[Cite as *N. Royalton v. Morgan*, 2010-Ohio-4355.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94108

CITY OF NORTH ROYALTON

PLAINTIFF-APPELLANT

vs.

DAVID W. MORGAN, ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-677135

BEFORE: Blackmon, J., Kilbane, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: September 16, 2010

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PATRICIA ANN BLACKMON, J.:

{¶ 1} Appellant city of North Royalton ("City") appeals the trial court's decision denying its request for a permanent injunction and assigns the following errors for our review:

> **"I. The trial court erred in finding that the Morgans' physical training facility was a permitted use on a lot zoned for residential use and in denying injunctive relief to North Royalton."**
>
> **"II. The trial court erred when it entered a judgment that failed to find Appellees' business violated safety requirements and as such was a nuisance under North Royalton's Zone Code."**

{¶ 2} Having reviewed the record and pertinent law, we affirm the trial court's decision. The apposite facts follow.

{¶ 3} In 2005, David Morgan, a retired teacher and coach, formed Enhanced Fitness & Performance to educate, inform, and promote physical fitness. In 2006, he began operating the physical fitness business in his home in North Royalton, Ohio.

{¶ 4} On November 24, 2008, the City filed a complaint seeking to enjoin Morgan from operating the physical fitness facility in his residence and to declare the business a nuisance. The City specifically alleged that Morgan violated the planning and zoning code by operating his business within an area zoned "[S]ingle Family Residential R1A" pursuant to North Royalton Codified Ordinances Sections 1268.01, 1268.03, and Chapter 1270.

{¶ 5} On May 26, 2009, the trial court convened a preliminary injunction hearing, which, by agreement of the parties, was later converted to a trial on the merits. They also stipulated to numerous facts.

Trial

{¶ 6} At trial, Morgan testified that his business provides specialized fitness instruction to student athletes and adults. Morgan operated his business out of his residence, but stated that he also conducted lectures, clinics, and workshops outside his home. Morgan meets with clients at the running tracks located in Independence and North Royalton, and conducts training at a commercial facility in which he has a 1% ownership interest.

{¶ 7} Morgan primarily conducts the physical fitness sessions in the basement of his home, where high powered physical fitness training equipment is

located. He had at times conducted sessions outside in his yard, but discontinued this practice when neighbors complained. Morgan also instructs clients at specific times during the weekdays.

{¶ 8} Morgan had approximately 1800 client sessions in 2008. His residence was not structurally altered to accommodate the business. There is no sign advertising the business, and he is the only person working in his home-based business.

{¶ 9} Rito Alvarez, the City's Building Commissioner, testified that since Morgan's property is located in a residential zoning district, his physical fitness business is not permitted. Alvarez stated that Morgan's business would be permitted in locations zoned for business. Alvarez stated, however, that it was not illegal to have a business in a location zoned residential.

{¶ 10} Alvarez stated that it was not apparent from looking at the Morgans' residence that a business was located in the property. Alvarez only became aware of Morgan's business because of complaints of traffic in and out of the property, as well as multiple cars being parked in and around the property. Alvarez had driven by Morgan's residence on three separate occasions, but noticed no activity that violated the City's ordinance.

{¶ 11} David Schuster, who lives across the street from Morgan, testified that since Morgan moved into the neighborhood, he has noticed an increase in traffic. Morgan stated that the number of cars parked on the street increased. Schuster had observed activity outside Morgan's home involving the use of

various training equipment and ropes, weights, and a tire that was dragged up and down the driveway.

{¶ 12} Schuster's main objection to the location of the physical fitness business in Morgan's home is the increase in traffic and the outside practice sessions. Schuster never confronted Morgan, but complained to the City. Schuster stated that sometime in July or August 2008, the number of cars decreased and the outside practice sessions ceased entirely.

{¶ 13} Robert Klimo, another neighbor, also testified about the increased number of cars parked on the street and about practice sessions being held outside Morgan's residence. Klimo sent an email to his councilman, but never confronted Morgan. Klimo stated that the number of cars parked on the street have decreased and Morgan no longer conducts the outside practice sessions.

{¶ 14} Joseph Garcia, who lives next door to Morgan, testified that he did not notice any significant increase in car traffic or in the noise level as a result of Morgan's home-based fitness enterprise. Garcia stated that Morgan's home-based business did not change the residential character of the neighborhood, because there was no outward evidence of a business being conducted.

{¶ 15} On September 25, 2009, the trial court ruled that Morgan's business did not violate the City's ordinance as long as it was confined to the interior of the home and the business traffic did not exceed approximately 1750 appointments per year.

Denial of Injunctive Relief

{¶ 16} In the first assigned error, the City argues the trial court erred when it denied its request for an injunction by finding that Morgan's home-based fitness business was a permitted use on a lot zoned for residential use.

{¶ 17} Injunctions are an extraordinary remedy, equitable in nature, and their issuance may not be demanded as a matter of right. *KLN Logistics Corp. v. Norton*, 174 Ohio App.3d 712, 2008-Ohio-212, 884 N.E.2d 631, citing *Perkins v. Quaker City* (1956), 165 Ohio St. 120, 133 N.E.2d 595, syllabus. The issue whether to grant or deny an injunction is a matter solely within the discretion of the trial court and a reviewing court will not disturb the judgment of the trial court in the absence of a clear abuse of discretion. *Danis Clarkco Landfill Co. v. Clark Cty. Solid Waste Mgt. Dist.* (1995), 73 Ohio St.3d 590, 653 N.E.2d 646, paragraph three of the syllabus. The term "abuse of discretion" connotes more than an error of law or judgment; it implies an unreasonable, arbitrary, or unconscionable attitude on the part of the trial court. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 450 N.E.2d 1140. When applying the abuse-of-discretion standard, a reviewing court is not free merely to substitute its judgment for that of the trial court. *Sinoff v. Ohio Permanente Med. Group* (2002), 146 Ohio App.3d 732, 740, 767 N.E.2d 1251.

{¶ 18} As a preliminary point, we note that under R.C. 519.24, a board of township trustees, a county prosecuting attorney, or a township zoning inspector may file an action for an injunction to prevent any unlawful use of buildings or land. Because R.C. 519.24 grants the injunctive remedy, the township is not

required to plead or prove an irreparable injury or that there is no adequate remedy at law, as is required by Civ.R. 65. *Union Twp. Bd. of Trustees v. Old 74 Corp.* (2000), 137 Ohio App.3d 289, 294, 738 N.E.2d 477.

{¶ 19} Instead, the township must show only that the property is being used in violation of a zoning ordinance. Id. at 295, 738 N.E.2d 477. The township has the burden, however, of proving its case for an injunction by clear and convincing evidence. *Concord Twp. Trustees v. Hazelwood Builders, Inc.* (May 16, 1997), 11th Dist. No. 96-L-075.

{¶ 20} In the instant case, the City argues that Morgan's home-based physical fitness business is prohibited because it fails to meet one of the exceptions specified in North Royalton's Ordinances 1270.03, which states in pertinent part:

> **"(b) Home Professional Offices. An office may be permitted in Residential Districts in the home of a person practicing any recognized professions including, but not limited to an accountant, architect, artist, engineer, lawyer, musician, physician, realtor, appraiser, photographer, planner or mental health counselor * * *.**
>
> **(c) Home Occupations. Gainful home occupations may be permitted in Residential Districts, including dressmaking, interior decorating, arts and craft, or any other similar home occupation, but excluding uses permitted as commercial or industrial uses * * *."**

{¶ 21} The City argues Morgan's home-based business is not permissible under either §1270.03(a) or (b). At trial, the following exchange took place between the trial court and Alvarez, the City's inspector:

“The Court: **I have got a couple of questions. The Home Occupations section, does it provide as follows: ‘Gainful home occupation may be permitted in Residential Districts * * *.’**

The Witness: **Yes.**

The Court: **Okay. Now, could an attorney have an office there, in his home?**

The Witness: **Yes. There’s a previous section before that one.**

The Court: **That says what?**

The Witness: **That deals with home professional services * * *.**

The Court: **Could a masseuse?**

The Witness: **Yes.**

The Court: **A yoga instructor?**

The Witness: **Yes.**

The Court: **Do you have a yoga instructor in your town that have - -**

The Witness: **Not to my knowledge.**

The Court: **But a yoga instructor would be okay?**

The Witness: **Yes, it would be.**

The Court: **And even though a yoga instructor could have 10 or 12 different clients coming at one time to sit on mats, that would be okay?**

The Witness: **Again, when we look at this section of the code, we want to make sure that, one, the impact of what the individual --- that the use for that house is not adversely affecting the neighborhood. It is still a residential neighborhood.**

The Court: It would probably be more of a question of how successful that business is than anything, wouldn't it?

The Witness: Yeah, I would agree to that.

The Court: A successful yoga instructor or attorney or dressmaker, if she has five weddings to make dresses for and everybody is coming over for a fitting or something like that, they could have 10 or 12 cars coming over at one time." Tr. 77-79.

{¶ 22} Here, Alvarez admitted that a yoga instructor, who could easily have a dozen people showing up for classes at the same time, could operate their business out of their home. The trial court's query about a yoga instructor illustrates the parallel nature of both home-based businesses, yet one is deemed acceptable and the other is alleged to have violated the City's zoning ordinance. Both addresses the physiological well being of their respective clients and both businesses could arguably generate vehicular traffic, with the attendant parking issues that could disrupt the residential nature of any given district.

{¶ 23} At trial, the evidence established that the issues regarding vehicular traffic and the increase in the number of cars being parked on the street, as a result of Morgan's home-based fitness business, had been abated. Further, the evidence established that there was no set guidelines for the number of cars being parked on a residential street. The following exchange took place between the trial court and Alvarez relative to cars parking on a residential street:

"The Court: Okay. Now, the number of cars on the street, that may be a significant problem let's say. Is there any

limitation as to the number of cars that can be parked on a street visiting a particular residence?

The Witness: No. For example, if there was a party there.

The Court: What if somebody has a party every other weekend or every weekend? You might get complaints, but there's nothing that you can do about it?

The Witness: That's correct." Tr. 81.

{¶ 24} We conclude there is no compelling evidence in the record that the trial court abused its discretion in denying the City's motion for injunctive relief. Morgan's home-based physical fitness business is not unlike other home-based businesses, which the City deems permissible, the complained of issues have been abated, and the testimony established that there was no outward evidence to indicate that a business was located in the residence.

{¶ 25} Nonetheless, the City cites *City of Madeira v. Furtner* (July 13, 1994), 1st Dist. No. C-930317, in support of its contention that Morgan's home-based business is not permissible. However, *Madeira* is distinguishable from the instant case. *Madeira* involved an easement where all residents shared equal access and equal responsibilities of a private driveway for ingress and egress. *Madeira* also involved a restriction that stated that "no industry, business, trade, occupation, profession, or commercial activity of any kind is permitted on any lot in the subdivision."

{¶ 26} Here, unlike *Madeira*, Morgan's property involves no easement and no restrictions as discussed above. Thus, the City's reliance on *Madeira* is

misplaced. As such, the trial court did not err when it denied the requested relief. Accordingly, we overrule the first assigned error.

Safety Violation

{¶ 27} In the second assigned error, the City argues Morgan's home-based business violated the City's safety requirement. The City has raised this argument for the first time on appeal. The Ohio Supreme Court has held that "we have long recognized, in civil as well as criminal cases, that failure to timely advise a trial court of possible error, by objection or otherwise, results in a waiver of the issue for purposes of appeal." *RBS Citizens, N.A. v. Zigdon*, Cuyahoga App. No. 93945, 2010-Ohio-3511, quoting *Goldfuss v. Davidson* (1997), 79 Ohio St.3d 116, 121, 679 N.E.2d 1099. As such, we decline to address the second assigned error.

Judgment affirmed.

It is ordered that appellees recover from appellant their costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

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PATRICIA ANN BLACKMON, JUDGE

MARY EILEEN KILBANE, P.J., and
MARY J. BOYLE, J., CONCUR