

IN THE SUPREME COURT OF THE STATE OF DELAWARE

K. KAY SHEARIN,	§	
	§	
Defendant Below-	§	No. 461, 2004
Appellant,	§	
	§	
v.	§	Court Below-Court of Chancery
	§	of the State of Delaware,
	§	in and for New Castle County
TOWN OF ELSMERE,	§	C.A. No. 549-N
	§	
Plaintiff Below-	§	
Appellee.	§	

Submitted: February 11, 2005
Decided: April 11, 2005

Before **HOLLAND**, **BERGER** and **JACOBS**, Justices

ORDER

This 11th day of April 2005, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, K. Kay Shearin (“Shearin”), filed an appeal from the Court of Chancery’s September 17, 2004 final judgment order and the Court of Chancery’s November 22, 2004 order holding her in contempt of its final judgment order. We find no merit to the appeal. Accordingly, we AFFIRM.

(2) In July 2004, the plaintiff-appellee, the Town of Elsmere (“Elsmere”), filed a complaint against Shearin in the Court of Chancery seeking abatement of the nuisance presented by conditions on property owned by Shearin at 1301 Maple Avenue, Elsmere, Delaware 19805 (the “property”). Specifically, the complaint

alleged that, for a number of years, Shearin had failed to properly care for the property and that conditions, including overgrown weeds, bushes and trees, trash and animal waste, had grown so extreme that the public health and safety was endangered.

(3) On September 17, 2004, trial was held in the Court of Chancery on Elsmere's complaint. Shearin failed to appear. After hearing the testimony of witnesses on behalf of Elsmere, including Charles Scavitto, Elsmere's Code Enforcement Officer, and several of Shearin's neighbors, the Vice Chancellor found that the conditions on the property endangered the public's health/safety and welfare and, thus, constituted a common law nuisance and/or a violation of the Elsmere's Property Maintenance Code (the "Code"). The Vice Chancellor then entered a final judgment order in favor of Elsmere, appointing Charles Scavitto Receiver for the purpose of abating the conditions on the property and enjoining Shearin from either interfering with the Receiver or failing to dispose of animal waste on the property in violation of the Code.¹

(4) At the beginning of the trial, the Vice Chancellor had instructed Elsmere's counsel to make a full record concerning service upon Shearin so that a

¹ The order stated, "A violation of this injunction may result in the removal, under Court order and after proper notice, of any animals kept by Shearin at 1301 Maple Avenue. In connection with the abatement provided for by this Final Judgment, the Receiver is authorized to take reasonable measures that he determines in his judgment will permit Shearin to continue to keep her animals while complying with the Code."

ruling on that issue could be made. In that regard, Elsmere's counsel questioned William E. Shipe of the Elsmere Police Department, who had been appointed special process server to serve Elsmere's complaint upon Shearin.² Shipe testified that members of the Elsmere Police Department waited for several days outside Shearin's residence and, finally, telephoned her to ask if she would come outside to accept service of the papers, which she refused to do. Finally, on August 24, 2004, Shipe was contacted by Elsmere Police Chief Neal Strauss, who told him that Shearin had left her residence and that he was following her as she drove on Kirkwood Highway. Shipe, who had the Court of Chancery papers with him in his car, caught up with Strauss and they followed Shearin to a business park on Foulk Road, where she entered one of the buildings.

(5) Sometime between 3:30 and 4:00 p.m., as Shearin walked from the building back to her car, Shipe, who was dressed in his police uniform, approached Shearin and stated that he was there to serve papers from the Court of Chancery upon her. As Shipe held out the papers, he asked Shearin if she would accept them. She said "no," brushed against the papers on her way to her car and drove

² This case originally was filed in the Superior Court. Unable to gain access to Shearin's house for service of process, a Sheriff's deputy posted the Superior Court complaint on Shearin's back door. After the case was transferred to the Court of Chancery, Elsmere mailed a copy of the complaint to Shearin. Anticipating that Shearin would contend that she had not been properly served, Elsmere requested the Court of Chancery to permit the appointment of a special process server. The Court of Chancery granted Elsmere's request.

away. While the Vice Chancellor did not explicitly rule at the trial that service on Shearin was effective, he implicitly did so by continuing to hear the evidence after Shipe's testimony and by entering a final judgment order.

(6) On October 19, 2004, Elsmere filed a motion requesting the Court of Chancery to find Shearin in contempt of its final judgment order.³ The motion alleged that Shearin had continued to permit the accumulation of animal waste on the property following Elsmere's cleanup of the property. The affidavit of Charles Scavitto, the Receiver of the property, and recent photographs Scavitto had taken of animal waste on the property were attached to the motion.

(7) At the hearing on the motion, Scavitto testified concerning the cleanup of the property by Elsmere, including the removal of trash and animal waste and the placement of sod and mulch. Scavitto also testified concerning the animal waste that had been permitted to accumulate after the cleanup was completed. Photographs taken by Scavitto of these post-cleanup conditions were admitted into evidence.⁴ During her testimony, Shearin admitted to letting animal waste accumulate on the property, but said she was not aware she had to remove it because Elsmere officials had never told her so. On cross examination by

³ The Court of Chancery record reflects that Shearin's response to the contempt motion was filed on October 25, 2004. Shearin does not dispute that she was aware of the contents of the final judgment order and the contempt motion at least by that date.

⁴ Scavitto testified that some of the photographs showing animal waste had been taken the day before the hearing.

Elsmere's attorney, Shearin denied receiving a notice from Elsmere in 1999 requiring her to remove animal waste from her property, in spite of being shown a copy of such a notice. She likewise denied receiving any letters from Elsmere offering to assist her in maintaining her property, but did remember receiving such a verbal offer at a JP Court trial. Shearin, finally, admitted that she refused to take the Court of Chancery papers when the special process server attempted to serve her with them.

(8) After hearing the evidence, the Vice Chancellor made the following findings of fact: Shearin had actual notice of the trial on September 17, 2004, but refused to accept service of the court papers and chose not to appear for trial; Shearin allowed animal waste to accumulate on the property after Elsmere had completed its cleanup of the property; and Shearin's claim that she did not understand her obligation to remove animal waste from the property was not credible. The Vice Chancellor found Shearin in contempt of its final judgment order and ordered that she cease keeping any animals on the property.⁵

(9) In this appeal, Shearin claims that her due process rights were violated because: a) she never was properly served with Elsmere's complaint, depriving the

⁵ Prior to the filing of Shearin's opening brief on appeal, Elsmere filed a motion to dismiss the appeal on the ground that Shearin was not entitled to appeal because she stood in contempt of the Court of Chancery's final judgment order. By letter dated February 8, 2005, the Clerk notified the parties that Elsmere's motion to dismiss would be considered by the Court in conjunction with the briefs on appeal.

Court of Chancery of jurisdiction; and b) she had no notice of her obligation to remove animal waste from the property pursuant to the final judgment order and, therefore, there was no basis for the Court of Chancery to hold her in contempt.

(10) This Court must accept the factual findings of the trial judge if those findings are supported by the record and are the product of an orderly and logical deductive process.⁶ The applicable standard of appellate review requires this Court to defer to such factual findings.⁷ Moreover, when the determination of facts turns on a question of credibility, and the acceptance or rejection of live testimony by the trial judge, this Court must give great deference to those findings.⁸

(11) In this appeal, we conclude that the Court of Chancery's findings of fact were amply supported by the evidence presented at trial and that there was no abuse of discretion. We further conclude that the Court of Chancery properly asserted jurisdiction over this matter, because Shearin's claim of improper service of process is without merit.⁹ Contrary to her claims, there is no evidence in this record that Shearin's due process rights were violated in any respect.

⁶ *Levitt v. Bouvier*, 287 A.2d 671, 673 (Del. 1972).

⁷ *Id.*

⁸ *Id.*

⁹ Ch. Ct. R. 4(d) (1); 4A Charles Alan Wright & Arthur M. Miller, *Federal Practice & Procedure* § 1095 (3d ed. 2002).

NOW, THEREFORE, IT IS ORDERED that the judgment of the Court of Chancery is AFFIRMED.¹⁰

BY THE COURT:

/s/ Carolyn Berger
Justice

¹⁰ Elsmere's motion to dismiss Shearin's appeal also is hereby denied. Elsmere argues that dismissal is warranted because Shearin was found in contempt of the Court of Chancery's final judgment order, citing *Schmidt v. Schmidt*, 610 A.2d 1374, 1376-77 (Del. 1992). We do not find *Schmidt* to be persuasive in the circumstances of this case. In *Schmidt*, Husband failed to place \$140,000 in escrow as ordered by the Family Court and then failed to appear for the hearing on Wife's petition to hold him in contempt, leading to the issuance of a capias for his arrest. This Court dismissed Husband's appeal. At the time Husband filed his appeal, he had not even responded to the contempt petition. Here, not only did Shearin appear for the contempt hearing, but her dogs, whose waste was the subject of the contempt, were ordered removed from the property. The appellee has presented no evidence that the contempt is currently ongoing. We conclude that dismissal of Shearin's appeal is not warranted in these circumstances.