COURT OF APPEALS
DECISION
DATED AND FILED

April 24, 2014

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP1997 **Cir. Ct. No. 2011CV1264**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT IV

IYAD NABHAM,

PLAINTIFF-RESPONDENT,

V.

CITY OF BELOIT,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Rock County: BARBARA W. McCRORY, Judge. *Affirmed.*

Before Higginbotham, Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. The City of Beloit appeals an order permanently enjoining it from enforcing a condemnation order issued June 2, 2011, against property owned by Iyad Nabham at 609 Portland Avenue, Beloit. The circuit court concluded that the code violations cited by the City and the assessed value of

the property were pretextual so that the City could eliminate the property under WIS. STAT. § 66.0413(1)(b)1. (2011-12),[1] without having to compensate Nabham. The City argues that the circuit court's conclusion is not based on the evidence or proper considerations. We conclude that the circuit court's findings are based on a credibility assessment and those findings support a determination that the condemnation order was unreasonable. We affirm the injunction order.

¶2 The building on Nabham's property dates back to the 1900s and consists of a store on the first floor and five apartments upstairs. The building was regularly inspected by the City since 1997 and rental permits were issued every year. A November 2010 inspection found only minor violations of the city code. An inspection on March 15, 2011 found substantial code violations and required electrical upgrades in the rental units. On June 2, 2011, the City issued a condemnation order declaring that the property "constitutes a nuisance and is old, dilapidated or has become so out of repair as to be dangerous, unsafe, unsanitary or otherwise unfit for human habitation, occupancy or use." The order also stated: "It has been determined that the cost of necessary repairs would exceed fifty (50) percent of the assessed value" of the building. The order required Nabham to raze

[1] WISCONSIN STAT. § 66.0413(1)(b) provides in part:

> The governing body, building inspector or other designated officer of a municipality may:
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> 1. If a building is old, dilapidated or out of repair and consequently dangerous, unsafe, unsanitary or otherwise unfit for human habitation and unreasonable to repair, order the owner of the building to raze the building or, if the building can be made safe by reasonable repairs, order the owner to either make the building safe and sanitary or to raze the building, at the owner's option.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

the building within thirty days. Nabham petitioned the circuit court under WIS. STAT. § 66.0413(1)(h) for a restraining order. A temporary ex parte restraining order was entered. After a trial to the court, the circuit court granted the injunction.[2]

¶3 The circuit court's duty was to determine whether the raze order was reasonable. WIS. STAT. § 66.0413(1)(h). The determination of reasonableness is a question of law which we review independently. ***A&A Enters. v. City of Milwaukee***, 2008 WI App 43, ¶17, 308 Wis. 2d 479, 747 N.W.2d 751. However, because reasonableness is so intertwined with the circuit court's factual findings, we give "more credence" to the circuit court's legal determination than we do other legal questions. ***Village of Williams Bay v. Schiessle***, 138 Wis. 2d 83, 88, 405 N.W.2d 695 (Ct. App. 1987). The circuit court's factual findings are reviewed under the clearly erroneous standard giving due regard to the circuit court's assessment of the credibility of the witnesses. ***A&A***, 308 Wis. 2d 479, ¶17. The circuit court's credibility determination may not be disturbed on appeal. *See* ***Plesko v. Figgie Int'l***, 190 Wis. 2d 764, 775-76, 528 N.W.2d 446 (Ct. App. 1994).

¶4 The City argues that the raze order was presumptively reasonable because the cost of repairs would exceed 50% of the assessed value of the building. *See* WIS. STAT. § 66.0413(1)(c).[3] However, the circuit court rejected not

[2] Judge Barbara W. McCrory entered the injunction order. Judge James E. Welker presided over the trial to the court and decided the case by a memorandum decision.

[3] WISCONSIN STAT. § 66.0413(1)(c) provides in part:

(continued)

only the necessity of the repairs ordered but also the accuracy of the assessed value of the building.

¶5 Although the circuit court did not make an express credibility determination, it implicitly rejected the testimony of the inspectors as to the violations found and repairs needed to bring the property into compliance. The circuit court found the City's conduct to be a pretext and that the City had acted in bad faith in artificially creating a situation where the building could be razed. It also found that "the inspector mysteriously found in March that there were very substantial code violations, all of which admittedly had existed for many years" and that the "city has no explanation for why alleged code violations which had been in existence over many years suddenly required immediate remediation in March of 2011." Words like "pretext," "mysterious[]," "no explanation," and "bad faith" reflect a rejection of the credibility of the testimony of the City inspectors as to the legitimacy of the condemnation order.

¶6 The testimony regarding the timing of the discovery of the violations and repair estimates supports the circuit court's findings and credibility assessment. The fire inspector testified that there were no changes to the city's code and no change to the building that would have required the electrical upgrades she set forth as a violation after the March 15, 2011 inspection. She

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> if a municipal governing body, building inspector or designated officer determines that the cost of repairs of a building described in par. (b)1. would exceed 50% of the assessed value of the building divided by the ratio of the assessed value to the recommended value as last published by the department of revenue for the municipality within which the building is located, the repairs are presumed unreasonable for purposes of par. (b)1.

confirmed that the rental permit which was issued to Nabham on February 14, 2011, would not have been issued if there were uncorrected code violations. Her testimony was that the property had deteriorated in just one month to the point where all the electrical upgrades were needed.

¶7 The plumbing inspector testified that he found plumbing violations at his May 19, 2011 inspection but he did not issue violation orders because he was told the condemnation order was coming. He confirmed that before issuance of the condemnation order the building was not required to have a fire suppressing sprinkler system but that he had been asked to price the cost of such a system *after* the condemnation order was issued. He confirmed that it was the issuance of the condemnation order which created the requirements to install a new bathroom in the second floor unit and to install a sprinkler system.[4]

¶8 The city building inspector testified that the estimate of repair costs was not prepared until *after* the City issued the condemnation order. He also confirmed that the building was not required to have a fire suppressing sprinkler system and that the condemnation order created that requirement. The same was true with an automatic fire smoke alarm system listed on the estimate of repairs at $9,585—the need to install that system was triggered by the condemnation order.

¶9 As to the assessed value of the property, the circuit court found that "the city dramatically reduced the assessed value of the property at a rate many times the adjustments that were made for property in the city in general" and that

[4] The City estimated the cost of repairs for the new bathroom, sprinkler system and related plumbing upgrades to be $63,000. The plumbing inspector testified that at most it would have cost $2,000 to repair the violations he found on his inspection for which he did not issue a violation order.

the City's motive in reducing the assessed value was to get the property assessment down to a level at which the City could claim repairs would exceed 50% of the assessed value. The city assessor testified that in 2010, the first year he was the city assessor, the assessed value of the building was reduced by 50% to $49,300. The assessor based the reduction on a drive-by exterior view of the property he had done three years earlier and on the deterioration of the real estate market. He testified "not many" other properties in Beloit had the value of their improvements decline by 50% in 2010. Only three properties were identified by the City as having a 50% decrease in the assessed value between 2007 and 2011.

¶10 The circuit court also found that the City's claim of violations and lower assessed property value were pretextual. The circuit court pointed out that the fire inspector's report from the March 15, 2011 inspection contained unnecessary reference to Nabham's appearance as a person of Middle East ethnicity and to his heavy accent, and that he had the television in the store tuned to something in Arabic. The court found the inspector's answer for why the report contained such details disingenuous and noted the report was vastly different from her prior inspection reports of the same property. The court concluded that such details suggested the inspector or the City had an interest in removing the building because of suspicions relating to the ethnic background of people occupying the building.

¶11 The City contends that the circuit court relied on an improper consideration when it attributed an improper motive for the City's action. We disagree. The improper motive or pretext the court attributed to the City's action was a factor bearing on the credibility of the city's inspectors and officials. The circuit court was not required to ignore what it believed to be pretextual actions.

¶12 Overall the evidence supports the circuit court's credibility determination and findings. The circuit court found that there were no violations needing repair and that the City suddenly reduced the assessed value of the property "beyond anything that appears reasonable." Not only was there no basis for the City's declaration that the building was "so out of repair as to be dangerous," but there also was no basis to claim needed repairs exceeded 50% of the assessed value. We conclude that the condemnation order was unreasonable.

¶13 With respect to granting injunctive relief, our review is limited to whether the circuit court erroneously exercised its discretion. ***A&A***, 308 Wis. 2d 479, ¶18. The City argues the circuit court erroneously exercised its discretion because it improperly rejected the reasonableness of the condemnation order. We have determined that the condemnation order was unreasonable. When the condemnation order is found to be unreasonable, the circuit court "shall continue the restraining order or modify it as the circumstances require." WIS. STAT. § 66.0413(1)(h). We are not persuaded that the continuation of the restraining order by granting the injunction was an erroneous exercise of discretion.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.