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IN THE
COURT OF APPEALS OF INDIANA

MARILYN BARLOW,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 47A04-0607-CV-386
	)	
CITY OF MITCHELL,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable Michael A. Robbins, Judge
Cause No. 47D01-0506-OV-701

March 22, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Marilyn Barlow appeals the trial court's order entering judgment against her and in favor of the City of Mitchell in the amount of $38,200.00 for her violations of three City of Mitchell ordinances regarding weeds, junk, and litter, unsafe buildings, and animals. Because Barlow defaulted on the City of Mitchell's complaint and the hearing in this case was only to address damages, many of Barlow's arguments are not available on appeal. As for damages, we conclude that the trial court properly computed them; therefore, we affirm the court.

Facts and Procedural History

Barlow owns a house located at 903 Lawrence Street in Mitchell, Indiana ("the Lawrence Street property"). In 2005, Barlow did not live at the Lawrence Street property; rather, she rented a house elsewhere. At the time, the Lawrence Street property remained unoccupied, except for three dogs that lived outside. On April 26, 2005, the City of Mitchell Building Commissioner, Bill Watson, sent a letter by certified mail to Barlow. The letter advised Barlow that Watson had received numerous complaints about the condition of the Lawrence Street property and then detailed the problems. The letter continued that it "serve[s] as notification (pursuant to Ordinances 3-1999, 10-1998 and Mitchell Code of Ordinances Chapter 90)" that Barlow must remedy the problems at the Lawrence Street property—including such things as cutting and removing grass and weeds, removing several cars, piles of lumber, kitchen chair frames, wheels and tires, plastic containers, and a fence that had fallen down, tearing down an 8 x 12 wooden storage building, removing all animals from the property and relocating them to where

Barlow lives, and cleaning out and disinfecting the dog pen—within five days from receipt of the letter. Appellant's App. p. 12. The letter contained the following advisement:

> Failure [to remedy these problems] will result in legal action by the city to enforce these ordinances. Ordinance No. 3-1999 provides for a fine of $25.00 per day for each and every day that each violation continues to exist beyond the time you are given to comply. Ordinance No. 10-1998 provides for a fine of not more than $500 for each day or part thereof that the violation continues to exist beyond the time you are given to comply. Mitchell Code of Ordinances Chapter 90 provides for a $50 fine.

Id. at 12-13 (formatting altered). Barlow received the letter on May 14, 2005.

On June 21, 2005, the City of Mitchell filed an Ordinance Violation Complaint ("Complaint") against Barlow in Lawrence Superior Court alleging that she was in violation of Ordinance No. 3-1999 (Weeds, Litter, and Junk), Ordinance No. 10-1998 (Unsafe Building Law), and Section 90 of the Mitchell City Code of Ordinances (Animals). Copies of these ordinances were attached to the Complaint as exhibits. The Complaint further alleged that Barlow was given five days to correct the violations, but she failed to do so. The Complaint outlined the penalties for the violations as follows:

> 9. Section Three of Ordinance No. 3-1999 provides that for each and every day beyond the 5 days provided for in Section Two of the Ordinance, the owner shall pay a fine of Twenty-Five Dollars ($25.00) per day for each and every day that each violation continues to exist, which may be charged cumulatively, together with the costs of any action that may be filed by the City to enforce the ordinance. That a copy of such Ordinance is attached hereto, made a part hereof and marked Exhibit D.
>
> 10. Section Nine of Ordinance No. 10-1998 provides that any person violating any of the provisions of Section 2 through Section 8 shall be fined not more than $500.00 for each day or part thereof that the violation continues. That a copy of such Ordinance is attached hereto, made a part hereof and marked Exhibit E.
>
> 11. Section 90:99 of Chapter 90 of the Mitchell City Code of Ordinances provides that any person violating any provision of the chapter

> shall be deemed guilty of a chapter violation and the punishment for a first violation in any calendar year shall be a $50.00 fine. That a copy of such Chapter is attached hereto, made a part hereof and marked Exhibit F.

Id. at 8. The City of Mitchell's prayer for relief provided:

> WHEREFORE, the Plaintiff demands judgment against the Defendant for such fines as provided for [in] the separate ordinances for each and every day beyond May 19, 2005 – together with the costs of this action and for all other proper relief in the premises.

Id.

On July 16, 2005, Barlow, pro se, filed a document with the trial court entitled "Defendant's Response." In the Response, Barlow asserted that she "has been diligently working toward compliance; however, due to health conditions and the weather (hot, humid and wet conditions), [she] has been unable to attain compliance to date." *Id.* at 27. She requested four to six months for compliance. On August 8, 2005, the City of Mitchell filed a Motion for Default requesting the trial court to enter a default against Barlow. In the Motion for Default, the City of Mitchell argued that Barlow's July 16, 2005, Response did not qualify as a responsive pleading pursuant to Indiana Trial Rule 8.[1] The trial court granted the City of Mitchell's motion that same day. Then, on August 16, 2005, the City of Mitchell filed a Motion for Default Judgment against Barlow

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[1] Trial Rule 8(B) provides:

> A responsive pleading shall state in short and plain terms the pleader's defenses to each claim asserted and shall admit or controvert the averments set forth in the preceding pleading.

Subsection (D) goes on to provide:

> Averments in a pleading to which a responsive pleading is required, except those pertaining to amount of damages, are admitted when not denied in the responsive pleading.

requesting the trial court to enter judgment against Barlow in the amount of $47,900.00. On August 19, 2005, the trial court entered judgment against Barlow in the amount of $47,900.00.

Thereafter, Barlow obtained counsel, who filed a motion to set aside the default judgment. Barlow and the City of Mitchell ultimately entered into a Stipulation to Set Aside Portion of Default Judgment ("Stipulation") on December 5, 2005. The Stipulation provided:

> 1. That the Order of Default dated August 8, 2005, . . . shall remain intact and unchanged.
> 2. That the Judgment Decree fixing the damages entered August 19, 2005, be set aside and the issue of damages be set for hearing with a determination of the amount of damages to be made by the Lawrence Superior Court I, without a jury.

Id. at 33. Following a damages hearing on April 10, 2006, the trial court entered Findings of Fact, Conclusions of Law, and Order ("Order") on May 17, 2006. Pursuant to the Order, the trial court entered judgment against Barlow in the amount of $38,200.00 plus costs. Barlow now appeals.

Discussion and Decision

Barlow appeals raising numerous issues. First, she contends that the City of Mitchell failed to prove the penalties for violating the three ordinances because it did not introduce the ordinances into evidence at the April 10, 2006, damages hearing. Second, Barlow contends that the trial court erred in imposing a fine of $8,950.00 for her violation of Section 90 of the Mitchell City Code of Ordinances because the Complaint only requested a fine of $50.00. Third, Barlow contends that the trial court erred in concluding that she violated Section 90 of the Mitchell City Code of Ordinances for a

period of ninety days because there was no evidence introduced at the damages hearing as to the duration of her violation. Last, Barlow contends that the procedure used by the City of Mitchell to notify her of the ordinance violations regarding unsafe premises violated her due process rights.

I. Proof of Penalties for Ordinance Violations

First, Barlow contends that the City of Mitchell failed to prove the penalties for violating the three ordinances because it did not introduce the actual ordinances into evidence at the April 10, 2006, damages hearing. Specifically, Barlow argues that trial courts cannot take judicial notice of municipal ordinances, and "[w]ithout the ordinances, the record is incomplete to determine a computation of the fines, even in light of Barlow's admission of a violation." Appellant's Br. p. 10.

Here, the ordinances were attached to the City of Mitchell's Complaint as exhibits. As noted in the Facts section of this opinion, the Complaint itself detailed the penalties for violating the ordinances. The trial court entered a default against Barlow when she did not properly respond to the Complaint, and the trial court later entered judgment against Barlow in the amount of $47,900.00. The parties subsequently entered into a Stipulation, which provided that the default "shall remain intact and unchanged" but that the "Judgment Decree fixing the damages . . . be set aside and the issue of damages be set for hearing . . . ." Appellant's App. p. 33.

A default judgment amounts to a confession of the complaint. *Core Funding Group, LLC v. Young*, 792 N.E.2d 547, 550 (Ind. Ct. App. 2003), *trans. denied*. Where a defendant fails to answer a complaint and a judgment is taken by default, such failure is a

confession that the complaint is true as to the facts alleged therein, except allegations of value or amount of damages, which must be proved. *Second Nat'l Bank v. Scudder*, 212 Ind. 283, 6 N.E.2d 955, 958 (1937). Thus, Barlow's default amounts to a confession that the Complaint is true as to the facts alleged therein, and the facts alleged in the Complaint included that Barlow was in violation of the three ordinances and what the penalties for the ordinance violations were. Therefore, the City of Mitchell did not need to prove the penalties for violating the ordinances by introducing the actual ordinances into evidence at the hearing.

II. Fine for Violation of Section 90

Second, Barlow contends that the trial court erred in imposing a fine of $8,950.00[2] for her violation of Section 90 of the Mitchell City Code of Ordinances (Animals) because the Complaint only requested a fine of $50.00. As detailed above, Paragraph 11 of the Complaint alleged as follows:

> 11. Section 90:99 of Chapter 90 of the Mitchell City Code of Ordinances provides that any person violating any provision of the chapter shall be deemed guilty of a chapter violation and the punishment *for a first*

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[2] In its Order, the trial court provided the following calculations for Barlow's violation of this ordinance:

> d. Section 90.99(A) provides that the fine for a first violation is a $50 fine.
> e. Section 90.99(B) provides that a second violation shall be punished by a fine of $100, and any subsequent violations by a fine of not less than $100 nor more than $500.
> f. Section 90.99(C) provides that each day in violation is considered a separate violation for purposes of calculating fines.
> g. Defendant has been in violation of Section 90 for 90 days.
> h. Thus, Plaintiff is entitled to damages in the amount of **$8,950**: $50 (first day) + $100 (second day) + $8800 ($100 day for 88 subsequent days).

Appellant's App. p. 5.

> *violation* in any calendar year shall be a $50.00 fine. That a copy of such Chapter is attached hereto, made a part hereof and marked Exhibit F.

Appellant's App. p. 8 (emphasis added). Although the Complaint did not recite the full text of § 90.99, which also set forth the penalties for second and subsequent violations and clarified that each day is considered a separate violation, *see supra* note 2, the prayer for relief provided, "WHEREFORE, the Plaintiff demands judgment against the Defendant for such fines as provided for [in] the separate ordinances *for each and every day* beyond May 19, 2005 – together with the costs of this action and for all other proper relief in the premises." *Id.* (emphasis added).[3] By defaulting, Barlow admitted that she could be fined for *each* day she was in violation of Section 90. Therefore, the trial court did not err in imposing a fine of $8,950.00 for her violation of Section 90 of the Mitchell City Code of Ordinances.[4]

III. Duration of Violation of Section 90

Next, Barlow contends that the trial court erred in concluding that she violated Section 90 of the Mitchell City Code of Ordinances (Animals) for a period of ninety days because "[t]here was no evidence showing how long that violation continued." Appellant's Br. p. 14. To the contrary, the Complaint alleged that Barlow was in violation of Section 90 of the Mitchell City Code of Ordinances because:

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[3] In addition, Commissioner Watson testified at the damages hearing that Section 90 has a "[f]lat fine of $50.00 of, I believe it's $50.00 first offense. Second offense is $100.00. Then $150.00 third offense." Appellant's App. p. 50. Barlow did not challenge his testimony at the hearing.

[4] Barlow cites Indiana Code § 34-28-5-4 in support of her argument that the trial court could not fine her more than $50.00 for violating Section 90. However, because we determined that the Complaint did not request a fine of only $50.00, the limitation contained in Indiana Code § 34-28-5-4 does not apply.

> There *is* a Rottweiler mix dog tied up at the [Lawrence Street] property . . . . The cable is too long allowing the dog to get onto approximately 4 foot of the paved portion of the roadway. . . . There *is* an 8 foot by 8 foot pen which houses 2 dogs which has a large amount of animal feces about the pen causing a stench and/or smell which is very strong and offensive to the neighborhood . . . .

Appellant's App. p. 7-8 (emphases added) (formatting altered). It is apparent that the Complaint speaks in the present tense. By defaulting, Barlow admitted to violating the Animal Ordinance from the time of the violation alleged in the Complaint to the time that the default was entered, a period of ninety days. In addition, Commissioner Watson testified at the damages hearing that at least one of the dogs was still on the property a couple of days before the hearing. *See* Tr. p. 65. The trial court properly concluded that Barlow violated Section 90 for a period of ninety days.

IV. Due Process

Last, Barlow contends that the procedure used by the City of Mitchell to notify her of the ordinance violations regarding unsafe premises violated her due process rights because the notice provisions of Indiana Code § 36-7-9-5 were not followed. Specifically, Indiana Code § 36-7-9-5(b) provides that a local government's order requiring "action relative to any unsafe premises"[5] must contain:

> (1) the name of the person to whom the order is issued;
> (2) the legal description or address of the unsafe premises that are the subject of the order;
> (3) the action that the order requires;
> (4) the period of time in which the action is required to be accomplished, measured from the time when the notice of the order is given;

[5] "Action relative to any unsafe premises" includes "removal of trash, debris, fire hazardous material, or a public health hazard in and about the unsafe premises" and "removal of an unsafe building." Ind. Code § 36-7-9-5(a)(4), (7).

> (5) if a hearing is required, a statement indicating the exact time and place of the hearing, and stating that person to whom the order was issued is entitled to appear at the hearing with or without legal counsel, present evidence, cross-examine opposing witnesses, and present arguments;
> (6) if a hearing is not required, a statement that an order under subsection (a)(2), (a)(3), (a)(4), or (a)(5) becomes final ten (10) days after notice is given, unless a hearing is requested in writing by a person holding a fee interest, life estate interest, or equitable interest of a contract purchaser in the unsafe premises, and the request is delivered to the enforcement authority before the end of the ten (10) day period;
> (7) a statement briefly indicating what action can be taken by the enforcement authority if the order is not complied with;
> (8) a statement indicating the obligation created by section 27 of this chapter relating to notification of subsequent interest holders and the enforcement authority; and
> (9) the name, address, and telephone number of the enforcement authority.

On appeal, the City of Mitchell does not argue that it properly complied with Indiana Code § 36-7-9-5; rather, it argues that "[t]he question of whether Barlow was in violation of the Mitchell Unsafe Building Ordinance was previously settled by the entry of" default against Barlow. Appellee's Br. p. 30.

The trial court entered a default against Barlow when she did not properly respond to the City of Mitchell's Complaint. Although Barlow's attorney later filed a motion to set aside the default judgment, Barlow and the City of Mitchell eventually entered into a Stipulation whereby the parties agreed that the default "shall remain intact and unchanged" but that the "Judgment Decree fixing the damages entered August 19, 2005, be set aside and the issue of damages be set for hearing with a determination of the amount of damages to be made by the Lawrence Superior Court I, without a jury." Appellant's App. p. 33. That is, the issue of whether Barlow was in violation of the ordinances was settled by the entry of the default. The hearing was only to address the issue of damages. *See* Appellant's App. p. 46-47. At that stage, Barlow could not argue

that the default should be set aside because she had a meritorious defense, i.e., the City of Mitchell did not comply with Indiana Code § 36-7-9-5. That argument was only available in a motion to set aside default judgment. Because Barlow abandoned her motion to set aside the default judgment and stipulated that the default "shall remain intact and unchanged," she cannot now argue that she did not violate the ordinances because the City of Mitchell did not follow Indiana Code § 36-7-9-5 and therefore violated her due process rights. Accordingly, we affirm the trial court.

Affirmed.

BAILEY, J., and BARNES, J., concur.