

NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2014 CA 1758

BOB WELCH & DANIEL HOOVER

VERSUS

EAST BATON ROUGE PARISH METROPOLITAN COUNCIL

Judgment rendered JUN 03 2015

Appealed from the
19th Judicial District Court
in and for the Parish of East Baton Rouge, Louisiana
Trial Court No. 563,619
Honorable Wilson Fields, Judge

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BEFORE: PETTIGREW, HOLDRIDGE, AND CHUTZ, JJ.

Holdridge, J. concurs in the result.

PETTIGREW, J.

This matter has been before this court on numerous occasions, the most recent of which was an appeal by the plaintiffs of a judgment that dismissed their claims. **Welch v. East Baton Rouge Parish Metropolitan Council**, 2012-1440, 2014 WL 1356808, (La. App. 1 Cir. 2/26/14)(unpublished opinion), writ denied, 2014-0805 (La. 5/30/14), 140 So.3d 1178. The factual background and procedural history of the matter leading to that appeal will not be repeated herein; we adopt by reference that which was set forth in our prior opinion. In that appeal, this court found rezoning Ordinance 14280 invalid because it violated Section 8.218F of the Unified Development Code ("UDC"), in that the UDC required the Traditional Neighborhood Development ("TND") to have the complete, unified, and legal control of all land included therein; yet, the plaintiffs, Bob Welch and Daniel Hoover, owned five acres of land and were the beneficiaries of a predial servitude of passage, all contained within the boundaries of the proposed TND. On that basis, this court reversed the judgment of the district court, which had dismissed the plaintiffs' claims, and rendered a declaratory judgment in favor of the plaintiffs, finding Ordinance 14280 invalid, and remanded the matter to the district court "for further proceedings consistent with our finding." *Id.* 2014-1440 at p. 10. (Emphasis added.)

CURRENT PROCEDURAL POSTURE

Following this court's February 2014 decision, on June 2, 2014, the plaintiffs filed a second supplemental and amending petition with injunctive relief. They alleged that the defendant, East Baton Rouge Parish Metropolitan Council ("EBRPC"), and the intervenor, 2590 Associates, LLC ("intervenor") (hereinafter referred to collectively as "the defendants"), had blocked their use of the servitude of passage and utilities. They further alleged that the defendants had "in fact taken the servitude without any pretense of due process and converted it to their own use." Additionally, they claimed that in the application process for the original Concept Plan, which is now part of Ordinance 14280 that created Rouzan TND, the intervenor had agreed to enter into said property, where possible for construction purposes, from Perkins Road, rather than Glasgow Street. The plaintiffs alleged that the intervenor has refused to abide by that agreement, and at all

times, has used large construction equipment to enter the property from Glasgow Street, using plaintiffs' servitude of passage, causing damage to the servitude (holes and ruts) and ultimately obliterating the surface of the servitude. These activities interfered with the plaintiffs' enjoyment of their homes and right of passage. The plaintiffs further alleged that the intervenor had dug up hundreds of yards of natural gas pipe that supplied the gas utilities to the home of plaintiff Bob Welch and left him without a natural gas supply for 14 months. They also alleged that the defendants continue to build structures on the property in defiance of the declaratory judgment rendered by this court in February 2014. Based on the foregoing actions by the defendants, the plaintiffs asserted a claim to recover for damages caused by the foregoing actions.

The plaintiffs additionally sought an injunction directed to EBRPC prohibiting it from issuing a permit to the intervenor to construct anything on the property that is not in compliance with A-1 zoning (the zoning in existence prior to Ordinance 14280). They further sought an injunction directed to the defendants, prohibiting them from submitting and approving any plan which disturbs the plaintiffs' "possession" of the servitude, prohibiting them from taking possession of any portion of that servitude, enjoining them from interfering with the plaintiffs' actions to restore and maintain the servitude of passage and utilities, and enjoining them from any actions to perpetuate the "illegal TND." The plaintiffs additionally sought an order from the court requiring the intervenor to remove all structures it had made on the Rouzan TND property in violation of the UDC; and finally, the plaintiffs prayed for a permanent injunction and a judgment awarding them damages, after due proceedings.

The defendants responded to the plaintiffs' second amending and supplemental petition by noting that plaintiffs failed "to mention the new ordinance of the amended [UDC]" and asserting the plaintiffs are subject to sanctions for failing to so apprise the court. The EBRPC also set forth several exceptions raising objections of *lis pendens*

(citing La. C.C.P. art. 531¹, and asserting that the issues related to the conventional servitude were set for a bench trial on August 21, 2014, in Judge Janice Clark's courtroom, Division D, Section 21, hereinafter referred to as "Division D")²; prematurity (asserting that the final delay for applying for writ of certiorari of this court's prior opinion had not yet run); failure to join a party under La. C.C.P. 641 and 642 (asserting that the current property owners and unidentified homeowners within the area involving the request for injunction are indispensable parties necessary for a just adjudication of plaintiffs' claims); vagueness (asserting the failure of the plaintiffs to identify which structures they seek to have removed); and unauthorized use of a summary proceeding (asserting that the plaintiffs improperly seek damages at a preliminary injunction hearing, when an action for damages is an ordinary proceeding, and also asserting that the plaintiffs failed to meet their burden to obtain a preliminary injunction, failed to show a likelihood of success on the merits, and failed to show irreparable injury).

In the memorandum filed in support of the foregoing exceptions, the defendants noted that following this court's prior decision, the EBRPC, pursuant to its police powers and the plan of government, in April 2014, amended the UDC, revising the provision upon which this court had found a violation of the UDC by the TND, by removing the requirement that a TND must have the complete, unified control of all property within the boundaries of the development. The amended UDC now requires a TND to be in accordance with the Concept Plan officially adopted for Traditional Neighborhood Developments, and regulations that existed when the amendment granting the TND was adopted. Thereafter, the EBRPC enacted a new ordinance, Ordinance 15691, changing the zoning in accordance with the UDC, and on May 14, 2014, the EBRPC rezoned the

¹ When two or more suits are pending in a Louisiana court or courts on the same transaction or occurrence, between the same parties in the same capacities, the defendant may have all but the first suit dismissed by excepting thereto. La. C.C.P. art. 531.

² The defendants claim that the plaintiffs, on February 22, 2012, filed a second lawsuit styled **Welch v. Planning and Zoning Commission of Baton Rouge and 2590 Associates, L.L.C.**, Docket No. 608,569, which was docketed and allotted to Division D, and in which they sought "most, if not all, of the identical relief" sought by the plaintiffs in the second supplemental and amending petition with injunctive relief. In the second suit, the plaintiffs sought an injunction prohibiting further disturbances to the former location of the servitude, and further sought rulings regarding possession, location, and the extent of the servitude.

Rouzan tract, which now excluded the plaintiffs' properties, but still includes the area encompassed by the conventional servitude in favor of the dominant estates owned by the plaintiffs. The defendants claim that the new rezoning, pursuant to the new ordinance, renders most, if not all, of the plaintiffs' claims for preliminary injunction moot.

The defendants also argue that the plaintiffs' second supplemental and amending petition was filed without first seeking leave of court or their written consent (as the adverse parties) in violation of La. C.C.P. art. 1151, which provides that a petition amended after the answer thereto has been served may be amended only by leave of court or by written consent of the adverse party. They further contend that, although designated as a request for a preliminary and permanent injunction, the plaintiffs' claims, insofar as they seek the removal or demolition of homes and other constructions, seek a mandatory injunction. They also contest the plaintiffs' claim for damages, raised for the first time in the second supplemental and amending petition.

Shortly after filing the foregoing exceptions, the intervenor filed a motion to transfer this matter to Division D, on the basis that the second suit filed in this matter (docket No. 608,569) had been tried in Division D on August 21, 2013, and taken under advisement in September 2013. (At the oral arguments for this appeal, the parties informed this court that the matter remains under advisement in Division D.) The intervenor attached to its motion a judgment in the second-filed suit, rendered by Division D on February 9, 2013, granting the intervenor's request for injunctive relief. Specifically, the judgment ordered that a preliminary injunction issue enjoining and prohibiting the plaintiffs "from causing any illegal disturbances to impede or obstruct the construction activities" at Rouzan "or from attempting to use or using such property or their purported servitude in any way so as to impede or obstruct the construction activities."

At the status conference in this matter, the district court advised the parties that it was setting a hearing on the defendants' exceptions and plaintiffs' request for injunctive relief for June 18, 2014. However, at the request of the plaintiffs, who wanted an earlier date for hearing, the district court then requested a reallocation of the matter. The matter was then reallocated to Judge Timothy E. Kelley, Division F, Section 22,

hereinafter referred to as "Division F." Division F held a status conference on June 27, 2014, and set the pending exceptions and preliminary injunction request for hearing on July 2, 2014.

The intervenor filed a motion to vacate or rescind the reallocation of the matter to Division F, arguing that it was in violation of the public policy of random allotment of cases, and there was no valid basis for the reallocation, which was obtained without its consent and without the requirements for consolidation pursuant to La. C.C.P. art. 1561. The record contains a judgment, dated August 25, 2014, rendered by Division F that granted the intervenor's motion challenging the reallocation, finding it improper, and returned the entire matter before it (the pending exceptions by the defendants, and the plaintiffs' request for a preliminary injunction) back to Judge Wilson E. Fields, Division O, Section 25, hereinafter referred to as "Division O."

HEARING AND JUDGMENT CURRENTLY ON APPEAL

On August 13, 2014, a hearing was held by Division O on the defendants' exceptions (the exception of prematurity was rescinded by the defendants as moot, since the time frame for taking writs had expired), defendants' motion to transfer this matter, the intervenor's motion to vacate and rescind the reallocation, and the plaintiffs' request for a preliminary injunction.

The intervenor argued, in support of its motion to transfer, that the suit, which is before this court at this time, dealt only with the validity of Municipal Ordinance 14280, at the time the second suit was filed in a different division, and that none of the issues regarding possession of the servitude of passage were raised in this original suit. Instead, those issues were raised based on allegations made in the second suit, allotted to Division D. The intervenor maintains that the first time any issues concerning the servitude, including possession, relocation thereof, and damages were raised in this suit was when the plaintiffs filed their second supplemental and amending petition, following this court's opinion declaring Ordinance 14280 invalid on the basis of the existence of the servitude, and the plaintiffs' legal rights in connection therewith. The intervenor argued, however, that by that time, those same issues had been tried in Division D, following a ruling by

that judge that pursuant to La. C.C. art. 748, it had the right to move the servitude. Once the servitude was moved, the matter proceeded to trial to resolve the issues of whether the relocation was in accordance with the legal requirement in La. C.C. art. 748 that it be moved to an "equally convenient location," and whether the plaintiffs were entitled to damages.

EBRPC additionally argued that this matter, concerning only the validity of Ordinance 14280 that rezoned the property to a TND, was now moot, because this court found that ordinance invalid, following which an amended ordinance was passed that cured the irregularities upon which this court found the original ordinance invalid. EBRPC maintains that the TND is now in accordance with the new ordinance, rendering all issues which this court remanded back to the district court moot.

The district court heard arguments and the testimony of witnesses called by the intervenor in support of the defendants' exceptions. The hearing then proceeded on the plaintiffs' claim for a preliminary injunction. Plaintiff Dr. Welch testified regarding the changes made to the original servitude by the intervenor during construction, which he claimed rendered the servitude highly inconvenient and even impassable at times. Specifically, Dr. Welch testified that trenches were dug blocking access to their homes and barricades were placed across the servitude. Mr. Hoover testified that the intervenor removed a bridge and two gates that were located on the original servitude. Dr. Welch also testified that the intervenor placed other constructions for future residences in the TND in the servitude, partially blocking their right of passage.

In connection with Dr. Welch's testimony, the defendants introduced into evidence a letter, dated May 16, 2012, from the intervenor to plaintiff Mr. Hoover and his family, of which Dr. Welch acknowledged receipt, informing them that the servitude had been moved to a new location. A certified true copy of the *Temporary Servitude of Passage* that was recorded in the official records of EBRP, officially relocating the servitude of passage, was attached to the letter.

Plaintiff Mr. Hoover also testified at the hearing; his testimony regarding the inconveniences the plaintiffs and their families faced due to construction on the servitude

was consistent with that of Dr. Welch. Notably, both plaintiffs testified that, at the time of the hearing, they had all utilities and could use the relocated servitude to travel to and from their homes. However, they had the same complaints about the relocated servitude, not being as convenient for them (they now have to travel through a maze of streets on a path much narrower and longer than the original servitude in order to reach the public road), and that at times, during construction, the servitude had been rendered impassable.

The plaintiffs also called as a witness Mr. Ryan Lee Holcomb (Mr. Holcomb), the assistant planning director for the City-Parish Baton Rouge Planning Commission. Mr. Holcomb testified regarding the changes made to the UDC, and the subsequent ordinance that was passed following this court's prior opinion. He testified that the changes were made because it had been brought to the Commission's attention that the requirement that a TND have complete, unified control of all property contained within it, was problematic for TNDs due to the existence of various servitudes running through many properties, making it almost impossible for any TND to have the complete, unified control of all properties contained within the development. In answer to the district court's questioning, Mr. Holcomb testified that the amendments to the UDC and the enactment of the new ordinance were not intended to apply to any specific development; rather, the changes were made to cure broad language in the previous TND ordinance that would render it "invalid and unusable for all developments." Mr. Holcomb also testified that the EBRPC acted within its police powers in rezoning the TND, which does not require the consent of any landowner. He further noted that after the new ordinance was passed, Rouzan reapplied with a new rezoning request, which was ultimately approved.

The defendants called as a witness Mr. Glen Raymond Jarrell (Mr. Jarrell), the project and construction manager for 2590 Associates, the intervenor. Mr. Jarrell acknowledged that the intervenor temporarily relocated the existing servitude, and that they did everything possible to avoid interruption of the plaintiffs' utilities during construction. Mr. Jarrell further acknowledged that they inadvertently hit the gas line to the plaintiffs' properties because the line was shallower than they expected. He testified

that he contacted Entergy, which was willing and ready to put in a temporary line so that the natural gas supply would not be interrupted, but that Dr. Welch refused to consent in writing to the installation of the temporary line, which resulted in Dr. Welch not having natural gas. Mr. Jarrell explained that, although the new permanent gas line was installed six months after the incident, Dr. Welch, for unexplained reasons, waited an additional eight months before he hooked up to the new line. Mr. Jarrell maintained that the plaintiffs always had a right of passage from their properties to a public road. He testified that the servitude was temporarily moved, but that he provided them with alternate routes at all times.

After the hearing, on September 15, 2014, the district court, in open court, issued an order granting the intervenor's motion to vacate or rescind the reallocation (of the suit to Judge Kelley's division) and denied the plaintiffs' request for preliminary injunction. Notably, although they were heard, the district court did not rule on any of the defendants' exceptions. In written reasons, the district court noted that, despite the plaintiffs' assertions that the servitude they were granted through the will of Ms. Ford was one of passage *and utilities*, they had presented no proof of the existence of a utility servitude. The court further noted that the plaintiffs acknowledged that they are currently being served by all public utilities. Also, the court stated that the plaintiffs acknowledged that the right of passage was moved, and that they can access Glasgow Street from the public street in Rouzan. The court also stated that the rezoned TND was in compliance with the amended UDC and the new ordinance, and no longer includes the servitude or lots owned by the plaintiffs, also noting that the plaintiffs have not raised any challenge to the new zoning ordinance. Thus, the district court concluded that the plaintiffs "made no showing of irreparable injury or demonstrated a likelihood of irreparable injury" and denied the preliminary injunction.

The plaintiffs appeal that judgment. The defendants answered the appeal, and seek damages, costs, and attorney fees based on their contention that the appeal is frivolous. They claim that the plaintiffs neglected to inform the district court that the UDC had been revised and that Rouzan had been rezoned pursuant to new Ordinance 15691,

and continued to pursue an injunction based on the old ordinance, which this court previously found was invalid. Thus, they maintain the appeal is frivolous.

ASSIGNMENTS OF ERROR

The plaintiffs assert the following assignments of error:

1. The Trial Court erred by denying the application for a preliminary injunction on the basis that the applicants failed to prove that they would suffer irreparable harm and injury.
2. The court erred in failing to apply Code of Civil Procedure Article 3663(2) which if applied would have entitled plaintiffs to a preliminary injunction without the need of showing irreparable harm.
3. The court erred by failing to consider Civil Code Articles 744 and 745 to determine whether the plaintiffs are entitled to a preliminary injunction which did not require the showing of irreparable harm.

We do not find it necessary to address these assignments individually; however, they are included in the analysis of the entire matter as set forth below.

PRELIMINARY INJUNCTION

Injunctive relief is available to a person who is disturbed in possession of a real right that he has in immovable property of which he claims the ownership, the possession, or the enjoyment. La. C.C.P. art. 3663(2). Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury if the injunction does not issue and must show entitlement to the relief sought; this must be done by a prima facie showing that the party will prevail on the merits of the case. La. C.C.P. art. 3601; **CDI Corp. v. Hough**, 2008-0218 (La. App. 1 Cir. 3/27/09), 9 So.3d 282, 286-87. The jurisprudence interpreting Article 3601 establishes that, while the trial court has broad discretion in deciding whether to grant injunctive relief, injunction is an extraordinary remedy and should only issue where the party seeking it is threatened with irreparable loss without adequate remedy at law. **ANR Pipeline Co. v. Louisiana Tax Com'n**, 2007-2282 (La. App. 1 Cir. 10/17/08), 997 So.2d 105, 110, writ denied, 2009-0025 (La. 3/6/09), 3 So.3d 484.

Appellate review of a trial court's ruling on a preliminary injunction is limited. The issuance of a preliminary injunction addresses itself to the sound discretion of the trial

court and will not be disturbed on review unless a clear abuse of discretion has been shown. **Lassalle v. Daniels**, 96-0176 (La. App. 1 Cir. 5/10/96), 673 So.2d 704, 708, writ denied, 96-1463 (La. 9/20/96), 679 So.2d 435, cert. denied, 519 U.S. 1117, 117 S.Ct. 963, 136 L.Ed.2d 848 (1997). A preliminary injunction is essentially an interlocutory order issued in summary proceedings incidental to the main demand for permanent injunctive relief. The courts have generally held that a preliminary injunction is designed to preserve the status quo pending a trial of the issues on the merits of the case. **Silliman Private School Corp. v. Shareholder Group**, 2000-0065 (La. App. 1 Cir. 2/16/01), 789 So.2d 20, 23, writ denied, 2001-0594 (La. 3/30/01), 788 So.2d 1194.

A mandatory preliminary injunction has the same basic effect as a permanent injunction, and therefore may not be issued on merely a prima facie showing that the party seeking the injunction can prove the necessary elements; instead, the party must show by a preponderance of the evidence at an evidentiary hearing that he is entitled to the preliminary injunction. **Spine Diagnostics Center of Baton Rouge, Inc. v. Louisiana State Bd. Of Nursing ex rel. Louisiana Dept. of Health and Hospitals**, 2008-0813 (La. App. 1 Cir. 12/23/08), 4 So.3d 854, 864, writs denied, 2009-0144, 2009-0188 (La. 4/13/09), 5 So.3d 163.

DISCUSSION/ANALYSIS

We have thoroughly reviewed the record, the applicable law, and the arguments presented by the parties, both to the district court and to this court on appeal. Although the particular circumstances and the unique procedural posture of the matter at this juncture is problematic, we are constrained to find that the district court did not abuse its discretion in denying the plaintiffs' request for a preliminary injunction.³

³ The plaintiffs' supplemental and amending petition also sought an order from the district court requiring the intervenor to remove all structures they made on the Rouzan property in violation of the UDC. Inasmuch as this request is for a mandatory injunction, we also find that the district court did not abuse its discretion in finding the plaintiffs failed to prove, by a preponderance of the evidence, that they are entitled to such relief.

The evidence revealed that the plaintiffs have full service of all utilities that were located on the original servitude.⁴ Moreover, the plaintiffs both acknowledged that they presently have a right of passage from their homes to a public road. Based on these findings alone, the requirements for obtaining a preliminary injunction have not been met. The plaintiffs have not shown any irreparable harm, nor have they shown that likely they would prevail on the merits, therefore, we cannot say that the district court abused its vast discretion in denying the plaintiffs' request for a preliminary injunction, finding they had failed to prove entitlement to such relief.

Although the plaintiffs contend the relocated servitude is not equally convenient or suitable for their desired use of the right of passage, the issue of the propriety of the relocated servitude is not before us, nor was it before the district court. Those issues have been tried in another division of the district court, and, at the time of the hearing of this appeal, it was represented by both parties that a decision on those issues is still under advisement. We note that the district court did not rule on the defendants' exceptions, one of which, the exception raising the objection of *lis pendens*, was based on the pendency of the second suit, during which the issues related to the propriety of the relocated servitude were tried. That issue is not before us, has not yet been ruled on, and remains pending in the district court, together with defendants' other exceptions. We further note that the request for a permanent injunction, as well as the plaintiffs' claim for damages sustained by them as a result of the intervenor's actions, also remain pending in the district court.

With regard to the plaintiffs' request for an injunction enjoining the EBRPC from granting any permits to the intervenor to perform any work on the property inconsistent

⁴ We note that, contrary to the plaintiffs' contention that this court, in its prior decision, ruled that the servitude they enjoyed was a utility servitude, we did not make any such ruling, nor do we find that the evidence established the existence of any such utility servitude. Rather, the evidence establishes that the plaintiffs were given a right of *passage* as a result of Ms. Ford's will. In our prior decision, we merely noted that La. C.C. art. 705 provides that a servitude of passage is the right for the benefit of the dominant estate whereby persons, animals, *utilities*, or vehicles are permitted to pass through the servient estate. Additionally, the plaintiffs' erroneously assert that the declaratory judgment rendered by this court declared them to be owners of the property comprising the servitude. While this court recognized the plaintiffs' right of passage, we did not rule or state that they owned the property on which the servitude was located. **Welch**, 2012-1440 at p. 9.

with A-1 zoning, and enjoining the defendants from any actions to “perpetuate the illegal TND,” we also are constrained to find that the district court did not abuse its discretion in denying such relief. The evidence submitted at the hearing consisted of amendments to the UDC and the enactment of a new ordinance with which the rezoning of the TND was in compliance. The defendants represented that those actions were taken within the police powers of the EBRPC, and the plaintiffs have not raised nor challenged that authority or the validity of the amendments to the UDC or the new ordinance. Thus, based on the evidence before it, the district court did not abuse its discretion in denying relief to which the plaintiffs did not prove they were entitled.⁵

ANSWER TO APPEAL

The defendants seek damages, attorney fees, and costs for a frivolous appeal in part because the plaintiffs’ failed to inform the trial court as well as this court of the amendments to the UDC and the new ordinance that was enacted, with which all of their actions subsequent to this court’s prior decision were in compliance. We decline to award any such relief, because although the issue is not before us, as noted, we question the propriety of the defendants’ intentions in making those amendments and enacting a new ordinance directly after this court’s decision, finding the original ordinance invalid, was rendered.

CONCLUSION

As stated earlier, the extraordinarily unique procedural posture of the matter before us, the fact that many of the issues raised herein have been tried and remain under advisement before another division of the district court, and the fact that the district court did not rule on any of the defendants’ exceptions, is problematic. Without ruling on the request for a permanent injunction, or the plaintiffs’ claims for damages arising out of the defendants’ actions under the old ordinance, as well as under the new

⁵ Although we question the propriety, the good faith, and the intentions of the defendants’ actions following, and in light of, this court’s decision finding the original ordinance invalid, there has been no challenge to those actions either at the district court or before us on appeal, and any issues in connection therewith are not before us. We simply note that any actions taken subsequent to this court’s prior decision were directed to be made “in accordance” with that decision, which found the original ordinance invalid.

ordinance, we merely find that the district court did not abuse its discretion in denying the plaintiffs' request for a preliminary injunction. We must remand the matter to the district court inasmuch as the defendants' exceptions, the request for a permanent injunction, and the claim for damages remain pending.

Accordingly, the judgment of the district court denying the plaintiffs' request for a preliminary injunction is hereby affirmed. The matter is remanded to the district court to resolve all pending pleadings and claims. All costs of this appeal are assessed equally to all parties.

AFFIRMED AND REMANDED.