

STATE OF LOUISIANA
COURT OF APPEAL
FIRST CIRCUIT

2016 CA 1675

ZACHARY MITIGATION AREA, LLC

VERSUS

TANGIPAOHA PARISH COUNCIL

Judgment rendered: SEP 21 2017

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On Appeal from the
Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
State of Louisiana
No. 2016-0001497

The Honorable Charlotte H. Foster, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

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HOLDRIDGE, J.

The plaintiff-appellant, Zachary Mitigation Area, LLC (Zachary), seeks reversal of the trial court's judgment denying its petition for a temporary restraining order (TRO), preliminary injunction, permanent and mandatory injunction, declaratory judgment, writ of mandamus,¹ and damages against defendant-appellee, Tangipahoa Parish Council. For the following reasons, we affirm in part, vacate in part, and remand to the trial court for further proceedings.

FACTS AND PROCEDURAL HISTORY

In May of 2016, Tangipahoa Parish Council advertised for bids in connection with the purchase of mitigation credits² relating to its efforts to expand the Tangipahoa Parish Landfill.³ Zachary alleged that it was the lowest responsive bidder and timely submitted its bid before the deadline. However, Tangipahoa Parish Council accepted the bid (proposal) of Jamestown Mitigation Bank, L.L.C. (Jamestown) alleging that it was the lowest bidder.

On May 26, 2016, Zachary filed a petition seeking a TRO, preliminary injunction, permanent and mandatory injunction, declaratory judgment, writ of mandamus, and damages. The trial court granted Zachary's TRO, prohibiting Tangipahoa Parish Council from awarding a contract or signing a contract with any other bidder other than Zachary.⁴ On June 16, 2016, Tangipahoa Parish Council

¹ It is improper to cumulate a petition for writ of mandamus with a petition for injunctive relief, declaratory judgment, and damages since a petition for a writ of mandamus is a summary proceeding and the other actions are ordinary proceedings. *See* La. C.C.P. arts. 462, 2592(6). However, since Tangipahoa Parish Council failed to file a dilatory exception raising the objection of improper cumulation, the objection is waived. *See* La. C.C.P. arts. 926(A)(7) & (B).

² Mitigation credits are used by the United States Army Corps of Engineers (Corps of Engineers) to assess and quantify the ecological value of an impact to wetlands into a mathematical number.

³ In order to expand the landfill, Tangipahoa Parish Council was required by the Corps of Engineers to purchase wetland mitigation credits from select mitigation banks in order to mitigate the impact of its landfill expansion into areas designated as wetlands.

⁴ On June 17, 2016, Zachary amended its petition and named additional defendants; however, the record does not reveal whether they were served.

filed a Rule to Dissolve the TRO, alleging that the public bid law did not apply and further alleging that the “wetland mitigation credits are intangible property representing a ‘service’ to be performed by the mitigation bank to offset the ecological impact that the development ... would have to the environment.”

The trial court set a hearing on Zachary’s preliminary injunction and Tangipahoa Parish Council’s Rule to Dissolve the TRO for June 20, 2016. After hearing arguments from both parties and testimony from two expert witnesses, the trial court dissolved Zachary’s TRO and denied its petition for preliminary, permanent, and mandatory injunctive relief, declaratory judgment, writ of mandamus, and damages. On September 1, 2016, the trial court signed written reasons for judgment. On October 13, 2016, Zachary suspensively appealed the trial court’s reasons for judgment.

On December 29, 2016, this Court issued a rule to show cause order stating that the matter appeared to be non-appealable because Zachary was appealing reasons for judgment signed on September 1, 2016 and not a final judgment. *See* La. C.C.P. art. 1918; Cameron Parish Police Jury v. All Taxpayers, 2017-55 (La. App. 3 Cir. 2/21/17), 212 So.3d 663, 675, writ denied, 2017-0504 (La. 5/1/17), 221 So.3d 71. Based on the defect in Zachary’s appeal, this court, *ex proprio motu*, issued an interim order on February 21, 2017, remanding the case to the trial court for the limited purpose of supplementing the record with a final judgment. Thereafter, the trial court supplemented the record with a final judgment signed on October 24, 2016, curing the defect and making the appeal valid. The judgment dissolved Zachary’s TRO and denied Zachary’s petition for a preliminary injunction, permanent and mandatory injunction, writ of mandamus, declaratory judgment and damages, presumably dismissing all of Zachary’s claims. From this judgment, Zachary assigns as error on appeal:

- 1) The denial of requested relief and dismissal of [Zachary's] suit is erroneous and contrary to law because the public bid law does not allow a public entity to waive requirements for bids after all bids have been received.
- 2) The ruling of the trial court in determining that public bid law does not apply to mitigation credits is erroneous and contrary to law because there was no evidence to be considered and the parties only had notice of a hearing on [Zachary's] preliminary injunction and [Tangipahoa Parish Council's] rule to dissolve restraining order.

DISCUSSION

Preliminary Injunction

We must first consider whether the trial court erred in denying Zachary's request for a preliminary injunction. A preliminary injunction is an interlocutory procedural device designed to preserve the status quo between the parties pending a trial on the merits. Acadian Ambulance Service, Inc. v. Parish of East Baton Rouge, 97-2119 (La. App. 1 Cir. 11/6/98), 722 So.2d 317, 322, writ denied, 98-2995 (La. 12/9/98), 729 So.2d 583.

An injunction shall be issued in cases where irreparable injury, loss, or damage may otherwise result to the applicant, or in other cases specifically provided by law. La. C.C.P. art. 3601(A). Generally, a party seeking the issuance of a preliminary injunction must show that he will suffer irreparable injury, loss, or damage 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. Adler v. Williams, 2016-0103 (La. App. 1 Cir. 9/16/16), 203 So.3d 504, 512-13. However, a showing of irreparable injury is not necessary when the act sought to be enjoined is unlawful, or a deprivation of a constitutional right is involved. Dale v. Louisiana Secretary of State, 2007-2020 (La. App. 1 Cir. 10/11/07), 971 So.2d 1136, 1141.

Although a trial court's judgment on a preliminary injunction constitutes an interlocutory ruling, a party aggrieved by a judgment granting or denying a preliminary injunction is entitled to an appeal. La. C.C.P. art. 3612(B); Acadian Ambulance Services, Inc., 722 So.2d at 322. Appellate review of a trial court's issuance of a preliminary injunction will not be disturbed on review unless a clear abuse of discretion is shown. Concerned Citizens for Proper Planning, LLC v. Parish of Tangipahoa, 2004-0270 (La. App. 1 Cir. 3/24/05), 906 So.2d 660, 663. This broad standard is based upon a conclusion that the trial court committed no error of law and was not manifestly erroneous or clearly wrong in making a factual finding that was necessary to the proper exercise of its discretion. Harvey v. State, 2014-0156 (La. App. 4 Cir. 12/16/15), 183 So.3d 684, 700, writ denied, 2016-0105 (La. 3/4/16), 188 So.3d 1060.

In the instant matter, Zachary claims that it is entitled to a preliminary injunction, prohibiting Tangipahoa Parish Council from awarding the contract to any bidder other than Zachary. Zachary alleges that a showing of irreparable injury, loss, or damage is not necessary since the conduct sought to be restrained is unconstitutional or unlawful, *i.e.* Tangipahoa Parish Council's action is in direct violation of La. R.S. 38:2212, *et seq.* This allegation is based on Zachary claiming that Tangipahoa Parish Council violated Louisiana Public Bid Law by not awarding Zachary the contract for the proposed landfill project despite it being the lowest bidder. Zachary further alleges that it is entitled to a preliminary injunction because it is "a business to make money [and] [t]he funds the Parish will pay to Zachary Mitigation pursuant to the contract, will enable [it] to continue its business, pay its employees and expenses, and make a profit."

Tangipahoa Parish Council counters that Louisiana Public Bid Law does not apply to the instant matter because the contract at issue is a public service contract,

which is not subject to the bidding requirements of Louisiana Public Bid Law. The Supreme Court held that the public bid law was intended to apply to “public works” and not to public service contracts. American Waste and Pollution Control Co. v. Madison Parish Police Jury, 488 So.2d 940, 944 (La. 1986); *see also* B & C Electric Inc. v. East Baton Rouge Parish School Board, 2002-1578 (La. App. 1 Cir. 5/9/03), 849 So.2d 616, 620. A public work is defined as the erection, construction, alteration, improvement, or repair of any public facility or immovable property owned, used, or leased by a public entity. La. R.S. 38:2211(A)(12). Tangipahoa Parish Council argues that Louisiana Public Bid Law is meant to regulate the purchase of materials or supplies, or contracts for the construction of public works, which this contract does not. Tangipahoa Parish Council is not purchasing land or any other tangible assets, but rather is purchasing a service through a procedure that references wetland mitigation credits.

Based on the foregoing, we find that the trial court did not abuse its discretion in denying Zachary’s request for a preliminary injunction. The determination of whether the contract falls under Louisiana Public Bid Law will have to be made at trial on the merits of the permanent injunction and declaratory judgment. Therefore, we find that the trial court did not abuse its vast discretion in denying the preliminary injunction and finding that Zachary failed to carry its burden of proving that it was entitled to relief as a matter of law or that it would likely prevail on the merits.

Dismissal of Remaining Claims

We must now consider another issue in this appeal—whether the trial court erred in denying Zachary’s claim for a permanent and mandatory injunction, declaratory judgment, writ of mandamus, and damages, when the parties only had

notice of a hearing on Zachary's preliminary injunction and Tangipahoa Parish Council's Rule to Dissolve the TRO.

As a general rule, "[t]he principal demand, as opposed to the [preliminary] injunction, is determined on its merits only after a full trial under ordinary process, even though the hearing on the summary proceedings to obtain the injunction may touch upon or decide issues regarding the merits." Weatherly v. Sanchez, 2015-0534 (La. App. 4 Cir. 11/25/15), 181 So.3d 218, 222. While in some cases the merits of an action may be decided during an interlocutory proceeding, this is only when the parties have expressly agreed to submit the case for final decision at the hearing on the rule for a preliminary injunction. See City of Baton Rouge v. State, ex rel. Dep't of Social Services, 2007-0005 (La. App. 1 Cir. 9/14/07), 970 So.2d 985, 995; see also Transworld Drilling Co. v. Texas General Petroleum Co., 517 So.2d 1262, 1263 (La. App. 4 Cir. 1987) ("The trial of a rule for a preliminary injunction cannot replace a trial on the merits, in the absence of such a stipulation by the parties").

The record in the instant matter reveals that there was no stipulation between the parties agreeing to dispose of the entirety of the case during the preliminary injunction proceeding. The trial court denied Zachary's claim for a permanent and mandatory injunction, declaratory judgment, writ of mandamus, and damages without sufficient notice beforehand to the parties that the merits would be under consideration at the hearing for the preliminary injunction and Rule to Dissolve the TRO.⁵ Absent such notice, Zachary is entitled to a trial on the merits of its claims.

⁵ Tangipahoa Parish Council argues that the trial court granted a peremptory exception raising the objection of no cause of action *sua sponte* as to Zachary's demands. First, this argument lacks merit because in order to raise the exception of no cause of action on its own motion, the trial court is required to provide notice to all parties and set the matter for hearing. Claborne v. Housing Authority of New Orleans, 2014-1050 (La. App. 4 Cir. 4/15/15), 165 So.3d 268, 288, writ denied, 2015-0946 (La. 9/11/15), 176 So.3d 1039. Second, Zachary's petition states a cause of action for a declaratory judgment and therefore should not have been dismissed without a full trial on the merits. See La. C.C.P. art. 1879.

Although the trial court properly acted within its discretion to deny Zachary's preliminary injunction, it was without authority to deny Zachary's other claims absent an evidentiary trial on the merits. Accordingly, the trial court erred in dismissing Zachary's claim for a permanent and mandatory injunction, declaratory judgment, writ of mandamus, and damages.

TRO

Zachary also appeals the trial court's judgment, granting Tangipahoa Parish Council's Rule to Dissolve the TRO. The review of the granting or denial of a petition for a TRO is governed by La. C.C.P. art. 3612(A), which provides that "[t]here shall be no appeal from an order relating to a temporary restraining order." Louisiana jurisprudence has consistently held that an appellate court has no authority on appeal to consider the propriety of the trial court judgment refusing to grant or dissolve a temporary restraining order. *See Zeringue v. St. James Parish School Board*, 2013-444 (La. App. 5 Cir. 11/19/13), 130 So.3d 356, 358; *Gaumnitz v. Williamson*, 36,177 (La. App. 2 Cir. 8/14/02), 824 So.2d 531,535. Accordingly, the trial court's granting of Tangipahoa Parish Council's Rule to Dissolve the TRO is not properly before this Court and will not be considered for review. *Delesdernier v. Floyd*, 2015-331 (La. App. 5 Cir. 12/23/15), 182 So.3d 1159, 1163.

CONCLUSION

For the above reasons, we affirm the trial court's denial of Zachary's request for a preliminary injunction and do not consider the trial court's granting of Tangipahoa Parish Council's Rule to Dissolve the TRO. In all other respects, the judgment is vacated, and this matter is remanded to the trial court for further proceedings consistent with this opinion. All costs of this appeal are divided equally between the parties.

AFFIRMED IN PART; VACATED IN PART; REMANDED.