

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Louis Thomas, :
Appellant :
v. :
: No. 1133 C.D. 2009
: Submitted: December 31, 2009
The City of New Castle Zoning :
Hearing Board :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge
HONORABLE KEITH B. QUIGLEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE PELLEGRINI

FILED: February 1, 2010

Louis Thomas (Thomas) appeals from the order of the Court of Common Pleas of Lawrence County (trial court) sustaining the City of New Castle Zoning Hearing Board's (Board) preliminary objections in the nature of a demurrer and dismissing Thomas' "complaint for mandamus." For the reasons that follow, we affirm.

This case has a long history dating back to 1998. In that year, Thomas appeared before the Board seeking permission to operate an auto repair business in a residential neighborhood zoned R-1 and R-2 under the zoning ordinance. Some years before, the property had been operated as a non-conforming use as the headquarters of a taxi service. The Board issued an order granting Thomas' request to re-establish the existence of this legal non-conforming use subject to several conditions designed to prevent the business from unduly encroaching upon the rights of neighboring homeowners. These conditions included limits to the

business' hours of operation, materials that could be left on the outside of the property, and the number of cars allowed to be parked on the property and adjacent streets.

Several months later, the Board revoked its prior order granting Thomas the conditional right to operate his business because he was in constant violation of numerous conditions imposed by the Board's order. However, the Board then issued a new order on September 29, 1998, re-establishing his legal non-conforming use based on new conditions relating to the same subject matters. The order indicated that if Thomas again failed to meet the conditions, the agreement to grant the non-conforming use status would be void. Nine months later, in 1999, the Board again revoked the non-conforming use status due to continuous violations of the conditions and Thomas' "indifferent recalcitrant attitude" towards the necessity of his compliance with those conditions.

Thomas filed a land use appeal with the trial court, and a *de novo* hearing was held. By order dated August 21, 2001, the trial court indicated that the parties had reached a settlement whereby Thomas' application for a legal non-conforming use of his property as a garage to repair vehicles in a residential-zoned area was granted subject to the conditions of the Board's September 29, 1998 order. The trial court ordered that if Thomas breached any condition of the order, his legal non-conforming use would immediately and automatically terminate and revert to an illegal non-conforming use. The trial court indicated that its order dismissing Thomas' land use appeal was without prejudice and stated that the doctrines of *res judicata* and collateral estoppel would not apply.

Because the Board believed that Thomas continued his uninterrupted violation of the conditions of the 1998 order, it filed a petition for contempt with the trial court. The trial court issued a rule to show cause why he should not be held in contempt, but Thomas failed to respond, and the trial court entered an order making the rule absolute and finding Thomas in indirect civil contempt for violating the court's August 21, 2001 order. It imposed sanctions for contempt but suspended them to allow Thomas to come into compliance with the order. The trial court also allowed the Board to file a motion to reinstate the sanctions if Thomas failed to comply. Because Thomas continued to ignore the conditions, the Board filed a petition for reinstatement of sentence, and the trial court issued a rule to show cause why a bench warrant should not be issued for Thomas to carry out his sentence at the Lawrence County Jail. At the subsequent hearing, the parties agreed to have the petition to reinstate sentence withdrawn and to attempt to resolve the dispute amicably.

The parties were unable to resolve the dispute amicably, as Thomas continued to violate the conditions of the Board's and trial court's orders. The Board again filed a petition to reinstate sentence. It also filed a petition for injunctive relief seeking to enjoin Thomas from operating his business and to immediately remove all cars and any other visible signs of his business from the area. Additionally, it filed another petition for contempt. The trial court, from this point forward with a different judge assigned to the case, determined that the parties had resolved some of the issues and that Thomas had agreed to come into full compliance with the conditions in the August 21, 2001 order. Additionally, by

order of August 2, 2005, the trial court imposed new conditions on Thomas' continued legal non-conforming use.

In November and December 2005, the City of New Castle and the Board (collective, City) again filed for injunctive relief, contending that Thomas had continued to violate the agreements between the parties and the trial court's orders. The City also filed a petition for contempt and a petition for reinstatement of sentence, arguing that Thomas should have his sentence reinstated for his breach of the trial court's orders by consistently and continuously refusing to comply with the conditions set forth in the previous agreements between the parties and the trial court's orders.

Following a hearing and testimony from several of Thomas' neighbors, the trial court issued a decision on December 29, 2006, granting in part and denying in part the City's petitions. It dismissed the City's petition to reinstate sentence because the City failed to specify whether the contempt sought was civil or criminal. The trial court also determined that while Thomas did violate the August 2, 2005 trial court order on one specific date, the City failed to present sufficient evidence to warrant injunctive relief. In doing so, the trial court *sua sponte* held that because the City did not take decisive enough action against Thomas' violations and because the City negotiated with Thomas regarding the conditions he needed to follow, a legal non-conforming use had been created on Thomas' lot.

A subsequent hearing was held to determine whether the contempt sought was civil or criminal in nature. The trial court determined that the contempt sought was criminal, that Thomas indeed was in contempt for violating the trial court's August 2, 2005 order, and that Thomas was subject to a \$300 fine. The City filed a motion to reconsider with the trial court, which was denied by order dated March 1, 2007.

The City then appealed to this Court, captioned as *Louis Thomas v. Zoning Hearing Board of the City of New Castle and the City of New Castle*, No. 429 C.D. 2007. In an unreported decision filed October 26, 2007, this Court reversed the trial court's order to the extent of its *sua sponte* holding, finding that Thomas possessed a valid non-conforming use due to the interactions between Thomas and the Board. We held that the settlement entered into by the parties in the August 21, 2001 consent decree was a contract that was to be enforced according to principles of contract law. As such, the trial court was not free to vary the terms of the contract – which, in this case, granted Thomas a legal non-conforming use only as long as he complied with the various conditions in the Board's 1998 order – absent a clear showing of fraud, duress or mutual mistake. Because there was no evidence that the parties intended to amend the August 21, 2001 consent decree, the trial court was without authority to modify the terms of that decree by finding that Thomas had a valid non-conforming use. We then remanded the matter to the trial court to rule on the Board's petition for injunctive relief.

On remand, the trial court issued an order dated July 18, 2008, granting the Board's petition for injunctive relief and giving Thomas 60 days to comply with the injunction. Thomas filed a notice of appeal from that order, which was dismissed as untimely following a motion to quash by the Board. On September 10, 2008, Thomas filed a "motion to enlarge time" asking for additional time to comply with the injunction. The trial court denied this motion on September 16, 2008. Thomas did not appeal that order.

Three days later, on September 19, 2008, Thomas instead instituted a new action by filing a "Complaint for Mandamus"¹ seeking to "compel the Defendant to enforce the Legal Non-Conforming Use granted February 12, 1998." He argued that the Board did not have the authority to revoke the granting of the legal non-conforming use at the first 1998 hearing when Thomas complied with all the required conditions. By so revoking the legal non-conforming use, the Board acted arbitrarily and capriciously and violated his due process rights. Thomas followed his complaint in mandamus with a motion to stay enforcement of the

¹ Mandamus is an extraordinary writ that compels the official performance of a ministerial act or mandatory duty. *McGriff v. Board of Probation and Parole*, 809 A.2d 455 (Pa. Cmwlth. 2002). Its purpose is not to establish legal rights, but to enforce those rights which are already established. *Waters v. Department of Corrections*, 509 A.2d 430 (Pa. Cmwlth. 1986). To obtain a writ of mandamus, a petitioner must demonstrate: (1) a clear legal right in the petition; (2) a corresponding duty in respondent; and (3) absence of any appropriate or adequate remedy. See *Equitable Gas Company v. City of Pittsburgh*, 507 Pa. 53, 488 A.2d 270 (1985) (also finding that the petitioner must show an immediate, specific, well-defined and complete legal right to the thing demanded). "Mandamus may not be used to direct retraction or reversal of an action already taken in good faith and in the exercise of legitimate jurisdiction." *Walker v. Lawrence Township*, 791 A.2d 458 (Pa. Cmwlth. 2002).

injunction order, seeking the same relief that the trial court had denied on September 16, 2008.

The Board replied by filing preliminary objections arguing that Thomas' complaint for mandamus should be dismissed because the issues had been fully litigated. Thomas countered that this was an affirmative defense that had to be pled in a new matter and, thus, the preliminary objections had to be dismissed. By order and opinion dated May 7, 2009, the trial court granted the Board's preliminary objections, holding that this Court, in its October 26, 2007 decision, held that Thomas had no legal non-conforming use and that mandamus would not lie to compel the enforcement of a right that this Court already ruled that he did not possess. The trial court also held that to the extent that the preliminary objections suffered from any procedural defects, they did not affect the substantial rights of the parties and could be disregarded pursuant to Pennsylvania Rule of Civil Procedure (Pa. R.C.P.) No. 126.² Thomas then filed the appeal currently before this Court.³

² Pa. R.C.P. No. 126, entitled "Liberal Construction and Application of Rules," provides:

The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties.

³ Our review of a trial court's order sustaining preliminary objections and dismissing a complaint is limited to determining whether the trial court abused its discretion or committed an error of law. *Petty v. Hospital Service Association of Northeastern Pennsylvania*, 967 A.2d 439 (Pa. Cmwlth. 2009). In reviewing preliminary objections, all well pleaded relevant and material **(Footnote continued on next page...)**

On appeal, Thomas contends that he has a clear right to relief and satisfies all the conditions for mandamus directing the Board to find that he had a legal non-conforming use.

Thomas' argument borders on frivolous. Thomas can have no clear legal right to a legal non-conforming use on his property because this Court already has held that Thomas *did not* have a legal non-conforming use but rather was bound by the August 21, 2001 consent decree that allowed him to continue his use of the property *only* as long as he complied with various conditions, which he failed to do. Thomas cannot use mandamus to reverse either our earlier holding or the trial court's holding on remand granting the injunction.

Because it is manifest as a matter of law that Thomas cannot obtain a writ of mandamus, it is unnecessary to examine his other arguments, including the alleged unavailability of *res judicata* as a defense to the Board due to a 2001 trial court order, alleged procedural defects in the preliminary objections due to the Board's captioning its *res judicata* argument as a preliminary objection rather than as a new matter, and his insinuation that the trial court's opinion is somehow invalid because it contracted with an outside attorney to assist in writing the opinion.

(continued...)

facts are to be considered as true, and preliminary objections shall only be sustained when they are free and clear from doubt. *Id.* Such review raises a question of law as to which our standard of review is *de novo* and our scope of review is plenary. *Id.*

For the foregoing reasons, the order of the trial court is affirmed.

DAN PELLEGRINI, JUDGE

