquire into the merits of the controversy, but instead we will examine the record only to determine if there were any apparently reasonable grounds for the trial court's action. Id.

preliminary injunction, which would result in demolition of his dwelling. See Moyerman v. Glanzberg, 391 Pa. 387, 138 A.2d 681 (1958). If demolished, Ivory contends, the subject property would become another vacant eyesore in an already blighted neighborhood. Ivory maintains that allowing him to prevent the City from demolishing his dwelling would provide him time to complete repairs and make the subject property habitable again.

Ivory also asserts the trial court did not consider the steps he took to rehabilitate the subject property. Instead, the trial court accepted the Demolition Inspector's unsubstantiated testimony regarding the high costs of repairing the front of the dwelling. Ivory argues the trial court did not address the consequences of total demolition or the cost of replacement, both of which formed the basis for his injunctive relief request; rather, the hearing only focused on issues relating to repair of the dwelling. Ivory contends the trial court did not consider the irreversible nature of the City's proposed demolition, the irreparable harm to Ivory, and the long-term effects of demolition on the neighborhood.

In response, the City argues, among other things, that Ivory waived the primary issue he now raises in his brief to this Court by failing to raise it before the trial court or include it in his 1925(b) Statement.⁴

⁴ The City further contends Ivory did not preserve the issues raised in his 1925(b) Statement because he did not file post-trial motions pursuant to Pa. R.C.P. No. 227.1. Contrary to the City's assertions, Pa. R.A.P. 311(a)(4) permits an appeal as of right from an order regarding a preliminary injunction. As such, post-trial motions are neither required nor permitted in these circumstances. City of Phila. v. Frempong, 865 A.2d 314 (Pa. Cmwlth. 2005).

Upon review, we agree with the City that Ivory did not preserve the primary issue he raises before this Court, that the trial court did not consider the irreparable harm or economic loss Ivory would suffer if the City demolished his dwelling, because he did not include it in his 1925(b) Statement. To that end, with regard to the requirements of Pa. R.A.P. 1925, our Supreme Court recently explained:

Our jurisprudence is clear and well-settled, and firmly establishes that: Rule 1925(b) sets out a simple bright-line rule, which obligates an appellant to file and serve a Rule 1925(b) statement, when so ordered; any issues not raised in a Rule 1925(b) statement will be deemed waived; the courts lack the authority to countenance deviations from the Rule's terms; the Rule's provisions are not subject to *ad hoc* exceptions or selective enforcement; appellants and their counsel are responsible for complying with the Rule's requirements; Rule 1925 violations may be raised by the appellate court *sua sponte*, and the Rule applies notwithstanding an appellee's request not to enforce it; and, if Rule 1925 is not clear as to what is required of an appellant, on-the-record actions taken by the appellant aimed at compliance may satisfy the Rule. We yet again repeat the principle first stated in [Commonwealth v. Lord, 553 Pa. 415, 420, 719 A.2d 306, 309 (1998)] that must be applied here: “[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters Complained of on Appeal pursuant to Pa. R.A.P. 1925. Any issues not raised in a Pa. R.A.P. 1925(b) statement will be deemed waived.”

Commonwealth v. Hill, ___ Pa. ___, ___, 16 A.3d 484, 494 (2011) (emphasis added); see also Lang v. Dep't of Transp., 13 A.3d 1043 (Pa. Cmwlt. 2011) (failure to raise issue in 1925(b) Statement results in waiver pursuant to Pa. R.A.P. 1925(b)(4)(vii)). Thus, in Hill, our Supreme Court held that a capital Post

Conviction Relief Act⁵ appellant waived all issues on appeal by failing to comply with a common pleas court's order requiring the filing of a 1925(b) Statement.

Here, the primary issue that Ivory raises in his brief to this Court, that the trial court erred in failing to consider the irreparable harm and economic loss that would result from denial of the preliminary injunction, was not raised in Ivory's 1925(b) Statement. R.R. at 70a-71a. Thus, it is waived. Hill; Lord; Lang.⁶

To the extent Ivory briefly mentions two of the issues raised in his 1925(b) Statement, which concern the trial court's decision to reject Ivory's testimony and accept that of the Demolition Inspector, the trial court ably addressed those issues in its thoughtful opinion. Thus, to the limited degree that

⁵ 42 Pa. C.S. §§9541-46.

⁶ Even if not waived, Ivory's argument fails. Specifically, although Ivory argues the trial court erred in failing to consider the irreparable harm and economic loss he would suffer as a result of denial of the preliminary injunction, Ivory presented no proof in support of these claims. Absent any supporting evidence, we could not conclude the trial court lacked reasonable grounds to deny Ivory's request for preliminary injunction. See, e.g., Warehime v. Warehime, 580 Pa. 201, 860 A.2d 41 (2004) (where party does not present evidence to satisfy essential elements for grant of preliminary injunction, trial court has reasonable grounds to deny request).

Further, Moyerman v. Glanzberg, 391 Pa. 387, 138 A.2d 681 (1958), cited by Ivory, does not support his position. In Moyerman, two landowners sought an injunction requiring the demolition of a dwelling that violated applicable setback requirements and slightly encroached onto the landowners' easement. Our Supreme Court held that demolition of the dwelling would cause greater harm to the owner of the dwelling than benefit to the objecting landowners given that the encroachment was slight and did not seriously affect the landowners' use of the easement. The Court further explained, because the encroachment was not intentional or willful, the drastic remedy of demolition of the dwelling was not proper.

Here, the trial court denied Ivory's attempt to prevent demolition of his dwelling based on its determinations that the dwelling suffered from numerous structural deficiencies that posed a substantial safety risk, and Ivory did not rehabilitate the dwelling despite having nine months to do so. We fail to see any similarity between Moyerman and this case.

Ivory preserved those issues in his appellate brief, we affirm on the basis of the Honorable Alan Hertzberg's opinion in Ivory v. City of Pittsburgh, Bureau of Building Inspection, (GD No. 10-1761, filed June 1, 2010) (C.P. Allegheny).

ROBERT SIMPSON, Judge

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ORDER

AND NOW, this 1st day of July, 2011, the order of the Court of
Common Pleas of Allegheny County is **AFFIRMED**.

ROBERT SIMPSON, Judge