

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ralph Cipriano and Rosemarie :
Cipriano, h/w, Peter Wiacek and :
Jacquelyn Skammer, h/w, Krepps :
Finnell, Ulysses Parker and Janice :
Byman, h/w, Keith S. Grube and :
Barbara Ratteree :
 :
 :
v. : No. 1581 C.D. 2007
 : Argued: March 11, 2008
The City of Philadelphia and Friends :
of Eastern State Penitentiary Park, Inc., :
Appellants :

BEFORE: HONORABLE DAN PELLEGRINI, Judge
HONORABLE ROBERT SIMPSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY
SENIOR JUDGE FLAHERTY

FILED: April 18, 2008

The City of Philadelphia (City) and Friends of Eastern State Penitentiary Park, Inc. (FESPP)(Collectively, Appellants) appeal from the decision of the Court of Common Pleas of Philadelphia County (trial court) which ordered FESPP to cease and desist from operating a dog pen in a community park operated by FESPP. The trial court also ordered the Department of Public Property (Department) to immediately lock the fenced-in area comprising the pen until further order of the trial court. Thereafter, the trial court clarified the order at a status conference, stating that the entire area was to be sealed off and fenced, if

possible, thereby keeping everyone, including dogs, out. We affirm the decision of the trial court.

On April 3, 2007, Ralph and Rosemarie Cipriano, Peter Wiacek and Jacquelyn Skammer, Krepps Finnell, Ulysses Parker and Janice Byman, Keith S. Grube and Barbara Ratteree (Collectively, Appellees) filed a two-count complaint seeking permanent injunctive relief and asserting a claim of nuisance against FESPP.¹ Appellees reside in homes on Corinthian Avenue across the street from the Property. The park is operated by FESPP pursuant to a license agreement with the Department dated March 5, 2001 (Agreement).

The Agreement authorizes FESPP to “establish and maintain a community park” on the two grassy strips of land and gives FESPP permission to “enter the Premises for the sole purpose of performing the Permitted Use [community park] and no other purpose.” The “Permitted Use” is defined as a “community park”. Section 5(A) of the Agreement also requires FESPP to comply with all federal, state and local laws, including the Philadelphia Code. Section 5(C) of the Agreement also requires the FESPP to obtain city permits for any work done on the “community park.”

¹ FESPP is a non-profit corporation which was formed in 2001 to care for lands owned by the City which were part of a historic and vacant prison, the Eastern State Penitentiary (ESP), in the City. The ESP grounds are bounded by Brown Street to the north, Corinthian Avenue to the east, Fairmount Avenue to the south, and N. 22nd Street to the west. Due to the orientation of the ESP building on the grounds, there are two narrow grassy strips of land outside the ESP building, such grassy strips are the lands FESPP was formed to care for. FESPP is a voluntary, membership-based community organization that has approximately 500 members, some of whom are dog owners. The first grassy strip of land to the north of the ESP building and bounded by Brown Street and N. 22nd Street contains a children’s playground. The second grassy strip of land to the east of the ESP building (Property) runs the entire length of the block along Corinthian Avenue from Fairmount Avenue to Brown Street. This Property is the subject of this controversy.

In 2002, FESPP created a dog pen on the Property. Such dog pen was directly across the street from the Appellees' homes. The dog pen consisted of two barren gravel pens approximately 170 feet long and 9,200 square feet in area. Such pens were only 88 feet from the residential properties along Corinthian Avenue and comprised approximately 39% of the Property. The Property is zoned R-9 Residential.

Appellees alleged in their complaint that the dog pen is not a permitted use under the terms of the Agreement. Appellees further alleged that the dog pen violates the Agreement's compliance with laws section, that the operation of the pen is not a permitted use under the zoning classification for the area, and that the operation of the pen and its attendant conditions constitutes a nuisance and health hazard.

In addition to the complaint filed by Appellees on April 3, 2007, seeking permanent injunctive relief and asserting a claim of nuisance against FESPP, Appellees filed a petition for a preliminary injunction on April 6, 2007. On April 24, 2007, Appellants filed preliminary objections to Appellees' complaint. Appellants argued that Appellees' attempt to obtain an order compelling the City to enforce its zoning codes was improper, as it should have been brought as a mandamus action.

On April 25, 2007, Appellants filed an answer in opposition to Appellees' petition for a preliminary injunction and a memorandum of law. In response to Appellants' preliminary objections, Appellees filed an amended complaint on May 10, 2007. On May 20, 2007, the City filed preliminary objections to the amended complaint, again arguing that Appellees' complaint was

impermissible, as it asks the court to compel performance of a ministerial function of the City. FESPP filed an answer to the amended complaint.

On June 5 and 12, 2007, a hearing on Appellees' petition for a preliminary injunction was held. Testimony was presented that the dog pen was heavily used by dogs and their owners, with loud barking, fighting and shouting throughout the day. Further testimony revealed that bags of dog feces overflowed in the trashcans that were available for the users of the dog pen and that an odor of dog feces and urine was prevalent at Appellees' properties.

Appellees further argued that the dog pen violated the Philadelphia Zoning Code (Zoning Code), as the property is zoned R-9 Residential. The R-9 Residential district permits single and multiple family dwellings and both residential and non-residential uses that are listed in Section 14-203 of the Zoning Code with the securing of a certificate from the Zoning Hearing Board. As a private park and dog pen are not listed among the uses set forth in Section 14-203, they are prohibited and require a variance from the Zoning Hearing Board in order to operate legally.

Appellees also argued that FESPP failed to acquire any permits for the erection of the fencing and construction of the gravel pens. This failure also violated the Philadelphia Administrative Code, as it requires that an application for a use registration permit must be secured for each new use on a property.

A City police officer testified that after a neighborhood complaint, he visited the property, smelled the dog feces and urine, and observed the overflowing trashcans. The officer further testified that he observed Code violations at the site but did not issue any violations. The officer did photograph the trashcans and

commented to the dog pen users that the bags of feces were a nuisance in a public area.

Counsel for FESPP and the President of FESPP admitted to not obtaining or seeking any permits for the fence, gravel and use of the property for a dog pen. A representative for the City Public Property Department testified that the Agreement did not contain any mention of a dog park or dog pen. The representative also stated that the erection of a fence requires the filing of a building permit application and that such application was not filed by FESPP.

FESPP presented signatures of approximately 125 residents in the area surrounding the dog pen, including eight from residents on Corinthian Avenue, who stated that they believed the pen was a positive resource for the neighborhood. FESPP presented the testimony of Barbara Brandoff who resides at 749 Corinthian Avenue. Brandoff is not a dog owner and stated that she did not notice any problems with noise, smell or trash collection at the dog pen. Brandoff stated that the dog pen did not interfere with her enjoyment of her property.

FESPP also called Amy Johnston who resides at 803 Corinthian Avenue. Ms. Johnston, a dog owner, testified that the dog pen is a benefit to her and the community and that shutting down the park would actually harm the community. FESPP further called Will Robinson and Ben Bigler, two men who live in the neighborhood of the dog pen. Both gentlemen testified that the dog pen was one of the reasons they moved to the neighborhood.

On July 17, 2007, the trial court granted Appellees' petition for preliminary injunctive relief. The trial court found that Appellants had failed to obtain permits for the use of the property as a dog pen and did not have zoning approval for such use either. The trial court further declared that a dog pen was not

a permitted use in the R-9 Residential district and that such use constituted a public and private nuisance. The trial court ordered FESPP to cease and desist using the Property as a dog pen and ordered the area comprising the pen to be closed off.

Thereafter, FESPP locked the interior fence to comply with such order. However, vandals broke open the dog pen lock and FESPP thereafter took down the fencing that had enclosed the dog pen to ensure that the space could not be used as a dog pen. Thus, the entire Property was simply open space with no interior partitioning for the dog pen.

Appellees, thereafter, sought clarification of the trial court's order contending that FESPP continued to use the dog pen for dog walking and defecation. At a status conference on August 3, 2007, the trial court clarified its order, stating that no dogs were permitted on the Property and that the entire area needed to be sealed off from use. The parties, including FESPP, agreed to the official closure of the record at the status conference on August 3, 2007, "thus making the July 17, 2007, order the ultimate resolution of this case." Appellants' Brief at 8. Appellants, thereafter, appealed the trial court order of July 17, 2007 and subsequent clarification, to our Court.²

² In reviewing the grant or denial of a final or permanent injunction, we are limited to determining whether the trial court committed an error of law. Buffalo Township v. Jones, 571 Pa. 637, 813 A.2d 659 (2002), cert. denied, 540 U.S. 821 (2003). Our Supreme Court in Buffalo Township determined that the standard of review for intermediate courts is not whether the trial court abused its discretion or committed an error of law, but merely whether the trial court committed an error of law, as a "permanent injunction will turn on whether the lower court properly found that the party seeking the injunction established a clear right to relief as a matter of law. This inquiry involves a legal determination by the lower court." Id. at 645, n.4, 813 A.2d at 664 n.4.

Appellants contend that the trial court erred in granting Appellees' petition for injunctive relief and also claim that if the relief is found appropriate, the trial court erred in the excessive scope of its injunctive relief.³

Injunctive relief will lie where there is no adequate remedy at law. Maritrans GP Inc. v. Pepper, Hamilton & Scheetz, 529 Pa. 241, 259, 602 A.2d 1277, 1286 (1992). In the case of a permanent injunction enjoining the dog park use, Appellees need only prove that the trial court found a legal wrong where there was no adequate remedy at law. Buffalo Township. In issuing a permanent injunction, the moving party need not establish irreparable harm, or the need for immediate relief. Id.

Before the trial court, Appellees presented testimony that the dog pen was a nuisance for which there was no adequate remedy at law. Appellees set forth that the dog pen was a public and private nuisance, as the dog pen was uncontrolled, unsupervised, had a lot of users, was loud, had overflowing trashcans and smelled of dog feces and urine. Appellees testified that the dog pen adversely impacted the use and enjoyment of their properties.

The trial court determined that Appellees' claims of nuisance were not exaggerated and accepted Appellees' testimony as credible. Also, the adverse impact of the dog pen on Appellees' quiet enjoyment of their properties was found credible by the trial court. The trial court, as the ultimate factfinder, determines credibility of witnesses. Such credibility determinations by the trial court will not

³ We note that Appellants contend that the trial court issued a preliminary injunction. A review of the record reveals that the preliminary injunction was what was before the trial court initially. However, upon Appellants' consent to the closure of the record and the final resolution of the case at the August 3, 2007 hearing before the trial court, the preliminary injunction became a final or permanent injunction.

be disturbed on appeal. Landsberger v. Department of Transportation, Bureau of Driver Licensing, 717 A.2d 1121 (Pa. Cmwlth. 1998). The trial court did not err in determining that the dog feces and urine constituted a nuisance in a public area.

Appellees also contended before the trial court that they had no other remedy at law, as they were not a party to the Agreement and the City failed to act on Appellees' zoning complaints. The dog pen created by Appellants was prohibited by the Zoning Code and the Administrative Code. FESPP admitted that it failed to seek any permits for the erection of the dog pen and the fence that surrounds it, even though the Agreement governing the use of the Property required such permits. Appellees had attempted to seek enforcement from municipal officials, but they did not respond. As FESPP did not seek permits for the dog pen, there was no municipal review of the change in use, no Zoning Board hearing, and the Department of Labor and Industry does not allow appeals from the lack of action on zoning complaints. Further, as Appellees were not a party to the Agreement between FESPP and the City, Appellees did not have standing to enforce the Agreement when FESPP violated it and the City failed to enforce the Agreement and ignored Appellees' complaints. The trial court did not err in determining that Appellees did not have an adequate remedy at law.

A review of the record reveals that the trial court properly determined that Appellees had a clear right to relief as a matter of law. See Anderson v. Guerrein Sky-way Amusement, 346 Pa. 80, 29 A.2d 682 (1943)(Supreme Court enjoined an open-air movie theater due to the noise that impacted upon the plaintiff's properties), Harford Penn-Cann Service v. Zymblosky, 549 A.2d 208 (Pa. Super. 1988)(Superior Court found that the operation of a trucking business constituted a nuisance because of the dust created by the operation) and

Bedminster Township v. Vargo Dragway, Inc., 434 Pa. 100, 253 A.2d 659 (1969)(Supreme Court enjoined the operation of a drag strip because of the noise created by the use).

Finally, Appellants contend that, if an injunction were appropriate under the circumstances, the trial court erred in the excessive scope of its relief. Specifically, Appellants contend that the trial court's order did more than simply require FESPP to increase the trash removal and/or improve sound reduction efforts, the trial court ordered the closing of the dog pen and mandated that the entire Property on which the dog pen is located to be closed off to all public access.

The trial court's relief was not excessive. The closure of the dog pen was the minimum relief to alleviate the impact on Appellees' use and enjoyment of their properties. The trial court initially ordered Appellants enjoined from using the Property as a dog park but when vandals broke the lock and the fence had to be taken down, the whole area became open and people continued to use the area for dog walking and defecation, in violation of the trial court's order.⁴

Further, the trial court's order to seal off the Property was necessitated by Appellants' failure to secure the Property in compliance with the trial court's initial order. Appellants' use of the Property for dog walking and defecation after being ordered not to use it in such manner prompted the trial court to clarify its initial order. The trial court, thereafter, ordered the Property sealed off from use. Appellants cannot complain that the trial court's order is excessive, when it was the result of their own conduct in violation of the initial trial court order.

⁴ While the trial court's order closed the operation of the existing dog park as an illegal use and a public nuisance, the order does not prevent Appellants from seeking the proper permits for the operation of a dog pen nor does it prevent them from seeking a smaller pen.

Accordingly, we affirm the decision of the trial court.

JIM FLAHERTY, Senior Judge

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	:	
The City of Philadelphia and Friends	:	
of Eastern State Penitentiary Park, Inc.,	:	
Appellants	:	

ORDER

AND NOW, this 18th day of April, 2008 the Order of the Court of Common Pleas of Philadelphia County in the above-captioned matter is affirmed.

JIM FLAHERTY, Senior Judge