IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CITY OF BOTHELL, a municipal corporation, Respondent, v. STEVEN D. FLANAGAN, a single person, GERARDO G. SUAREZ and TERESITA S. SUAREZ, husband and wife and their marital community composed thereof, Appellants.	)	NO. 62733-3-I DIVISION ONE Unpublished Opinion FILED: December 7, 2009

Lau, J. — This appeal involves a challenge to the City of Bothell's enforcement of its housing code to abate nuisances at an apartment building owned by Steven Flanagan and Gerardo Suarez. Flanagan and Suarez challenge (1) a summary judgment order requiring them to pay civil penalties under Bothell Municipal Code (BMC) 11.20.010(A)(1)(a); (2) a supplemental judgment awarding attorney fees and costs pursuant to BMC 8.24.060(B); and (3) the trial court's denial of their motion for

order directing City to cease and desist arbitrary and capricious enforcement of code. Because no material issues of fact exist relevant to the imposition of civil penalties, BMC 8.24.060 authorizes the recoupment of code enforcement costs, including legal expenses, and because Bothell's enforcement action was authorized by applicable city code and was not willful and unreasonable, we affirm.

FACTS

Flanagan and Suarez jointly own the Park Royal Apartments in Bothell. In 2006, the City of Bothell inspected the property and found numerous code violations. The City served Flanagan and Suarez with an abatement order/notice of violation (NOV) on January 2, 2007. The first NOV required Flanagan and Suarez to remedy roof leakage, water damage, and toxic mold in a number of units within 60 days. In August 2007, Flanagan and Suarez informed the City that asbestos was present on the property. The City served a second NOV on Flanagan and Suarez on November 7, 2007. This NOV detailed similar violations in other units and required Flanagan and Suarez to obtain permits to perform mechanical, plumbing, and electrical repairs; hire an exterminator for newly identified pest problems; abate mold; and address several additional maintenance issues within 30 days.

Over a year after the first NOV was issued, Flanagan and Suarez had not completed much of the required work. The parties entered into a stipulated injunction on January 25, 2008. The injunction prevented the continued occupancy of the Park Royal Apartments and required that Flanagan and Suarez remedy the violations listed in the two NOVs and those discovered through a comprehensive inspection report (CIR) process by April 30, 2008. The City

agreed to provide the CIR to Flanagan and Suarez by February 29, 2008.

By April 30, 2008, Flanagan and Suarez had fixed the roof and completed asbestos abatement but had not addressed other issues, such as mold. The City issued the CIR on May 8, 2008. The City had refused to conduct the inspection while asbestos abatement was ongoing. The CIR revealed several violations not previously addressed by the NOVs, including windowsills that were too far above the floor, missing vapor barriers, structural problems in balconies and walkways, and "electrical issues." Flanagan and Suarez obtained independent mold, plumbing, and engineering inspections in August 2008, but had not remedied other violations listed in the two NOVs or the CIR such as obtaining the building permits to complete plumbing, structural, and mechanical repairs. Meanwhile, Flanagan and Suarez's independent mold inspector reported mold in multiple units.

The City moved for summary judgment on September 25, 2008, alleging that Flanagan and Suarez had failed to comply with the NOVs and the stipulated injunction. Flanagan and Suarez opposed the motion and moved for an order directing City to cease arbitrary and capricious enforcement of code. The court denied Flanagan and Suarez's motion, granted the City's summary judgment motion, and entered a judgment against Flanagan and Suarez. The judgment required them to remedy housing code violations within 30 days; pay civil penalties, attorney fees, and costs; and apply for building permits; and it authorized the City to take corrective action if Flanagan and Suarez failed to remedy the violations.[1] The City filed a motion for supplemental judgment for attorney fees and costs incurred by defending against the motion for order directing the City to cease and desist

arbitrary and capricious enforcement of code, and the court awarded $4,000 in additional fees and costs to the City. Flanagan and Suarez appeal the order of summary judgment, the supplemental judgment, and the denial of their motion. Based principally on the stipulated injunction, the City moved for a motion on the merits to affirm. We have determined that Flanagan and Suarez's appeal should be heard by a panel of judges without oral argument.

ANALYSIS

Civil Penalties

Flanagan and Suarez first assign error to the trial court's award of civil penalties in its order granting summary judgment. The trial court awarded $9,260 in penalties at a rate of $20 per day for 463 days of violations. The Bothell Municipal Code expressly authorizes such penalties. "Any person violating or failing to comply with any of the provisions of this code . . . shall be subject to a maximum penalty in the amount of $250.00 per day for each violation from the date set for compliance until compliance with the order is achieved. . . ." BMC 11.20.010(A)(1)(a). The stipulated injunction

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[1] Specifically, the court entered a judgment as follows: "(a) requiring Defendants to complete the required and agreed remediation of various, multiple housing code violations within 30 days, (b) imposing civil penalties pursuant to City code in the amount of $9,260 ($20 per day x 463 days), and (c) reimbursing the City for its costs and fees incurred in pursuing this action, including attorneys' fees and costs in the amount of $73,976.15 through August 31, 2008. In addition if Defendants do not complete the nuisance abatement required by the terms of the Stipulated Injunction or file complete applications for Building, Plumbing, Mechanical permits . . . not later than Jan. 30, 2009, the court authorizes the City, in its discretion, to either complete the nuisance abatement . . . or take any corrective action reasonably necessary to abate the on-going nuisance . . . ."

"reserve[d] for subsequent agreement, or hearing before the Court, resolution of the amount of City costs and penalties to be paid by defendants."

A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The burden is on the moving party to show there is no genuine issue of material fact. Vallandigham v. Clover Park Sch. Dist. No. 400, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co., 115 Wn.2d 506, 516, 799 P.2d 250 (1990). If the moving party satisfies its burden, the nonmoving party must present evidence that demonstrates that material facts are in dispute. Atherton, 115 Wn.2d at 516. However, mere allegations and argumentative assertions will not defeat summary judgment. Vacova Co. v. Farrell, 62 Wn. App. 386, 395, 814 P.2d 255 (1991). Summary judgment is proper if, in view of all the evidence, reasonable persons could reach only one conclusion. Vallandigham, 154 Wn.2d at 26. This court reviews a trial court's summary judgment order de novo. Folsom v. Burger King, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

Flanagan and Suarez argue that the trial court's order of summary judgment was improper because it failed to view "evidence" that the City delayed Flanagan and Suarez's ability to comply with code provisions in the light most favorable to them. Specifically, Flanagan and Suarez assert that the trial court ignored their assertions that the City's failure to complete the CIR by February 29, 2008, prevented them from coming into compliance by the April 20, 2008 deadline. The City counters that while it did not issue its CIR until May 8, 2008,

the delay was caused by Flanagan and Suarez's failure to remedy known asbestos contamination—a violation of the BMC in and of itself.

The cause or effect of the CIR delay is immaterial to the review of the summary judgment order granting civil penalties. Flanagan and Suarez's argument ignores the fact that they had already been in violation for some 294 days before the parties entered into the stipulated injunction and the City agreed to provide the CIR by February 29, 2008. The City's January 2, 2007 NOV established the initial "date set for compliance" and provided for a 60-day curative period thus mandating compliance on March 4, 2007. The November 2007 NOV granted a 30-day curative period and established a new "date set for compliance" of December 10, 2007. The stipulated injunction's April 30, 2008 "date set for compliance" was the third such date established by the City. Flanagan and Suarez do not contest that it remained in violation following the January 2, 2007 NOV for 248 days (from March 5, 2007, until November 7, 2007) and following the November 8, 2007 NOV, for 46 days (from December 11, 2007, until January 24, 2008). Indeed, Flanagan and Suarez acknowledge as much in the stipulated injunction. Thus, Flanagan and Suarez effectively concede both that they were in violation for those dates and that civil penalties were therefore proper under BMC 11.20.010(A)(1)(a).

Flanagan and Suarez's contentions regarding the period after the stipulated injunction similarly raise no issues of material fact. The stipulated injunction established two affirmative remedial requirements. First, paragraph 2(c) required Flanagan and Suarez to "repair, reconstruct, or otherwise to remedy, on or before April 30, 2008 . . . all code violations or other

deficiencies at the Property noted in the [January 1, 2007 and November 8, 2007 NOVs.]" Second, paragraph 2(d) required Flanagan and Suarez to

> repair, reconstruct, or otherwise to remedy, on or before April 30, 2008 . . . all code violations or other deficiencies at the Property noted . . . pursuant to the inspection referenced in subparagraph 2.B., above . . . . Bothell shall complete the inspection . . . [by] February 22, 2008 . . . [and] provide to Defendants by February 29, 2008 a written report of any violations . . . .

The requirements of paragraph 2(c) were not contingent on the City completing its CIR but were based on the two 2007 NOVs. The CIR was entirely unnecessary for Flanagan and Suarez to remedy violations that had already been identified between 114 days and 423 days before the CIR was even due. Thus, as soon as the April 30, 2008 date for compliance passed, Flanagan and Suarez were immediately subject to civil penalties under BMC 11.20.010(A)(1)(a) for not complying with the two NOVs. Flanagan and Suarez point to no evidence establishing that they were in full compliance with the two NOVs as of April 30, 2008. Rather, Flanagan and Suarez's own inspector reported that mold remediation, initially required in the January 2, 2007 NOV, was incomplete as of July 11, 2008. The permit applications required by the November 8, 2007 NOV remained outstanding as of the date of the court's judgment. Thus, Flanagan and Suarez remained in violation of at least one of the NOVs for the entire period after April 30, 2008. Indeed, the City could have sought penalties starting from April 30, 2008, but declined to do so and only sought them beginning on May 9, 2008. Civil penalties were authorized under the BMC and the stipulated injunction regardless of the City's delay in completing the CIR.

We conclude that based on the stipulated injunction and BMC 11.20.010(A)(1)(a), no genuine issues of material fact exist

regarding the imposition of civil penalties. Accordingly, the trial court did not err in granting the City's summary judgment motion.

Attorney Fees and Costs

Flanagan and Suarez next contend that "the trial court failed to inquire into the reasonableness of the City's costs, including an [sic] attorney's fees and costs." Br. of Appellant at 11. Flanagan and Suarez, however, cite no authority supporting the assertion that the award of fees and costs was improper and fail to specifically argue how or which fees or costs were excessive. We will not review an issue raised in passing or unsupported by authority or persuasive argument. See Beal v. City of Seattle, 134 Wn.2d 769, 777 n.2, 954 P.2d 237 (1998) ("The City cites no authority for this proposition and, thus, it is not properly before us.") (citing RAP 10.3(a)(5)).

Even if the issue were properly before us, it is without merit. Whether a party is entitled to attorney fees is an issue of law that is reviewed de novo. Ethridge v. Hwang, 105 Wn. App. 447, 460, 20 P.3d 958 (2001). Whether the amount of the award was reasonable is reviewed for an abuse of discretion. Taliesen Corp. v. Razore Land Co., 135 Wn. App. 106, 141, 144 P.3d 1185 (2006). A trial court abuses its discretion only when its decision is manifestly unreasonable or based on untenable grounds. Wick v. Clark County, 86 Wn. App. 376, 382, 936 P.2d 1201 (1997), overruled on other grounds by Keller v. City of Spokane, 146 Wn.2d 237, 254–55, 44 P.3d 845 (2002).

The BMC authorizes an award of attorney fees and costs by providing,

> In case the owner of the premises, or the occupant thereof, or any other person or persons creating, causing or committing, or maintaining the same, should fail

> to remove any nuisance as described in this chapter, the city may proceed upon the premises and clean and level the premises and remove or destroy said nuisance. The cost to the city for such cleaning, leveling, removal or destruction shall be at the expense of the owner or occupant of the property or against any other person or persons creating, causing or committing, or maintaining the same. The amount of said costs, together with the reasonable legal and administrative costs incurred by the city in relation thereto and for collection, shall be paid within 30 days of the billing date.

BMC 8.24.060(B) (emphasis added).

In awarding attorney fees and costs in its October 24, 2008 summary judgment order and judgment, the trial court considered the declaration of Terri Battuello, the Assistant City Manager/Economic Development Manager for the City. The declaration and attached exhibits contained detailed documentation and records for staff salaries and benefits, attorney fees, and relocation assistance associated with the Park Royal restoration work. Based on this evidence, the trial court awarded $73,976.15 in attorney fees and costs. In awarding supplemental fees and costs for the City's defense of the motion for order directing City to cease and desist arbitrary and capricious enforcement of code, the trial judge again considered detailed documentation for attorney fees and the fees and costs provision under BMC 8.24.060. Indeed, the trial judge reduced the requested fees from $6,233.56 to $4,000. Given the substantial problems at the Park Royal, the ongoing costs of litigation, the well-documented evidence considered by the trial court, and Flanagan and Suarez's failure to cite legal authority or persuasive grounds to dispute the award, we hold that the trial court did not err in imposing costs and fees and that the amount of the award was well within the trial court's discretion.

Arbitrary and Capricious Enforcement of Code

Flanagan and Suarez next argue that the trial court erred by denying its motion for order directing City to cease and desist arbitrary and capricious enforcement of code. Specifically, Flanagan and Suarez assert that the extent of the remediation required and the City's failure to notify them of certain repairs in its first NOV constituted bad faith and arbitrary and capricious code enforcement. Arbitrary and capricious action is ""willful and unreasonable action, without consideration for facts or circumstances."" Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999) (quoting Teter v. Clark County, 104 Wn.2d 227, 237, 704 P.2d 1171 (1985)). Where there is room for two opinions, discretion exercised honestly and upon due consideration will not be overturned even if we disagree with it. Buechel v. State Dep't of Ecology, 125 Wn.2d 196, 202, 884 P.2d 910 (1994).

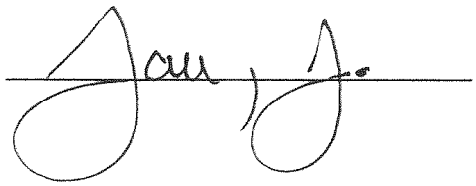
Flanagan and Suarez contend that the City acted arbitrarily and capriciously in requiring them "to lower windowsills, to install vapor barriers, to replace pan decking on upper walkways, and to fix electrical issues." Br. of Appellant at 12. Flanagan and Suarez do not contest that conditions at the property violated the BMC or that the City is authorized to enforce the BMC. Furthermore, Flanagan and Suarez cite no authority for the proposition that the CIR's repair requirements were an arbitrary and capricious enforcement of the BMC. The City, by contrast, correctly notes that Flanagan and Suarez were bound by the stipulated injunction to conduct the repairs identified by the CIR. Furthermore, the City points to the declaration of Mike DeLack, the Deputy Director of Community Development and Building Official for the City, as evidence that its decision was not arbitrary and

capricious. The declaration provides a point-by-point examination of all of the building problems that Flanagan and Suarez contest and cites to code and statutory authority for those requirements. Rather than contest the City's code and statutory authority, Flanagan and Suarez appear to take issue with the degree of alterations that the City required, stating, "These conditions required extensive alterations of the existing structure. The City is acting arbitrarily and capriciously in imposing these requirements." Br. of Appellant at 12. These conclusory arguments fail to establish that the City acted in a willful and unreasonable manner. Given Flanagan and Suarez's voluntary agreement in the stipulated injunction to make the CIR repairs, the code violations identified by DeLack and the corresponding repair work required by the City, we cannot say that the City's enforcement actions were arbitrary and capricious.

Attorney Fees On Appeal

The City requests reasonable attorney fees on appeal. Under RAP 18.1(a);(b), a party is entitled to attorney fees on appeal if applicable law authorizes the fees and the party devotes a section of its brief to the request. Attorney fees are authorized under BMC 8.24.060, and we therefore award reasonable attorney fees on appeal to the City subject to compliance with RAP 18.1.

For the foregoing reasons, we affirm.



WE CONCUR: