

NOT DESIGNATED FOR PUBLICATON

CHARES M. GARBER, JR., * NO. 2014-CA-0584
RODNEY VILLARREAL, *
RENE FRANSEN, EDDIE *
BONIN, AND VIEUX CARRE * COURT OF APPEAL
PROPERTY OWNERS, *
RESIDENTS, AND * FOURTH CIRCUIT
ASSOCIATES, INC. * STATE OF LOUISIANA

VERSUS * * * * *

ESPLANADE NOLA, LLC

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2013-04801, DIVISION "D-16"
Honorable Lloyd J. Medley, Judge
* * * * *

Judge Dennis R. Bagneris, Sr.
* * * * *

(Court composed of Chief Judge James F. McKay, III, Judge Dennis R. Bagneris, Sr., Judge Sandra Cabrina Jenkins)

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VACATED AND REMANDED

JANUARY 21, 2015

Appellants/plaintiffs, Charles M. Garber, Jr., Rodney Villarreal, Rene J. Fransen, Edward C. Bonin, and Vieux Carre Property Owners, Residents, and Associates, Inc. (collectively, “VCPORA”) appeal the judgment of the trial court that granted the exception of prescription filed on behalf of the defendant/appellee, Esplanade NOLA, L.L.C. The exception argued that VCPORA’s claim for damages and to compel the removal of an alleged illegal billboard maintained by Esplanade NOLA was not timely. For the reasons that follow, we vacate the judgment and remand to the trial court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

On May 20, 2013, VCPORA filed a petition for declarative and injunctive relief and damages against Esplanade NOLA for allegedly maintaining an illegal billboard on its Vieux Carre property located at 1040 Esplanade.¹ VCPORA claimed that the Staff of the Vieux Carre Commission (VCC) previously notified

¹ According to the complaint, Esplanade NOLA purchased the property on June 28, 2012 and the billboard was on the premises at the time of purchase.

Esplanade NOLA of the illegality and non-conformity of the billboard at a meeting on March 12, 2013; notwithstanding, Esplanade NOLA affixed new signage and lighting to the billboard on April 26, 2013 without the permission of VCC.

VCPORA contended that Esplanade NOLA's refusal to remove the billboard violated New Orleans Comprehensive Zoning Ordinance (CZO) Section 8.5.6 which prohibits outdoor general advertising signs in the VCC-2 zone of the Vieux Carre and CZO Section 12.4.1(3) which imposes a duty on the premises owner to remove such signs after notification.²

VCPORA claimed in part that the billboard is harmful to the "toute ensemble" and architectural, historical, cultural, and aesthetic values of the Vieux Carre; it also represented that the "illegal" billboard caused the individual plaintiffs to suffer the loss of the enjoyment of their respective properties and the diminution in the value of their properties.

Esplanade NOLA's answer included the affirmative defense that the billboard had obtained legal non-conforming use status via prescription. Thereafter, it filed an exception of prescription pursuant to L.R.S. 9:5625, the statute that provides the prescriptive periods to bring actions arising out of violations of zoning restrictions, building restrictions, or subdivision regulations.³

² CZO Section 12.4.1(3) states: "Any sign displayed which no longer advertises a bona fide business conducted upon the premises shall, upon notification by the Vieux Carre Commission or its agent (who is hereby authorized to so proceed), be taken down, removed or obliterated within five (5) days after such notification. Failure to comply on the part of the owner, occupant, agent or person having the beneficial use of any building or premises upon which such sign may be found shall subject such person to the penalty provided in Section 1-6 of the City Code."

³ Pertinent provisions of L.R.S. 9:5625 as they apply to the instant matter are as follows:

Esplanade NOLA claimed that the billboard had been located on the property in its current form since at least 1963; that from 1985, public surveys have documented the existence of the billboard; and that the billboard was present when the individual plaintiffs purchased their respective properties. Esplanade NOLA noted that although the current version of L.R.S. 9:5625(G)(3)(a) says that the prescriptive period does not begin to run until the City receives notice of a violation, Subparagraph G(3)(b) provides that the provisions of Subparagraph G(3)(a) “shall not divest a person of any right obtained as a result of prescription that accrued before August 15, 2007.” Therefore, Esplanade NOLA claimed it did not have to provide notice because based on the length of time the billboard had been in existence, the billboard had already obtained legal non-conforming use

A. (1) All actions civil or criminal, created by statute, ordinance, or otherwise, except those actions created for the purpose of amortization of nonconforming signs and billboards enacted in conformity with the provisions of R.S. 33:4722, which may be brought by parishes, municipalities, or their instrumentalities or by any person, firm, or corporation to require enforcement of and compliance with any zoning restriction, building restriction, or subdivision regulation, imposed by any parish, municipality, or an instrumentality thereof, and based upon the violation by any person, firm, or corporation of such restriction or regulation, must be brought within five years from the first act constituting the commission of the violation.

G. (1) The provisions of this Section shall not apply to property or areas which have been identified as historic districts, historical preservations or landmarks by any historic preservation district commission, landmarks commission, or the planning or zoning commission of a governing authority; however, the prescriptive period within which to bring an action to enforce a zoning restriction or regulation or a violation thereof shall be ten years from the first act constituting the commission of the violation.

(2) The provisions of this Subsection shall apply only to zoning or planning restrictions made by a municipality or parish, or other municipal or parish entity responsible for zoning, planning, or building restrictions.

(3)(a) Notwithstanding the provisions of Paragraph (1) of this Subsection, the prescriptive period set forth therein regarding any action to enforce a zoning or regulation or a violation thereof in the Vieux Carre section of the city of New Orleans shall begin to run on the date the properly authorized agency of the city actually receives written notice of the violation.

(b) The provisions of Subparagraph (a) of this Paragraph shall not divest a person of any right obtained as a result of prescription that accrued prior to August 15, 2007.

status under either the 1997 or 2001 versions of L.R.S. 9:5625 (G)⁴ by August 2007. Esplanade NOLA asserted that under those versions, there were no notice requirements; instead, the prescriptive periods ran from the first act constituting the alleged zoning violation.

In the interim, the City of New Orleans (City) filed a Motion For Leave To File Petition For Intervention. In its supporting memorandum, the City maintained that through the Department of Public Safety and Permits and/or its other departments, that the City has control of zoning and land use regulations within the City. Given the City's power to enact and enforce zoning and land use restrictions, its authority to enact ordinances regarding billboards, and the fact that the billboard's legal and non-conforming status has not been officially determined, the City stated that it was entitled to intervene in the lawsuit to enforce its rights relative to any damages alleged by VCPORA. In response to VCPORA's claim that the VCC had declared the billboard illegal, the City acknowledged that in its March 12, 2013 meeting that the Staff of the VCC recommended that "the unsightly and non-conforming billboard be removed as a condition of this project." However, the City averred that at no time did the VCC declare that the billboard was illegal. Indeed, the City cited the June 11, 2013 minutes from the VCC

⁴ Subsection (G)(1) in effect in 1997 provided in part that: "The provisions of this Section shall apply to property or areas which have been identified as historical preservations or landmarks by any historic preservation district commission, landmarks commission, or the planning and/or zoning commission of a governing authority; however, **the prescriptive period within which to bring an action to enforce a zoning restriction or regulation or a violation thereof shall be five years from the first act constituting the commission of the violation.**" (emphasis added).

Subsection(G)(1) in effect in 2001 provided in part that: "The provisions of this Section shall not apply to property or areas which have been identified as historic districts, historical preservations or landmarks by any historic preservation district commission, landmarks, commission, or the planning or zoning commission of a governing authority; however, **the prescriptive period with which to bring an action to enforce a zoning restriction or**

wherein the Staff stated- “It has been confirmed that the billboards can remain as an existing legal non-conforming use, and are considered general advertising.”

The City said that this finding was in response to an inquiry by the VCC to the Director of Safety and Permits and the Zoning Administrator. The City represented that the proper procedure to challenge a decision by the Director of Safety and Permits as to whether a billboard is legally non-conforming is an appeal to the Board of Zoning Adjustments. The plaintiffs did not utilize this procedure in the present matter; as a result, the City stated that VCPORA’s lawsuit was not timely.

The trial court heard argument on Esplanade NOLA’s exception of prescription on February 26, 2014. At the time of argument, the trial court had not acted on the City’s motion to intervene and the City was not represented at the proceedings.

Esplanade NOLA presented testimony and offered evidence from its owner and four of the individual plaintiffs as to the length of time that the billboard had been in existence. It reiterated its argument that the billboard had achieved legal non-conforming use status before August, 2007; and consequently, that VCPORA’s claim had prescribed.

VCPORA countered that the prescriptive periods discussed in L.R.S. 9:5625 do not apply to its complaint because the language of the statute expressly excepts “those actions created for the purpose of amortization of non-conforming signs and billboards enacted in conformity with the provisions of R.S. 33:4722.” Moreover, VCPORA urged that the trial court should reject Esplanade NOLA’s position that

regulation or a violation thereof shall be ten years from the first act constituting the commission of the violation.” (emphasis added).

the billboard had acquired legal non-conforming use status because Esplanade NOLA did not meet its burden of proof to show that the billboard was ever lawfully erected.

At the conclusion of argument, the trial court granted Esplanade NOLA's exception of prescription. This appeal followed.

LAW/DISCUSSION

In its appeal, VCPORA argues that the trial court erred when it interpreted L.R.S. 9:5625 to apply to plaintiffs' action regarding a non-conforming billboard, when the statute plainly states that it does not apply to actions concerning billboards; and that the ruling was erroneous because it necessarily suggests that Esplanade NOLA's billboard was "erected in compliance with parish or municipal regulations at the time of erection..." when in fact, Esplanade NOLA failed to carry its burden of proof on that issue. In opposition, Esplanade NOLA re-asserts that the plain language of L.R.S. 9:5625(G) shows that it applies to the present billboard because the billboard is located in the Vieux Carre section of the City and the statute covers all types of zoning violations within the Vieux Carre. It reiterates that the evidence proves that the billboard has been continuously located on Esplanade NOLA's property since at least 1963 and hence, has achieved legal non-conforming use status; as such, VCPORA's action has prescribed pursuant to L.R.S.9:5625.

Based on this Court's review of the record, however, we cannot address the merits of either party's positions without first noticing the joinder of the City as a party to this litigation.

L.C.C.P. art. 641 provides that a person shall be joined as a party in the action when either:

1) In his absence complete relief cannot be accorded among those already parties.

2) He claims an interest relating to the subject matter of the action and is so situated that the adjudication of the action in his absence may either:

a) As a practical matter, impair or impede his ability to protect that interest.

b) Leave any of the persons already parties subject to a substantial risk of incurring multiple or inconsistent obligations.

In the matter before us, the City requested leave to intervene in VCPORA's complaint, citing the City's authority to enact and enforce zoning and land use restrictions, as well as its power to enact ordinances regarding legal non-conforming billboards. It contested VCPORA's claim that the billboard at issue had been found to be illegal. Instead, it maintained that although the Director of Safety and Permits had rendered no official decision on the legal status of this billboard, the Director had confirmed in an inquiry from the VCC that the "billboards could remain as an existing legal non-conforming use." The City argued that in the event VCPORA contends that the billboard is not a legal non-conforming billboard, then, the proper procedure to challenge a decision by the Director of Safety and Permits is to appeal to the Board of Zoning Adjustments as specified by Code of Ordinances Sec. 134-170.⁵ Inasmuch as VCPORA had not followed this procedure, the City asserted that the filing of its lawsuit in Civil District Court was not timely.

⁵ Code of Ordinances Sec. 134-170 states:

Any person aggrieved by the decision of the director of the division of regulatory inspections in the enforcement of this article shall be entitled within 30 days from the date of such decision to appeal to the board of standards and appeals under the same procedure described for appeals in the city building code, Ordinance No. 11,625 M.C.S., and if aggrieved by the decision of the board of standards and appeals above provided shall be entitled within 30 days from the date of such decision of the board of standards and appeals to appeal to the council for a hearing on such decision to determine if such decision appealed from is justified in the exercise of reasonable and sound discretion.

Clearly, the City has demonstrated a substantial interest in this litigation; and complete relief cannot be afforded to the litigants without its joinder. In particular, this Court notes that whether VCPORA even has a cause of action rests on whether the billboard is illegal; concomitantly, whether Esplanade NOLA's exception of prescription can be maintained turns on whether the billboard achieved legal non-conforming use status. Moreover, the City, as even acknowledged by VCPORA, has the authority to pass laws regarding the legality of billboards in the Vieux Carre and the power to implement procedures to determine the legality of the billboards. Accordingly, the City is an indispensable party to this litigation and the trial court should have ruled on its motion to intervene before it heard argument on and granted Esplanade NOLA's exception of prescription.

L.C.C.P. art. 927 provides that the preemptory exception of nonjoinder of an indispensable party may be noticed by either the trial court or appellate court on its own motion. *See Edmonson v. Abell*, 423 So.2d 100, 103 (1982). The circumstances and issues involved in the present matter compel this Court, upon its own motion, to notice the joinder of the City.

Wherefore, based on the foregoing reasons, the judgment granting the exception of prescription is vacated and the matter is remanded to the trial court to act on the City's motion to intervene and to permit its joinder prior to any re-hearing on the exception of prescription or consideration of the merits of plaintiffs' action.

VACATED AND REMANDED

