IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Soni Properties, LLC, Appellant	:	
v.	:	No. 2559 C.D. 2009
	:	Argued: March 15, 2010
City of Reading and Cynthia Sopka	:	

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE PATRICIA A. McCULLOUGH, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: May 28, 2010

Soni Properties, LLC (Soni) appeals from an order of the Court of Common Pleas of Berks County (trial court), denying its motion for post-trial relief. In doing so, the trial court affirmed its verdict of February 17, 2009, wherein it determined that the Appellees, City of Reading (Reading) and Cynthia Sopka (Sopka), were not liable to Soni for damages. We affirm.

This case concerns zoning and use and occupancy permits for property located at 1626 Perkiomen Avenue in Reading, Pennsylvania (Property). Soni entered into an agreement of sale to purchase the Property on July 18, 2007. The agreement of sale contained a provision calling for

the seller to arrange a "One Call meeting" (Meeting) with authorities in Reading to discuss the use of the Property. On August 23, 2007, Soni attended the Meeting and met with inspectors and heads of various departments of Reading, including Sopka, the zoning administrator and Steve Franco, the chief building inspector.

At the Meeting, Sopka indicated that she did not see any problems with the zoning issues for the Property, but instructed Soni to schedule an official meeting with Reading's zoning department. On the same day, Soni went to the public works department, where it received permits for remodeling the Property. Soni thereafter acquired title to the Property by deed dated August 29, 2007.

On September 5, 2007, Soni completed a zoning application for the Property and met with James Mohn (Mohn), the acting zoning administrator.[1] Mohn told Soni he would review the plans and be in touch.

According to Soni, it learned in December of 2007, through one of its sub-contractors, that no zoning permit had been issued for the Property.

On June 12, 2008, Soni commenced an action by filing a three count complaint in mandamus alleging, among other things, that it was entitled to zoning and use and occupancy permits for the Property, and damages in excess of $50,000.00 as a result of Reading's and Sopka's failure to take any action on Soni's zoning application and/or to provide

[1] A review of the testimony indicates that Mohn is employed by The Associates, which is employed by the City of Reading. Mohn began serving as the active zoning administrator, the highest position in the zoning department, beginning in 2006. (R.R. at 96a.)

Soni with a written explanation for its failure to do so. Appellees filed an answer.

Thereafter, Soni filed a motion for partial peremptory judgment and the trial court conducted a hearing on July 22, 2008.[2] In an order dated August 6, 2008, the trial court granted Soni's motion, concluding that Appellees failed to notify Soni of the denial of its zoning application for nearly one year and deemed the zoning application approved. The trial court also ordered Appellees to issue a certificate of occupancy to Soni.[3]

Thereafter, counsel for both parties appeared before the trial court requesting that the case be certified for trial, so that Soni could pursue its claim for damages. After a bench trial, the trial court issued a verdict in favor of Appellees, concluding that Appellees were not liable to Soni for damages. Soni thereafter filed a motion for post-trial relief, which the trial court denied. Soni then filed a notice of appeal and, thereafter, Soni complied with the trial court's order to file a concise statement of matters complained of on appeal.

On May 12, 2009, the trial court issued an opinion in support of its verdict regarding damages. In the opinion, the trial court stated that at the hearing on damages, testimony and evidence were presented which were not presented at the hearing for partial peremptory judgment. If such testimony had been previously presented, the trial court indicated that it would not

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[2] Soni claims that it was not until the hearing that it learned the specifics of the denial of its zoning application.

[3] As of October 2008, the certificate of occupancy had not been issued and the trial court issued an order directing that Appellees issue the certificate no later than October 24, 2008. Appellees failed to comply and Soni filed a motion for adjudication of civil contempt and sanctions against Appellees on October 28, 2008. Appellees filed an answer. The trial court has not ruled on the motion.

have issued the order directing Appellees to issue a permit to Soni, inasmuch as the testimony undermined Soni's case. Specifically, Mohn, who did not testify at the hearing for partial peremptory judgment, testified at the hearing on damages that a decision to deny Soni's zoning application had been reached on September 7, 2007, and that he phoned Soni informing it of the decision. The trial court found the testimony of Mohn to be credible, as it was consistent with the contents of Appellees Exhibit 11, a March 13, 2008 letter which indicated that Soni was aware that it did not have approval of its zoning application.[4]

As to Soni's request for damages, the trial court stated that mandamus damages are not plenary, and the damages recoverable are those incidental to specific relief being sought. Stoner v. Township of Lower Merion, 587 A.2d 879 (Pa. Cmwlth. 1991), petition for allowance of appeal denied, 529 Pa. 660, 604 A.2d 252 (1992). In Stoner, this court determined that landowners who sought mandamus to compel approval of a subdivision

[4] The letter from Soni's former counsel to Sopka provides in pertinent part:

> Mr. Gussoni paid the appropriate fee and met in early September with Mr. Jim Bauman, the then Assistant Zoning Officer, who suggested that Mr. Gussoni make an application to the Zoning Hearing Board. Confused, Mr. Gussoni pointed out to Mr. Bauman that the property was zoned CN-Commercial Neighborhood, and that the permitted uses complied with his intent, i.e. his prospective tenants' uses. He indicated he would have to look into it. You called Mr. Gussoni in early November and again there was an indication that you would look into it. In the meantime, Mr. Gussoni was going forward, receiving all the proper permits and improving the property. It was just last week you indicated that Mr. Gussoni should go to the Zoning Hearing Board.

could not recover as mandamus damages any loss of bargain with respect to a contract to sell one of the lots.

The trial court, in this case, determined that the damages requested were not incidental to the relief sought through mandamus and thus, were not appropriate. Soni sought consequential damages which are not appropriate in a mandamus action. Specifically, Soni's alleged damages consisted of the money to be received from leasing the Property, but the leases were neither witnessed nor notarized and the principal of Soni, Frank Gussoni (Gussoni) was well aware that he did not have zoning approval for the Property. In support of its determination that Soni knew it did not have zoning approval, the trial court also relied on Exhibit 11, a letter dated March 13, 2008, which was sent by Soni's former counsel to Sopka, and copied to Gussoni. In the letter, counsel confirmed that in August of 2007, long before any leases on the Property were negotiated and executed, Soni was aware that it did not have the proper zoning approval.

In this appeal, we note that where a trial court denies mandamus damages, this court's review is limited to determining whether the trial court abused its discretion or committed an error of law. Maurice A. Nernberg & Associates v. Coyne, 920 A.2d 967 (Pa. Cmwlth. 2007).

In its brief to this court, Soni maintains that the trial court erred in finding that Appellees had notified Soni of the denial of its zoning application, that the trial court erred in concluding that Appellees were not required to provide it with written notice of its zoning application denial and that the trial court erred when it entered its verdict in favor of Appellees and against Soni on Soni's claim for damages.

In addressing the first two issues, we note that procedurally, the trial court initially granted Soni's motion for partial peremptory judgment. A peremptory judgment in a mandamus action is appropriately entered when there are no genuine issues of fact and where the case is free and clear from doubt. Shaler Area School District v. Salakas, 494 Pa. 630, 432 A.2d 165 (1981). Mandamus is an extraordinary writ and is a remedy used to compel performance of a ministerial act or a mandatory duty. Washowich v. McKeesport Municipal Water Authority, 503 A.2d 1084 (Pa. Cmwlth. 1996). In order to prevail in an action in mandamus, there must be a clear legal right for the performance of a ministerial act or mandatory duty, a corresponding duty in the party to perform the ministerial act or duty and the absence of any other appropriate or adequate remedy. The Council of the City of Philadelphia v. Street, 856 A.2d 893 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 583 Pa. 675, 876 A.2d 397 (2005).

In its August 6, 2008 order granting the motion for peremptory judgment, the trial court stated that "the Defendants failure to notify the applicant (Plaintiff) of the denial of the applicants permit application (for nearly one year), requires that said application be deemed approved." (R.R. at 78a.) The trial court then ordered that Soni's application for a zoning permit be approved and directed Reading to issue Soni a certificate of occupancy. Although Pa. R.A.P. 311(a)(5) permits an appeal as of right from a peremptory judgment in mandamus, no appeal was taken from the trial court's August 6, 2008 order.

Thus, any argument made by the parties in this case concerning whether Soni had been notified of the denial of its zoning application and

whether such notice needed to be in writing is of no moment as the trial court had previously determined that Reading did not notify Soni of the denial of its application, and no appeal was taken therefrom, the trial court's decision became *res judicata*.[5] Kelso Woods Association v. Swanson, 753 A.2d 894 (Pa. Cmwlth. 2000).

We next address the issue of damages. In accordance with 42 Pa. C.S. § 8303, "[a] person who is adjudged in an action in the nature of mandamus to have failed or refused without lawful justification to perform a duty required by law shall be liable in damages to the person aggrieved by such failure or refusal."

Before addressing Soni's argument, we first address Appellees' contention that Soni failed to plead damages in its complaint. In order to recover damages, a party must request damages in its complaint. Specifically, Pa. R.C.P. No. 1095 provides that a complaint in mandamus must contain "the damages, if any" and "a prayer for the entry of judgment against the defendant commanding that the defendant perform the act or duty required to be performed and for damages, if any, and costs." Pa. R.C.P. No. 1095(4) and (7). Thus, Soni's complaint must set forth and request damages in order to recover. Maurice A. Nernberg & Associates, 920 A.2d at 970.

The complaint in this case states that "[t]he amount in controversy, exclusive of interest and costs, exceeds Fifty Thousand Dollars

[5] We note that §27-201.2.D of the City of Reading Zoning Ordinance requires that the zoning administrator shall "[i]ssue or refuse permits within 30 days of the receipt of the complete application …." Further, §27-203.2. of the Ordinance provides that the zoning administrator "shall either issue the zoning permit, [or] refuse the permit, indicating in writing the reasons therefore …."

($50,000.00)." (Complaint at ¶1.) Further in the complaint, Soni alleges that it has suffered damages as a result of Appellees failure to issue use and occupancy permits for the Property. (Complaint at ¶23, ¶34.) In its prayer for relief, Soni similarly requests damages. (Complaint at p. 6, 7.)

While we agree with the trial court and Appellees that Soni did not state damages with any specificity in its complaint, the complaint does set forth a claim for damages and requests damages in its prayer for relief. Because pleadings are to be liberally construed, Vernon D. Cox & Company v. Giles, 406 A.2d 1107, 1109 n.3 (Pa. Super. 1979), we conclude that Soni has complied with the requirements of Pa. R.C.P. No. 1095(4) and (7).

As to damages, Soni introduced evidence showing that it had three tenants ready to lease the Property. Because Reading did not issue the use and occupancy permits to Soni until the beginning of 2009, those tenants could not move into the Property when the leases were negotiated and ultimately took their business elsewhere. We agree with the trial court that based on Stoner, damages for lost rentals are not within the scope of mandamus damages.

In Stoner, this court held that while mandamus damages are not plenary, they include those damages "incidental" to the "specific relief being sought" but do not include "consequential damages or damages arising in connection with transactions or potential transactions with other parties." Id. at 885. Thus, any damages alleged due to the loss of tenants are not recoverable in this case.

Soni also argues that it is entitled to incidental damages for its out of pocket expenses in maintaining the Property during the time that the

permits were not issued. Specifically, Soni claims that until it received the occupancy and use permits on January 9, 2009, it incurred monthly expenses to maintain the Property, totaling $140,000.00, with additional expenses at the rate of $8,500.00 per month beginning in March of 2009. Soni argues that the trial court erred in concluding that the damages were speculative and, in addition, not recoverable in a mandamus action.

We reiterate that the damages in a mandamus action must be "clearly related to the defendant's failure to perform a mandatory ministerial function." School District of Pittsburgh v. City of Pittsburgh, 352 A.2d 223, 229 (Pa. Cmwlth. 1976). The costs Soni seeks in association with maintaining the Property, which include payment for utility bills, are not the result of Reading's failure to issue the permit. Such costs are not a result of Appellees failure to perform a mandatory ministerial function.

Moreover, the determination of damages is a factual question to be determined by the fact-finder. Penn Electric Supply Company, Inc. v. Billows Electric Supply Company, Inc., 528 A.2d 643, 644 (Pa. Super. 1987). Here, the trial court rejected the estimate of damages as merely speculative.

In accordance with the above, the decision of the trial court is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, May 28, 2010, the order of the Court of Common Pleas of Berks County, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge