19-P-566 Appeals Court

MICHAEL J. MARONEY, trustee,[1] & another[2] vs. PLANNING BOARD OF HAVERHILL & others.[3]

Essex. February 5, 2020. - June 15, 2020.

Present: Hanlon, Wendlandt, & Englander, JJ.

Building Permit. Municipal Corporations, By-laws and ordinances, Building inspector, Enforcement of building code. State Building Code, Criminal penalty. Zoning, Enforcement, Criminal penalty. Notice. Moot Question. Practice, Civil, Summary judgment, Moot case, Counterclaim and cross-claim.

Civil action commenced in the Superior Court Department on July 23, 2015.

The case was heard by Christopher K. Barry-Smith, J., on a motion for summary judgment, and a motion for reconsideration was considered by him; motions for assessment of damages and attorney's fees were heard by Shannon Frison, J., and the entry of judgment was ordered by her.

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[1] Of the Premiere Realty Trust.

[2] Maroney Construction Company, Inc.

[3] William Pillsbury, as the economic development and planning director of Haverhill; Robert E. Ward, as deputy director of the public works department of Haverhill, water/wastewater divisions; and Richard Osborne, as building inspector of Haverhill.

David R. Kerrigan (Alexander R. Zwillinger also present) for the plaintiffs.

James B. Peloquin (Anthony V. Bova, II, also present) for the defendants.

ENGLANDER, J. The plaintiffs, entities owned or controlled by Michael J. Maroney (collectively, Maroney or plaintiffs), were the developers of a fifty-lot residential subdivision (property) in the city of Haverhill (city). When Maroney was part way through the subdivision build out, with many of the homes already completed, city officials stopped issuing the necessary permits for the remaining subdivision lots. The city[4] contended that Maroney had to complete a water pressure booster station before building on the lots in question, and that he had not done so. Maroney then brought this suit in Superior Court, seeking, among other things, relief in the nature of mandamus to compel the appropriate officials to issue the permits. Maroney also began building on several of the lots for which he did not have permits. The city building inspector issued cease and desist orders, and counterclaimed in this action for civil penalties[5] due to the unauthorized building.

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[4] We refer to the defendants, all entities and officials of the city, collectively as city.

[5] Although we are here discussing civil penalties, they are often described as "fines," both in the case law and the city's correspondence.

A Superior Court judge entered summary judgment for the city on Maroney's affirmative claims, and also granted the building inspector summary judgment on his counterclaims. At a subsequent damages hearing before a different judge (damages judge), the building inspector sought fines of $1,300 per day for each unauthorized build, but notably, only for time periods between when Maroney commenced construction and the dates the building inspector sent the cease and desist orders. The damages judge entered judgment on the city's counterclaims in the amount of $970,206.82, inclusive of prejudgment interest.

Maroney appeals. We dismiss the appeal from the portion of the judgment dismissing Maroney's claims, as the claims he now presses have become moot because he no longer owns the property, having lost it to foreclosure. We reverse the judgment on the counterclaims, however, because the building inspector did not follow the required procedures to impose such fines.

Background. The Haverhill city council granted Maroney a special permit for a cluster development in April of 2009, and in September of 2009 the city's planning board approved Maroney's definitive subdivision plan. Water pressure had been identified early on as an issue for some of the lots. To remedy that concern, Maroney proposed to install a water pressure booster station (water booster station), to service portions of the development at higher elevations (the property was

apparently quite hilly). It is undisputed that both the special permit and the planning board's subdivision approval incorporated by reference documents that required construction of a water booster station.

Once the planning board approved the definitive subdivision plan, the plaintiff began building out some of the subdivision. There were two main roads in the subdivision, "Back Nine Drive" and "Front Nine Drive." The lots on Back Nine Drive were considered "serviceable," in that they did not require the water booster station to meet State and local water pressure standards. Maroney started by building out the lots on Back Nine Drive. He did not build the water booster station in advance.

In order to obtain permits for a particular lot, the planning board first had to release the lot for construction and sale. Thereafter, Maroney had to submit to the city engineer a site plan for the lot, and the site plan had to be approved by several city departments, including the water department. Once the site plan had all the necessary approvals, the city building inspector could issue the permits to build. Maroney and the city went through the above process for each of the sixteen lots on Back Nine Drive; each lot was released by the planning board, received the site plan approvals, obtained foundation and building permits, and houses were completed. Maroney and the

city then followed the same process for thirteen lots on Front Nine Drive. Because these lots all were considered serviceable, Maroney accomplished this too without building the water booster station. When Maroney attempted to develop additional Front Nine Drive lots that the water department considered to have insufficient water pressure, however, the water department refused to sign off on the site plans until the water booster station was constructed. Maroney's applications for these lots accordingly stalled.

Maroney filed this action in Superior Court in July of 2015. Maroney asserted that since March of 2015, he had requested site plan approvals and permits for six additional lots (and an adjacent "maintenance building") that the city had not acted upon. Maroney claimed that he was entitled to approvals and permits for those lots. His position was that pursuant to the planning board's subdivision approval and other agreements with the city, the water booster station did not have to be completed prior to construction, but only prior to occupancy. Relevant here, Maroney sought mandamus, injunctive, and declaratory relief.[6]

[6] The declaratory judgment count sought, among other things, a declaration that the plaintiffs had fulfilled all requirements necessary for site plan approval, foundation permits, and building permits for the maintenance building and six additional lots. It also sought a declaration that the plaintiffs were allowed until October 1, 2016, to complete construction of the

Maroney's request for preliminary injunctive relief was denied. The city thereafter moved for summary judgment, which the motion judge granted. The gist of the judge's reasoning was that the planning board's site plan approval and related agreements did not bind the city's water department, which was a separate entity. Nor did it prevent the water department from enforcing State law or its own regulations regarding water pressure and fire hydrant flow. The motion judge concluded that where Maroney had not built the water booster station, the water department was justified in withholding its endorsement, and Maroney was not entitled to the permits.

The fines and counterclaim. Maroney not only filed suit against the city, but also went forward and began to build on certain of the unpermitted lots. By letters dated July 15, 2015, and July 29, 2015, the city building inspector ordered Maroney to cease and desist. The letters also warned that, "[i]f you ignore this order and continue work on these lots and any other unpermitted lots, additional penalties in the form of monetary fines will [be] sought against you in the amount of [$]1,000 per structure, per day the violation(s) exist." The

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water booster station, and a declaration barring the city departments "from denying further site plan, foundation, building, occupancy or water permits, tie-ins or service" due to the absence of a water booster station.

letters concluded by informing Maroney that he could appeal the order to the Haverhill zoning board of appeals. Maroney ceased working on the lots.

Over one year later, on August 26, 2016, the building inspector sent another letter to Maroney -- this one addressed the unauthorized use of the maintenance building, which was one of the unpermitted structures. The inspector noted that the use created a nuisance and put Maroney's staff at risk of harm. He concluded by warning: "Let there be no misunderstanding, this building is not to be used for storage, personal occupants and will be placarded today August 26, 2016. Failure to comply with this order or ignoring it will result in [the] City of Haverhill seeking additional action against you subject to $1,000 each day of continuing use." There is no allegation that use of the structure continued after the August 26, 2016 letter issued.

After Maroney filed this lawsuit, the city building inspector counterclaimed for fines, pursuant to both the State building code and Haverhill's bylaws. The motion judge granted summary judgment for the building inspector on the counterclaims, noting that Maroney did not contest that he began construction on lots for which he had no permit. The counterclaims then went forward to a hearing on damages. The city sought fines under the State building code of $1,000 per day for each violation at each lot, and similarly sought fines

of $300 per day for each violation of the local bylaws. The city only sought fines for violations on days before the July 15, 2015 letter, and before the August 26, 2016 letter regarding the maintenance building. Over Maroney's objections the damages judge awarded the full amount of the fines sought. Maroney appeals from the judgment on both his affirmative claims, and the counterclaims.

Discussion. Standard of review. "In ruling on a summary judgment motion, the judge views the evidence and all reasonable inferences therefrom, 'in the light most favorable to the nonmoving party.'" Jenkins v. Bakst, 95 Mass. App. Ct. 654, 656-657 (2019), quoting Premier Capital, LLC v. KMZ, Inc., 464 Mass. 467, 475 (2013). "We review a grant of summary judgment de novo." Jenkins, supra, quoting Merrimack College v. KPMG LLP, 480 Mass. 614, 619 (2018).

We first address Maroney's claims, and then turn to the city's counterclaims for fines.

1. Maroney's claims. Although Maroney's complaint identified several different causes of action, the fundamental remedies he sought were a declaration that he was entitled to the site plan approvals and permits he sought, and an order directing that the city issue those approvals and permits.[7] As

[7] We note, as did the motion judge, that Maroney did not pursue any administrative remedies before filing this suit.

noted, Maroney is no longer the owner of the property, having lost it through foreclosure. Maroney accordingly concedes that his requests for mandamus and injunctive relief are now moot. He is no longer the proper party to seek the permits, or to proceed with constructing either the water booster station or the rest of the subdivision. Moreover, although Maroney's complaint contained claims for misrepresentation, breach of contract, and breach of the implied covenant of good faith -- any of which, if viable, might have supported a claim for damages -- Maroney has not pursued those claims on this appeal.[8]

The only remaining claim that Maroney appears to pursue is his claim for a declaratory judgment. By that claim Maroney seeks a declaration that he met the qualifications for the outstanding permits and that the city should have issued them. As with the requests for mandamus and injunctive relief,

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Because the city did not argue that exhaustion was required and because of the result we reach, we need not consider whether some or all of Maroney's claims could or should have been dismissed for failure to exhaust administrative remedies. See Quincy v. Planning Bd. of Tewksbury, 39 Mass. App. Ct. 17, 20 (1995).

[8] In a footnote in their brief, the plaintiffs assert that "[d]ismissal of [their] breach of contract and breach of implied covenant of good faith and fair dealing claims were likewise improper." This general assertion, without citation to authority, fails to rise to the level of appellate argument. See Mass. R. A. P. 16 (a) (9), as amended, 481 Mass. 1629 (2019). The claims are accordingly waived. Nelson v. Salem State College, 446 Mass. 525, 527 n.2 (2006).

however, the declaratory judgment claim is moot because Maroney no longer has a legal interest to vindicate. See Commissioners of the Bristol County Mosquito Control Dist. v. State Reclamation & Mosquito Control Bd., 466 Mass. 523, 534 (2013), quoting Libertarian Ass'n of Mass. v. Secretary of the Commonwealth, 462 Mass. 538, 547 (2012) ("[D]eclaratory relief is reserved for real controversies and is not a vehicle for resolving abstract, hypothetical, or otherwise moot questions").

In general, our courts will not adjudicate a dispute merely because a party is interested in what answer the courts will give. Indeed, the declaratory judgment act itself contains an express "actual controversy" requirement. G. L. c. 231A, § 1. We have said that "[a]n 'actual controversy' exists when there is a 'real dispute caused by the assertion by one party of a legal relation, status or right in which he has a definite interest, and the denial of such assertion by another party also having a definite interest in the subject matter, where the circumstances attending the dispute plainly indicate that unless the matter is adjusted such antagonistic claims will almost immediately and inevitably lead to litigation'" (emphasis added). Wells Fargo Fin. Massachusetts, Inc. v. Mulvey, 93 Mass. App. Ct. 768, 771 (2018), quoting Bunker Hill Distrib., Inc. v. District Attorney for the Suffolk Dist., 376 Mass. 142, 144 (1978). Having lost the property to foreclosure, Maroney

has no legal interest in obtaining the permits at issue, and this court should not adjudicate an issue where one of the purported parties no longer has a live stake. See Blake v. Massachusetts Parole Bd., 369 Mass. 701, 703 (1976) ("litigation is considered moot when the party who claimed to be aggrieved ceases to have a personal stake in its outcome").

2. Fines. Maroney also challenges the judgment on the city's counterclaims. Maroney does not contest that he violated both the State building code and the city bylaws by building on the lots without the required permits; rather he challenges the procedure by which the fines were imposed and calculated. Maroney's procedural arguments have merit.

The procedure the city employed was as follows. The building inspector first issued two cease and desist letters in July of 2015.[9] Those letters did not identify any specific fine amount, and did not state that fines would be imposed for actions that Maroney had taken before the letters had issued. Indeed, the letters do not appear to address fines for past acts; they each employ the phrase, "[i]f you ignore this order and continue work on these lots, . . . additional penalties in the form of monetary fines will be sought against you . . ."

[9] The second July 2015 letter was merely a corrected version, which changed the numbers of certain of the lots involved.

(emphasis added). Maroney ceased building on the lots after receiving the 2015 letters.

After sending the July 2015 letters, the building inspector did nothing further until he moved for leave to file counterclaims in this lawsuit, approximately one year later.[10] The counterclaims stated, for the first time, that the building inspector would be seeking very substantial fines for Maroney's building code and local bylaws violations. Thereafter, in his memorandum of law filed in advance of the damages hearing -- on July 30, 2018, some three years after the first cease and desist letters -- the building inspector disclosed that he sought a total of $687,700 in fines.

The details of the building inspector's calculation are set forth in the margin. What is important for present purposes is: 1) the calculation assessed fines under both the State building code (at $1,000 per day per violation) and the city bylaws (at $300 per day per violation), and 2) the calculation sought daily fines only for time periods from when Maroney commenced construction (or use) to the dates of the cease and desist letters.[11]

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[10] As noted, in August of 2016 the building inspector also sent a cease and desist letter regarding the unauthorized use of the maintenance building. Maroney stopped using the maintenance building after receiving the letter.

Maroney opposed the city's assessment, arguing, among other things, that the city had not followed the correct procedures to impose such fines. The damages judge did not address Maroney's arguments. We conclude that the procedures employed did not comport with State law. As the procedures differ between the local bylaws and the State building code, we address each in turn.

a. The local bylaws. According to the summary judgment decision, § 255-66(A) of the Haverhill bylaws provides that "it is unlawful for any person to build a structure without first applying for and receiving a permit from the City's building inspector." The building inspector's counterclaim asserts that violators of the local bylaws may be fined up to $300 per day for each offense, pursuant to § 255-66(A) of the bylaws. Because our case law demonstrates that certain required

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[11] In its memorandum in support of an assessment of damages, the city alleged that the plaintiffs committed eight separate violations of the State building code on five lots (as to three of the lots, it asserted two violations per lot), and eight corresponding violations of the Haverhill zoning bylaws, on each day from June 10, 2015, to the date of the first cease and desist order, July 15, 2015. That is a total of thirty-five days, times eight violations, times $1,300 dollars per day.

In addition, the city sought fines for the unpermitted use of the maintenance building. Because Maroney had testified that the use began in "the winter," the building inspector assessed fines for 249 days, from December 21, 2015 (the first day of winter), through the date of the August 26, 2016 letter. Again, fines were assessed at $1,300 per day.

procedures were not complied with here, we assume the bylaw is as asserted by the city, and address the procedures that the city employed.

The zoning act, G. L. c. 40A, § 7, authorizes a town to impose penalties for violation of its zoning bylaws. Commonwealth v. A. Graziano, Inc., 35 Mass. App. Ct. 69, 70 n.1 (1993). The method for enforcing such violations is not spelled out in c. 40A, however. This court addressed the enforcement procedures for seeking a civil fine in Burlington Sand & Gravel, Inc. v. Harvard, 31 Mass. App. Ct. 261, 265 (1991). In that case the plaintiff landowner had sought a declaration that it was acting in compliance with the town of Harvard's zoning bylaws, and Harvard had counterclaimed for an assessment of fines for violating the bylaws -- just as Haverhill did here. Id. at 262-263. The Superior Court in Burlington Sand & Gravel found the landowner in violation, and awarded the fines. Id. at 263. We reversed, holding that c. 40A, § 7, did not provide a mechanism to seek civil fines for violations of a zoning bylaw in Superior Court:

> "[A] city or town may enjoin a violation of a zoning by-law by bringing an action in the Superior Court pursuant to G. L. c. 40A, § 7. If a city or town decides to seek a fine for a zoning by-law violation, however, it must proceed by a complaint in a District Court or by an indictment in the Superior Court under G. L. c. 40, § 21. If the city or town has a relevant ordinance or by-law providing for noncriminal dispositions, it may use the procedures outlined in G. L. c. 40, § 21D."

Id. at 265.[12]

Burlington Sand & Gravel thus established that a counterclaim in a civil action is not the proper route for imposing civil penalties allowed under a local zoning bylaw. 31 Mass. App. Ct. at 264-265. Instead, the city was obliged to follow the procedure set forth in G. L. c. 40, § 21D, or to pursue a criminal proceeding. A proceeding under § 21D is commenced by providing written notice to the offender, to appear before the clerk of the District Court no later than twenty-one days after the date of such notice. In lieu of appearance, the offender can pay the fine set forth in the notice. Manifestly, the jurisdictional and notice provisions of c. 40, § 21D, were not followed here. The building inspector's July 2015 and August 2016 letters were not notices under § 21D; neither mentioned the District Court, nor indicated that fines were to be imposed for actions that had already occurred. More to the point, however, under Burlington Sand & Gravel, supra at 265, the city simply could not initiate the imposition of fines for violations of the local bylaws by counterclaim in Superior

[12] General Laws c. 40, § 21, provides that "[n]otwithstanding the provisions of any special law to the contrary, fines shall be recovered by indictment or on complaint before a [D]istrict [C]ourt, or by noncriminal disposition in accordance with [§ 21D]."

Court. The civil penalties imposed for violations of the local bylaws must be reversed.

b. State building code. The city also failed to follow proper procedures to impose the civil penalties it sought for violations of the State building code. Such civil penalties are authorized by G. L. c. 148A, § 2, which provides in pertinent part:

> "(a) . . . any local code enforcement officer, empowered to enforce violations of the [S]tate building code . . . may, as an alternative to initiating criminal proceedings, give to the offender a written notice of a code violation. Such notice shall contain . . . the specific offense charged and the time and place of the violation. . . .
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> "(b) . . . If the notice is for [one] or more code violations, the code enforcement officer shall indicate on the notice the scheduled assessment for each violation alleged. If the notice of violation is for a continuing condition, the code enforcement officer shall indicate that the condition must be corrected within [twenty-four] hours of receipt of such notice. . . .
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> "(c) If the notice is for [one] or more code violations, the alleged violator shall return the notice of violation . . . to the municipal hearing officer and shall, within [twenty-one] days, either: (1) pay in full the scheduled assessment; or (2) request a hearing before the municipal hearing officer."[13]

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[13] General Laws c. 148A, § 2, was enacted in 2004 to provide "an alternative to initiating criminal proceedings" to remedy State building code violations. Prior to the enactment of c. 148A, § 2, the remedy for State building code violations was found in G. L. c. 143, § 94 (a), which provides, "Whoever violates any provision of the [S]tate building code . . . shall be punished by a fine of not more than [$1,000] or by imprisonment for not more than one year, or both, for each such violation. Each day during which a violation exists shall constitute a separate offense." See 780 Code Mass. Regs. § 114 (2017). This section was construed as authorizing only criminal

The civil procedure set forth in c. 148A, § 2, much like the procedure set forth in c. 40, § 21D, is designed (1) to ensure that an alleged violator has adequate notice of the violation alleged and the amount of any proposed fine, and (2) to provide a relatively efficient administrative process for either paying the assessed fine, or disputing it and obtaining a hearing. It is readily evident that the city did not follow this procedure, either. Most significantly, the July 2015 and August 2016 letters did not contain a "scheduled assessment"; they did not advise Maroney of the amount he was being fined -- or that he was then being fined at all. Rather, the most reasonable reading of the letters is that Maroney would not be fined unless he "ignore[d] this order and continue[d] work on these lots." Maroney accordingly could not have followed the procedure of c. 148A, § 2 (c), by either paying the "scheduled assessment"[14] or requesting a hearing -- there was no "scheduled assessment" in the letters.[15]

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penalties. See Commonwealth v. Porrazzo, 25 Mass. App. Ct. 169, 172 (1987) (authorizes criminal prosecution). See also Commonwealth v. Eakin, 43 Mass App. Ct. 693, 697 (1997), S.C., 427 Mass. 590 (1998).

[14] We note that the term "scheduled assessment" is a statutorily defined term. See G. L. c. 148A, § 1.

[15] We reject the building inspector's contention that the reference in his July letters to "additional" penalties provided notice that the city would assess fines for periods prior to the letters being sent. Such is not a natural reading of the

The city contends that because Maroney was an experienced builder, he should have known that fines would be imposed when he knowingly proceeded without a building permit, and that strict compliance with the notice requirements for both the State building code and the local bylaws was unnecessary. We disagree. The statutory procedures in question serve more than a salutary notice function; they are designed to provide not only appropriate notice, but an opportunity to be heard with administrative efficiency. We have previously refused similar suggestions that we relax the notice provisions of a related statute, G. L. c. 143, § 51 -- which applies to criminal prosecutions for State building code violations. See Commonwealth v. Duda, 33 Mass. App. Ct. 922, 923 (1992); Commonwealth v. Porrazzo, 25 Mass. App. Ct. 169, 175-177 (1987). Analogously to Porrazzo, supra, the notice provisions at issue here are prerequisites to the city pursuing civil penalties for State building code or local bylaw violations, and the failures here are substantive.

We acknowledge that the result here is unappetizing, as the city almost certainly could have fined Maroney for his clear violations of the building code and local bylaws had it followed proper procedures. Because we decide the case as we do, we need

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entirety of the letters, and in any event the letters do not set forth the amount of any fine for the prior violations.

not reach the additional questions of whether, and how, civil penalties may be imposed "retroactively" (that is, for past conduct), for violations of the State building code or local bylaws. We assume, although we need not decide, that fines may be imposed for actions that took place prior to the issuance of a notice or cease and desist order. A person should not be able to violate the State building code and local bylaws without risk of civil penalty, so long as they fall into line once they are caught. The extent to which such retrospective fines can be imposed on a daily basis, as the city attempted to do here -- and if so, for how far into the past -- are questions for another day. All we hold here is that the city did not follow the necessary procedures to impose the fines at issue.

The appeal from so much of the judgment that dismisses the plaintiffs' claims is dismissed as moot. So much of the judgment that awards monetary penalties to the city is reversed.

So ordered.