IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Uyseng Ngo and Xuan Tu Lam, Appellants	:	
v.	:	
	:	No. 2133 C.D. 2007
City of Philadelphia	:	Submitted: June 27, 2008

BEFORE: HONORABLE BERNARD L. McGINLEY, Judge
HONORABLE DAN PELLEGRINI, Judge
HONORABLE RENÉE COHN JUBELIRER, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE McGINLEY FILED: September 11, 2008

Uyseng Ngo and Xuan Tu Lam (collectively, the Ngos) appeal the order of the Court of Common Pleas of Philadelphia County (trial court) which enjoined all persons from remaining in a one story rear garage located at 1427 South 2nd Street in the City of Philadelphia, from obstructing, threatening, preventing, interfering, or otherwise impeding in any manner the Department of Licenses and Inspections of the City of Philadelphia (L & I) from vacating and demolishing the garage, authorized L & I to demolish the garage, directed the Sheriff of Philadelphia County and/or the Philadelphia Police Department to remove any such person from occupancy or possession of the garage, authorized the City of Philadelphia to remove all animals, and ordered all costs to be paid by the Ngos.

On May 14, 2007, the Ngos, husband and wife, owned the property located at 1427 South 2nd Street (Property). The property contained a row home with a one story garage in the rear.

On that date, Albert McCarthy (McCarthy), Construction Trades Inspector for L & I, inspected the property and determined that the garage was in an imminently dangerous condition and in violation of the Philadelphia Property Maintenance Code. L & I posted a sign on the property which stated "Danger – Keep Out." The posting indicated that the property was imminently dangerous and in need of repair, and, if not repaired, the City would demolish it.

On May 16, 2007, L & I issued a violation notice for the Property and informed the Ngos that the Property was unsafe and that if required repairs were not made the City had the authority to eliminate the unsafe conditions by demolition. L & I noted the following specific violations:

> The indicated wall of the subject structure is bulged and in danger of collapse. The structure has therefore been designated as unsafe in accordance with Section 307 of the Philadelphia Property Maintenance Code. You must repair the wall or demolish the structure in whole or in part. . . .
>
> **Location: top of wall at northwest corner adjoining 1425 S 2nd St. of one story garage**
>
> The indicated wall of the subject structure is cracked and/or fractured and in danger of collapse. The structure has therefore been designated as unsafe in accordance with Section 307 of the Philadelphia Property Maintenance Code. You must repair the wall or demolish the structure in whole or in part. . . .
>
> **Location: southeast corner of one story garage**
>
> The indicated wall of the subject structure is cracked and/or fractured and in danger of collapse. The structure has therefore been designated as unsafe in accordance with Section 307 of the Philadelphia Property

> Maintenance Code. You must repair the wall or demolish the structure in whole or in part. . . .
>
> **Location: southeastcorner [sic] and east wall of one story garage**
>
> The indicated wall of the subject structure is deteriorated and in danger of collapse. The structure has therefore been designated as unsafe in accordance with Section 307 of the Philadelphia Property Maintenance Code. You must repair the wall or demolish the structure in whole or in part. . . .
>
> **Location: south wall**
>
> The roof of the subject structure is deteriorated and in danger of collapse. The structure has therefore been designated as unsafe in accordance with Section 307 of the Philadelphia Property Maintenance Code. You must repair the roof or demolish the structure in whole or in part. . . .
>
> **Location: Main roof of one story garage.**

Violation Notice, May 16, 2007, at 1-2; Reproduced Record (R.R.) at 109-110.

On June 1, 2007, the Ngos obtained a building permit from L & I to make repairs to the garage. The permit stated that work must begin within ten days of the issuance of the building permit. On June 8, 2007, L & I again inspected the property and found that no repairs had been made. As a result, L & I issued another Violation Notice. On June 14, 2007, McCarthy returned to the property and determined that no work had been done on the garage. On June 14, 2007, L & I revoked the building permit.

On June 15, 2007, the City commenced an action in the trial court against the Ngos and all known and unknown occupants of the Property and sought

to preliminarily enjoin the Ngos and all occupants from occupying the premises, order the City to demolish the premises, order the Ngos to pay all costs, enjoin the Ngos or any other occupants from obstructing, threatening, preventing, interfering with, or impeding L & I and/or its contractors from vacating and demolishing the premises, and authorize the Sheriff of Philadelphia County and/or the Philadelphia Police Department to restrain and/or arrest any person who interfered with the demolition, if requested.

Also, on June 15, 2007, the City filed an emergency motion for a preliminary injunction and a temporary restraining order. The City alleged:

> 4. Defendant [Ngos] has failed and/or refused to correct the unsafe conditions that exist at the subject premises.
>
> 5. Unless the requested Temporary Restraining Order and Preliminary injunction are granted, plaintiff [City], defendants [Ngos], defendants' [Ngos] adjoining neighbors and the public at large will suffer great, immediate, and irreparable injury which cannot be compensated by damages. The condition at the subject premises presents an immediate and irreparable hazard to the health, safety and welfare of the public.
>
> 6. Defendants [Ngos] will not suffer any irreparable injury if the Temporary Restraining Order and Preliminary Injunction are granted.
>
> 7. Defendants' [Ngos] wrongful conduct in failing to correct the unsafe condition to exist and their failure to vacate the subject premises is clear.
>
> 8. Plaintiff's [City] right to equitable relief is clear.
>
> 9. Plaintiff [City] is likely to succeed on the merits of its claim.

10. Plaintiff [City] has no adequate remedy at law.

Petition for Temporary Restraining Order and Preliminary Injunction, June 15, 2007, Paragraphs 4-10 at 2; R.R. at 35. The City essentially sought the same relief as in the complaint.

At the hearing on the emergency motion on June 15, 2007, McCarthy described his inspection and introduced photographs of the Property which indicated its state of disrepair. McCarthy explained his concern for the Property:

> Well the rear garage, your honor, the very rear section, . . . the east wall, southeast corner of the building, there's a large crack separating the rear section of the garage from the remainder of the garage. The area of my greatest concern is the parapet wall which adjoins 1425. I could see from the small street up behind the garage, that it was leaning probably 2 to 3 inches, your honor. . . . Also, the rear four feet of it goes – are pulling away from the rest of the building, your honor. There's fractures all along the base of the wall.

Notes of Testimony, June 15, 2007, (N.T.) at 11-12; R.R. at 127-128.

McCarthy explained that he was also concerned the leaning wall could tip and fall which meant "the roof structure itself would fall, push the other wall out onto 1429, and vice-versa." N.T. at 14; R.R. at 130. Further, a weight bearing wall was pulling away from the rest of the building and if the wall collapsed, that would pressure the other wall adjoining 1425 and push it into 1425. N.T. at 16-17; R.R. at 132-133. McCarthy opined that the rear section of the garage could collapse. N.T. at 19; R.R. at 135. On cross-examination, McCarthy admitted that he was not an engineer, and although he did not attend college, he had eighteen years in the carpenter's union. N.T. at 20-21; R.R. at 136-137.

John H. Morley, Jr. (Morley), a friend of the Ngos and a certified fire protection engineer, testified "the south wall is not load-bearing. . . . In my judgment, there is no eminent [sic] danger." N.T. at 23; R.R. at 139. Morley attempted to introduce the report of an engineer named Dan Banks. The trial court sustained the City's hearsay objection. Morley asked for time to make the necessary repairs. N.T. at 26-27; R.R. at 142-143.

The City asked that the preliminary injunction be changed to a permanent injunction. The trial court granted the permanent injunction and authorized demolition. The trial court reasoned:

> This Court is presented with the evidence of a building that I believe maybe is not going to fall down in the next five minutes. But it wouldn't surprise me if it did, or in the next five days. This is one of those situations where . . . sitting here as a judge, you've got to make a decision: Do you let it pass? Do you do nothing? Do you do something?
> . . . .
> So I am going to sign this injunction, because I think it's the right thing to do.
>
> My paramount concern, ultimate concern, number one concern, is public safety. That is the most important thing that I take into consideration. And I think this is dangerous enough, based on the photographs, based on the testimony, based on just common sense, that it's sufficiently dangerous, that it justifies me signing this injunction so that the situation is made safe not in a week from now, but immediately.

N.T. at 32-33; R.R. at 149-150.

The trial court enjoined anyone from remaining in the garage and from interfering with the demolition. The trial court authorized L&I and/or its contractors to demolish the garage, directed the Sheriff of Philadelphia County and/or the Philadelphia Police Department to remove any person from occupancy or possession of the subject premises, authorized the City to remove all animals, ordered costs of demolition entered as a lien against the property and as a judgment against the Ngos, and ordered the Ngos to pay all costs.

The Ngos contend that the trial court abused its discretion when it converted the emergency hearing for a preliminary injunction into an evidentiary hearing for a permanent injunction which deprived the Ngos of their right to due process because they were denied the right of counsel, the right to present witnesses, and the right to have an interpreter present.[1]

The Ngos assert that they did not agree to allow the June 15, 2007, hearing to be a final full evidentiary hearing for the purpose of a permanent injunction. They argue that they sought a fair day in court where they would be represented by counsel, present witnesses, and have an interpreter present who understood the Khmer language. The Ngos argue that the trial court should have

[1] This Court's review of the grant of a permanent injunction is limited to a determination of whether the trial court properly found that the party seeking the injunction established a clear right to relief as a matter of law. Penn Square General Corporation v. Board of County Commissioners of the County of Lancaster, 936 A.2d 158, 167 n.7 (Pa. Cmwlth. 2007). In order to prevail on a permanent injunction, the plaintiff must establish a clear right to relief, that there is an urgent necessity to avoid an injury which is not compensable by damages, and that greater injury will result from refusing rather than granting the requested relief. Coghlan v. Borough of Darby, 844 A.2d 624, 629 (Pa. Cmwlth. 2004).

taken no action on June 15, 2007, other than scheduling an evidentiary hearing. By the time of the evidentiary hearing, the Ngos assert that they would have obtained counsel, witnesses in their favor, an interpreter, and avail themselves of their due process rights.

The Ngos are correct that the City initially moved for a preliminary injunction. The hearing was initially conducted on the request for a preliminary injunction. Near the conclusion of the hearing, the City's attorney, Ann Agnes Pasquariello, requested that the trial court change the injunction request from a preliminary injunction to a permanent injunction: "So I have apart the . . . package, and pulled the permanent preliminary injunction. I would ask that you change it to *permanent*. I can do it right here." N.T. at 31; R.R. at 147. There is nothing in the record which indicates that the Ngos agreed to the change. The trial court apparently granted the request because on the order the word "preliminary" was crossed out and replaced with the word "permanent."

This Court has held that "a court may not treat a hearing for a preliminary injunction as a final hearing and as a basis for a permanent injunction, unless the parties stipulate to the contrary." New Milford Township v. Young, 938 A.2d 562, 566 (Pa. Cmwlth. 2007) (quotation omitted). Further, in Warehime v. Warehime, 580 Pa. 201, 208-209, 860 A.2d 41, 46 (2004), our Pennsylvania Supreme Court stated, "The mere holding of hearings with regard to a motion for a preliminary injunction does not somehow morph that motion into a request for a permanent injunction. In fact, our rules specifically contemplate that hearings may be held on requests for preliminary injunctions. . . ." (Citation omitted).

Indeed, Pa.R.C.P. No. 1531(a) provides in pertinent part:

> A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice. In determining whether a preliminary or special injunction should be granted and whether notice or a hearing should be required, the court may act on the basis of the averments of the pleadings or petition and may consider affidavits of parties or third persons or any other proof which the court may require.

Very recently, this Court ruled:

> The trial court erred in converting the hearing on the preliminary injunction to a final hearing on the merits of the permanent injunction because it did so without a stipulation from the parties. Accordingly, the trial court erred in granting a permanent injunction, requiring that its order be vacated and the matter remanded.

Big Bass Lake Community Association v. Warren, 950 A.2d 1137, 1149 (Pa. Cmwlth. 2008).

Here, the trial court improperly granted the City's request to convert the hearing for a preliminary injunction into a hearing for a permanent injunction without the agreement of the Ngos. New Milford.

As in Big Bass Lake, this Court must vacate the order of the trial court and remand this case to the trial court for such further proceedings as the trial court determines is necessary.

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BERNARD L. McGINLEY, Judge

Judge Pellegrini concurs in the result only.

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O R D E R

AND NOW, this 11th day of September, 2008, the order of the Court of Common Pleas of Philadelphia County is vacated and this case is remanded to the Court of Common Pleas of Philadelphia County for such further proceedings as the trial court determines is necessary. Jurisdiction relinquished.

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BERNARD L. McGINLEY, Judge