IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Ronald G. Allen and Florence Allen,	:	
Appellants	:	
v.	:	No. 757 C.D. 2010
	:	Submitted: November 5, 2010
Zoning Hearing Board of Fairview Township and Board of Supervisors	:	

BEFORE: HONORABLE BONNIE BRIGANCE LEADBETTER, President Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY SENIOR JUDGE FLAHERTY FILED: December 22, 2010

Ronald G. Allen and Florence Allen (Allens), appeal from an order of the Court of Common Pleas of York County (trial court) which found the Allens in contempt of court for failure to abide by a court order which was entered after an agreement between the Allens, the Zoning Hearing Board of Fairview Township (Board) and the Board of Supervisors (Supervisors) on May 10, 2002 (2002 stipulated order). We affirm.

The history of this case is as follows. The Allens are the owners of property in Fairview Township, York County, on which an auto salvage business is conducted. On May 2, 1997, the Board issued a decision

(1997 decision) which granted the Allens' application for a nonconforming use certificate to continue the salvage yard, with conditions, but denied the request for a variance to authorize setback violations of a barn structure. The Board determined that the unpermitted addition to the barn, which intruded into the front yard area, should be removed. The Allens appealed to the trial court, which affirmed the decision of the Board. On appeal, this court, in an unpublished opinion, also affirmed and the Supreme Court, thereafter, denied the Allens' petition for allowance of appeal. Allen v. Zoning Hearing Board of Fairview Township, 741 A.2d 255 (Pa. Cmwlth. 1999), petition for allowance of appeal denied, 562 Pa. 674, 753 A.2d 820 (2000).

On June 21, 2001, the codes administration director of Fairview Township issued two notices of violation to the Allens. The notices cited various violations of the Board's 1997 decision, including the failure to operate the salvage yard in compliance with the nonconforming use permit and the failure to remove the unpermitted barn structure. The Allens then sought from the Board, via a special exception, a redetermination to allow the impermissible barn structure to remain. The Board, concluding that no new factual or legal issues were presented which differed from the Allens' 1997 application and the Board's resulting 1997 decision, the Board denied the special exception request based on *res judicata*.

The Allens appealed the Board's decision to the trial court and the Supervisors intervened. On May 10, 2002, a settlement was reached between the parties, the 2002 stipulated order, and approved by the trial

court. The 2002 stipulated order, via paragraph four, provides in pertinent part that the Allens:

> [S]hall remove from the premises each month a total number of tires equal to 200 tires plus the number of tires brought to the site during that month, until the entire stockpile of tires is eliminated. Appellants shall verify monthly to the Township the number of tires removed and the identity of all individuals or entities to whom the tires are delivered. At all times, Appellants shall insure that all tires remaining on the premises are [to] be treated as recommended by the Department of Environmental Protection [DEP] to control and prevent the possible growth on, and transmission of the West Nile virus from, the site.

(R. 24a-25a.)

In a letter dated September 15, 2009, the Supervisors notified the Allens that they had thirty days to provide verification as required by paragraph four of the 2002 stipulated order. The Allens did not provide such verification.

On December 11, 2009, the Supervisors filed a petition with the trial court requesting that the Allens be found in contempt of the 2002 stipulated order. After a hearing, the trial court determined that the Allens were in contempt. Specifically, the trial court concluded that the Allens failed to provide verification of the number of tires removed, as was required by the 2002 stipulated order. This appeal followed.[1]

[1] Our review when considering an appeal from a contempt order is limited to whether the trial court abused its discretion or committed an error of law. Lower Bethel Township v. Stine, 686 A.2d 426 (Pa. Cmwlth. 1996).

Initially, the Allens argue that the trial court lacked subject matter jurisdiction in this case because Allen Auto Inc. (Allen Auto) was not made a party to the contempt action. The Allens claim that at the time of the 2002 stipulated order, the salvage business was owned by them as individuals. However, sometime in 2005, the salvage business became owned by Allen Auto.

The Allens claim that Allen Auto was an indispensible party and that failure to join an indispensible party to a lawsuit deprives a court of subject matter jurisdiction. Pennsylvania Game Commission v. K.D. Miller Lumber Company, Inc., 654 A.2d 6 (Pa. Cmwlth. 1994), petition for allowance of appeal denied, 540 Pa. 643, 659 A.2d 561 (1995). Whether a party is indispensible includes consideration of whether the absent party has a right or interest related to the claim, and, if so, what is the nature of that right or interest, is that right or interest essential to the merits of the issue and can justice be afforded without violating the due process rights of the parties. County of Elk v. Highland Township, 677 A.2d 398, 400-01 (Pa. Cmwlth. 1996).

Ronald G. Allen is the president of Allen Auto and the Allens maintain that Allen Auto was an indispensible party to the proceeding. We observe that the Allens, not Allen Auto, were a party to the 2002 stipulated order. Its interest was not essential to the merits of the issue, as to whether the Allens, the parties to the 2002 stipulated order were in fact in compliance with the 2002 stipulated order. The issue in a contempt proceeding is whether a party violated a court order. Bold v. Bold, 939 A.2d 892 (Pa. Super. 2007).

Next, the Allens complain that the trial court lacked jurisdiction to enter and enforce the 2002 stipulated order. Specifically, although the 2002 stipulated order was entered with the Allens' consent, the Allens maintain that the storage and removal of tires which was addressed in the 2002 stipulated order, is a subject matter which is preempted by the Solid Waste Management Act (SWMA), Act of July 7, 1980, P.L. 380, as amended, 35 P.S. §§ 6018.101-6018.1003.

We initially observe that the conditions imposed regarding the removal of the tires in the 2002 stipulated order resulted from a land use appeal by the Allens regarding the barn on their property. The conditions imposed were agreed to by the Allens and such order was never appealed. By failing to appeal the imposition of a condition to a grant of a special exception, the applicant waives the right to seek a review of the conditions. Babin v. City of Lancaster, 493 A.2d 141, 145 (Pa. Cmwlth. 1985).

Moreover, the Allens argue that the 2002 stipulated order, which requires them to remove tires from their land and report and verify such removal to the Township, is unenforceable because regulation of tire removal is preempted by the SWMA. We disagree. The SWMA regulates the disposal of every type of solid waste in the Commonwealth. Office of Attorney General v. East Brunswick Township, 980 A.2d 720 (Pa. Cmwlth. 2009). A township cannot impose more stringent requirements than the SWMA. However, a township can address land use issues in a zoning ordinance because zoning is a public health and safety issue not addressed in the SWMA. Id. at 733. Because regulations govern the storage of whole and processed tires, set forth general limitations on storage of whole and

processed tires, describe areas where storage of whole and processed tires are prohibited and provide for annual reporting by waste storage sites, the Allens maintain that the 2002 stipulated order is preempted by the SWMA. We observe, however, that the tire removal and verification thereof does not conflict with the annual reporting required by the regulations.

Finally, the Allens argue that the order of contempt was inappropriate. Again, we disagree. As stated in Brocker v. Brocker, 429 Pa. 513, 519241 A.2d 336, 338 (1968), cert. denied, 393 U.S. 1081 (1960), a court of common pleas has inherent authority to require compliance with its orders. Here, the petition of the Supervisors for adjudication of civil contempt was brought for the purpose of enforcing the 2002 stipulated order. The trial court here observed that the Allens were notified by the Supervisors that they were not receiving reports with respect to tire removal as was required by the 2002 stipulated order and the Allens admitted that such reports were not provided. A court has the power to enforce orders and decrees by imposing penalties and sanctions for failure to comply or obey therewith. Commonwealth ex rel. Roviello v. Roviello, 323 A.2d 766 (Pa. Super. 1974).

The Allens rely on Beaver Valley Builders Supply, Inc. v. Zoning Hearing Board of Bell Acres Borough, 509 A.2d 1329 (Pa. Cmwlth. 1986), which is distinguishable. In Beaver Valley, the landowner appealed the board's denial of a variance request to the trial court. The trial court reversed the decision of the board and no further appeal was taken.

Thereafter, the borough filed a petition with the trial court to have the landowner adjudicated in contempt of the trial court's order

because of an alleged improper use of the property. The petition was denied. On appeal, this court concluded that a petition for contempt is an inappropriate means of enforcing a borough's zoning ordinance.

Here, Supervisors are not alleging that the Allens are in violation of a zoning ordinance as in Beaver Valley. Rather, the Supervisors have claimed and the trial court so found, that the Allens are in contempt of the trial court's 2002 stipulated order.

In accordance with the above, the order of the trial court is affirmed.

JIM FLAHERTY, Senior Judge

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O R D E R

Now, December 22, 2010, the order of the Court of Common Pleas of York County, in the above-captioned matter, is affirmed.

JIM FLAHERTY, Senior Judge