The Town of Georgetown v. Paul W. Vanaman

Civil Action No. 1225 (1986)
Court of Chancery of Delaware, Sussex
1988 Del. Ch. LEXIS 16
January 28, 1988, Decided

OPINION

DECISION AFTER TRIAL

MAURICE A. HARTNETT, III, Vice-Chancellor

Plaintiff, the Town of Georgetown, brought this suit seeking:

1) ". . . an Injunction . . . against Defendant requiring him to connect the property designated as Parcel 286 as shown on Sussex County Tax Map 1-35-14.20 to connect the said property to the public sewer system of Plaintiff;"

2) ". . . an Injunction . . . against Defendant requiring him to cut and keep cut the unregulated growth of weeds and vegetation located on the properties designated as Parcel 286 on Sussex County Tax Map 1-35-14.20 and Parcels 9 and 10 on Sussex County Tax Map 1-35-15.17;" and

3) ". . . in the alternative, Plaintiff be authorized to cut the unregulated growth of weeds and vegetation on Parcel 286 as shown on Sussex County Tax Map 1-35-14.20 and Parcels 9 and 10 as shown on Sussex County Tax Map 1-35-15.17; . . ."

Defendant appeared *pro se* and filed a pleading termed a "Counterclaim and Response to Complaint" in which he made numerous rambling charges against the Town and various other persons but which will be considered to be a general denial. The so-called "Counterclaim" portion of defendant's response, for the most part, merely restated rambling charges against the Town and others. The only relief which defendant prayed for was set forth in his so-called "Motion To Dismiss", which was annexed to his "Counterclaim and Response", and requested the Court to give relief in *haec verba*:

"1. DISMISS THIS THESE CHARGES AS THEY ARE WITHOUT FOUNDATION, AND ARE DISCCRIMINATING.

2. THAT THE WATER SUPPLY BE DEMANDED TO MAKE RESTITUATION AND A PAYMENT OF $ 50.00 PER DAY COVERING A TWO YEAR OR AS THE COURT MAY DECIDE.

2. THAT THE TOWN OF GEORGETOWN BE MADE TO RE CONNECT THE SEWER LINE PROPERLY, AND ALL NAMED DEFENDANTS OF THE TOWN INCLUDEING BE MADE PAY EACH THE SUM OF $ 100.00 DOLLARS PER DAY, ALSO THAT THE TOWN PAY FOR THE DAMAGES TO A GRAPE VINE AND TO A MAGNOLIA TREE.

THAT ALL EXPENSES OR COSTS BE PAID BY THE PLAINTIFF"

Although defendant set forth in his pleadings numerous allegations concerning a "Mrs. Barlow" and the "Water Company" (which is not the Town) and others, he made no effort to join any other person or firm as a party.

I

Trial was commenced on November 3, and ended late in the afternoon of November 5, 1987, shortly after defendant, who was representing himself, voluntarily left the courtroom after accusing the Court of being prejudiced against him and denying him a fair trial.

The Town called three witnesses: Robert L. Stickles (the Town Manager), Dr. Maynard H. Mires, Jr. (the Sussex County Health Officer), and David D. Titwell (a real estate appraiser). After testifying on direct examination, they were questioned at length by a long, rambling, argumentative, and often incoherent cross examination by the defendant.

Following plaintiff's case, defendant questioned seven of the many witnesses he had sought to subpoena. They were treated to the same argumentative and incoherent examination as were plaintiff's witnesses. None of the witnesses which defendant called gave any evidence which could be construed as being helpful to defendant's position.

It was often difficult during the trial to understand just what positions defendant was asserting, and he refused to enlighten the Court when requested to do so. Apparently defendant was attempting to claim that plaintiff, in bringing this suit, engaged in a conspiracy with certain neighbors of defendant, or was harassing defendant or was illegally discriminating against him. No competent evidence was presented, however, which showed the existence of any conspiracy, harassment or illegal discrimination.

II

The Town first charges that defendant has not complied with the terms of the Town of Georgetown Ordinance No. 202 which states:

"AN ORDINANCE PROVIDING FOR THE DISPOSAL OF HUMAN EXCRETA WITHIN THE TOWN LIMITS OF GEORGETOWN AND DECLARING OPEN PRIVIES TO BE A NUISANCE AND PROVIDING FOR THE ABATEMENT OF SUCH NUISANCES.

ARTICLE I. PROVIDING FOR A METHOD OF DISPOSING OF HUMAN EXCRETA OF OCCUPANTS AND THE OWNERS OF PREMISES.

Section 1. That every residence and building in which human beings reside, are employed or congregated, shall be required to have a sanitary method of human excreta disposal, namely; have a sanitary water closet connected with the town sewer, an approved type of septic tank or a sanitary privy.

Section 2. It shall be unlawful to dispose of any human excreta within the corporate limits of the town of Georgetown, except in a sanitary water closet or a sanitary privy.

Section 3. It shall be unlawful for any person, persons, firm or corporation owning or leasing any premises in the town of Georgetown to permit the disposal of any human excreta on any property, leased or rented by any such person, persons, firm or corporation or the agent of any such, except in a sanitary water closet or a sanitary privy.

Section 4. That no septic tank or privy other than those approved by the State Board of Health shall be constructed within the corporate limits of Georgetown.

Section 5. The cost of installing a sanitary water closet or sanitary privy shall be borne by the owner of the property upon which the sanitary water closet or privy is located.

Section 6. All privies within the corporate limits of Georgetown, not meeting the sanitary requirements of the State Board of Health, shall be and are hereby declared injurious to the public health, and shall be condemned and forthwith abated in accordance with the law or ordinance of said town.

Section 7. The town shall have the further right to make or have made such alterations and constructions of those privies which are nuisances and make them sanitary and all of the cost pertaining to such work shall be charged against the property owner.

Section 8. Where in any street or section of street there is now constructed a public sewer for the purpose of carrying off the sewage, the owner or owners abutting on, adjacent to, along the line of any or within 200 feet of any such sewer so constructed shall, within 30 days after being notified by the town clerk or secretary of the town of Georgetown, connect the house and buildings on such property with such public sewer in a proper manner.

ARTICLE II. DEFINITION OF TERMS (omitted)

ARTICLE III. PENALTY

Section 1. Any person, persons, firm or corporation or agent of any person, persons, firm or corporation who neglects, fails or refuses to comply with the provisions of this ordinance shall be deemed guilty of a misdemeanor and when convicted shall be fined the sum of $ 10.00 and costs of prosecution, and each time that such person, persons, firm or corporation neglects, fails or refuses to comply with any provisions of this ordinance shall be deemed a separate offense and punished as herein provided."

Plaintiff clearly established at trial that defendant is violating Section 8 of the Ordinance because he is living in the house which he owns at 307 Cedar Street in the Town of Georgetown (Parcel 286) and that the house is not connected to the Town sewer system which is within 200 feet of defendant's property and that defendant has had 30 days notice from the Town to connect to the sewer system. There was no contrary competent evidence presented. Plaintiff also introduced testimony that the use of the premises without it being connected to a sewer is, in the opinion of the Town Manager and the Sussex County Public Health Officer, a health hazard, but no evidence was shown as to how defendant is disposing of any wastes.

A municipal ordinance may constitutionally require connection with municipal sewer pipes or sewage conduits. *Hodge v. Stout, E.D.Tenn., 377 F.Supp. 131 (1974)*; *Butcher v. Grosse Ile, Mich. App., 180 N.W.2d 367 (1970)*; See *Commonwealth v. Dougherty, Pa. Super., 40 A.2d 902 (1945)*.

The conduct of defendant falls far short of what can be reasonably tolerated by a community. If defendant's illegal conduct is to be stopped, however, it must be done in accordance with the rule of law. Under our system of justice, all are entitled to a fair and impartial application of the law, even those whose conduct might not seem to warrant it.

Although the defendant did not assert any claim that Ordinance No. 202 is invalid or unenforceable, and by his conduct and actions often showed his contempt for all involved, including this court, he is entitled to the benefit of whatever defenses are available to him. I, therefore, must raise *sua sponte* any defenses which seem to apply.

III

I must, therefore, first consider whether this Court has jurisdiction to enter an order directing defendant to comply with Ordinance No. 202. Article III, Section 1 in the Ordinance (quoted above) clearly makes the ordinance a penal law.

The Court of Chancery is a court of limited jurisdiction having only that jurisdiction which existed in equity in England at the time of the American Revolution or that which has been conferred upon it by the General Assembly. *First Nat'l Bank v. Andres, Del. Ch., 28 A.2d 676 (1942)*.

Generally, Courts of Equity will not enjoin a violation of a municipal penal ordinance, unless the violation amounts to a public nuisance *per se*. In the absence of a showing that the challenged conduct is a nuisance *per se*, a municipality is left to enforce its remedy in the law courts. *Inganamort v. Merker, N.J. Super., 372 A.2d 1168 (1977)*; *International Cleaning v. Landowitz, Cal. Supr., 126 A.2d 609 (1942)*; *Mears v. Colonial Beach, Va. Supr., 184 S.E. 175 (1936)*. Moreover, absent specific authorization, a court of equity will not restrain a violation of a penal law which calls for a fine. *International Cleaning, supra.*

The existence of a public nuisance, however, will justify a Court of Equity enjoining acts in violation of a municipal ordinance. *Murden v. Commissioners of Town of Lewes, Del. Super., 96 A. 506, 507 (1915)*. "It is a doctrine of widest acceptance that an equity court has jurisdiction to restrain existing public nuisances by injunction. 4 POMEROY'S *Equity Jurisprudence* (5th Ed.) ß 1349. And that jurisdiction is not affected by the fact that such nuisance is technically a crime." *Cox v. New Castle County, Del. Supr., 265 A.2d 26, 27 (1970)*; see also *State v. Sposato, Del. Ch., 235 A.2d 841 (1967)*.

In sustaining equitable relief although an ordinance provided criminal sanctions, the Maryland Supreme Court recently stated, "Where . . . the enforcement of the criminal law is merely incidental to the general relief sought and the acts complained against constitute a nuisance as a danger to the public health and public welfare and a more complete remedy is afforded by injunction than by criminal prosecution, a court of equity may, on the request of a duly constituted authority, grant the relief sought by the injunction." *Whitaker v. Prince George's County, Md. Supr., 514 A.2d 4, 9 (1986)*.

Absent a definition of a public nuisance in a statute or ordinance, however, a Court is compelled to look to the common law definition. *Mayor of Wilmington v. Vandegrift, Del. Supr., 29 A. 1047 (1893)*. No definition of a "public nuisance" appears in Ordinance 202. Since 1893, a public nuisance has been defined under Delaware common law as "an unlawful act or omission to discharge a legal duty which act or omission endangers the lives, safety, health or comfort of the public or by which the public are obstructed in the exercise or enjoyment of a right common to all." *Id. at 1048*.

Generally, it is considered a nuisance for an individual to deposit on his own property garbage, refuse or filth of such a character as to cause injury and discomfort to adjacent residents. *58 Am.Jur.2d Nuisances ß 82*, citing *State ex rel. Heck v. Grillot, Ohio Misc., 128 N.E.2d 552 (1955)*. The discomfort may include the noxious odors which may make it uncomfortable or dangerous to reside nearby. 66 C.J.S. *Nuisances* ß 49, citing *Grillot, supra.*

If defendant is depositing human excreta or other similar waste, filth or garbage on his premises he is certainly committing a public nuisance and this Court could enjoin his acts. Unfortunately, the record is devoid of any evidence that this has ever happened. The most that was adduced at trial was a suspicion by plaintiff's witnesses that this was happening. This is insufficient. An opinion was expressed that the junk stored on defendant's premises was a public nuisance and health hazard but

plaintiff did not seek any relief because of the storage of junk. The opinion was also expressed that rats were attracted to defendant's premises because of their condition, but I find this opinion to be based on mere speculation.

Reluctantly, therefore, I must conclude that, on the present record, this court does not have the authority to enter a mandatory injunction compelling defendant to have his house at 307 Cedar Street connected to the Town of Georgetown sewer system.

IV

The Town also seeks to compel defendant to comply with Town Ordinance No. 402 which states in pertinent parts:

Section 1. The unregulated growth of weeds, grass or other vegetation maintained on any property within the corporate limits of the Town of Georgetown shall be and it is hereby declared to be a common and public nuisance.

Section 2. The Mayor of the Town of Georgetown, shall, upon complaint from two (2) or more residents of the Town of Georgetown, or upon a resolution passed by the Town of Georgetown, appoint a committee to investigate and determine whether there is unregulated growth of weeds, grass or other vegetation on property located within the corporate limits of the Town of Georgetown.

Section 3. If the Committee so appointed shall, following its investigation, determine and report to the said Town Council that there is an unregulated growth of grass, weeds, or other vegetation on property located within the corporate limits of the Town of Georgetown, the said Town Council shall notify the property owner or tenant at his last known address in writing by registered mail with return receipt requested to have the said unregulated growth of weeds, grass or other vegetation cut or otherwise remedied within five (5) days from the date of delivery of the written notice, as aforesaid.

Section 4. Upon failure of the property owner or tenant to have the said unregulated growth of grass, weeds or other vegetation cut or otherwise remedied within the time specified as aforesaid, the Town Council of Georgetown may proceed to cause the unregulated growth of grass, weeds or other vegetation cut or otherwise remedied, and, when completed, a bill for the costs thereby incurred in the name of Town Council of Georgetown shall, as soon as convenient thereafter, be presented by registered mail with return receipt requested to the owner or tenant of said property.

Section 5. If the bill so presented by the Town Council shall not be paid within thirty (30) days following the delivery thereof by registered mail, it shall be lawful for the Town Council of the Town of Georgetown to institute an action in the corporate name in any court of competent jurisdiction in the State of Delaware for the collection of the debt and to collect the same in the manner now or hereafter provided for the collection of judgments in the State of Delaware.

The evidence presented by plaintiff (and reinforced by defendant's own witnesses) clearly shows that defendant has permitted his property to become overgrown with tall grass, weeds and untrimmed bushes and trees. It also is the repose of an abandoned refrigerator in apparent violation of *11 Del. C. ß 1107*, an unused motor vehicle, and various other items usually considered to be junk or refuse.

The evidence also showed that the defendant is fiercely protective of his property ownership rights and has prevented the Town from entering his lands and premises to inspect them for health violations or to cut any of the growth. I also find that defendant has threatened Town employees and

others with bodily harm if they enter or remain on his property without his permission. The evidence also showed that defendant expresses a strong dislike of most of the employees of the Town and at least two of his neighbors, who he accuses of harassing him.

From the evidence adduced, I find that defendant is maintaining an uncut growth of weeds, grass or other vegetation on his property which is located within the corporate limits of the Town of Georgetown. Whether this is sufficient to enable me to enter an injunction against defendant is another matter.

V

Defendant, through his cross examination, showed that there are several other parcels of land in Georgetown which contain junk and a high growth of weeds, grass or other vegetation.

These facts, however, do not indicate that defendant was singled out for any special adverse action, as he charges. To the contrary, the evidence showed that the Town of Georgetown has sent written notices of the violation of Ordinance No. 402 on at least 200 occasions since 1982 and that every property owner so contacted responded by attempting to rectify the complaints with one exception -- defendant.

The evidence also showed that the Town of Georgetown is very liberal in its' enforcement policies. Its' policy is to require but one cutting of weeds and grass each year. It also attempts to find solutions for less affluent residents and those who show a genuine effort at cleaning up and it assists nonresident property owners by doing the cutting and billing them at a reasonable rate. This policy shows enlightenment -- not abuse of authority. Nor was there any competent evidence introduced which showed any harassment of defendant nor the existence of any conspiracy against him.

A municipality has broad discretion in determining when and how to enforce its ordinances. Courts will not interfere with a municipality's judgment so long as it acts in good faith and in a reasonable manner. *Pickarski v. Smith, Del. Supr., 153 A.2d 587 (1959)*; *Campbell v. Comm'n of Town of Bethany Beach, Del. Supr., 139 A.2d 493 (1958)*; *Arbour Park Civic Ass'n v. City of Newark, Del. Ch., 267 A.2d 904 (1970)*; *Wilmington Housing Authority v. Numbers 500, 502 . . . , Del. Super., 254 A.2d 856 (1958)*; *Mallory v. Town of West Hartford, Conn. Supr., 86 A.2d 668 (1952)*; *Blue Sky Bar Inc. v. Town of Stratford Housing Authority, Conn. App., 493 A.2d 908 (1985)*; *Zang & Sons Builders v. Taylor, Md. App., 102 A.2d 723 (1954)*.

VI

Although defendant did not attack the validity of Ordinance No. 402, as indicated previously, I am compelled in fairness to raise *sua sponte* the question of whether the Ordinance is enforceable as written. Somewhat regretfully, I find that it is not and therefore cannot be enforced against defendant.

VII

The first fault with Ordinance No. 402 is its failure to specify its purpose. The only possible valid object and purpose of a weed abatement ordinance is to promote the health, safety and welfare of the city's inhabitants. *Thain v. Palo Alto, Ca. App., 24 Ca.Rptr. 515 (1962)*. These purposes, if stated in the ordinance and if derived from the town's police power, are universally enforced and given liberal construction. *Illinois Cigarette Service v. Chicago, 7th Cir., 89 F.2d 610 (1937)*. In contrast, however, an ordinance declaring a particular activity to be a nuisance which is based solely on aesthetic consideration is an unconstitutional exercise of police power. *Newark v. Garfield De-*

velopment Corp., Ohio Mun., 495 N.E.2d 480 (1986), citing, *Defiance v. Killion, Ohio App., 186 N.E.2d 634 (1962)*.

The Town of Georgetown Ordinance No. 402 may therefore be unenforceable because it states no purpose for the vegetation abatement.

VIII

In determining whether the Ordinance is enforceable, I must also determine whether the Ordinance is impermissibly vague or whether it gives a person of average intelligence a fair warning in definite language of the prohibited act. *Trice v. City of Pine Bluff, Ark. Supr., 649 S.W.2d 179 (1983)*.

In applying this standard, however, a Court must presume the constitutionality of a municipal ordinance. For an ordinance to be found wanting, it must be shown ". . . that the [ordinance] is impermissibly vague in all of its applications." *Hoffman Estates v. Flipside, Hoffman Estates, 455 U.S. 487, 497 (1982)*.

The greatest deficiency of Ordinance No. 402 is that it fails to specify any prohibited height as to the vegetation it seeks to regulate. It merely prohibits "unregulated growth" without giving any guidance of what unregulated growth is. The setting of a prohibited height was approved in *Village of Arlington Heights v. Schroeder, Ill. App., 328 N.E.2d 74 (1975)*. The Arlington Heights ordinance made it unlawful for any lot owner to permit an improper growth of weeds or grasses -- improper growth being defined as all weeds or grasses over 12 inches in height from the ground. This portion of the ordinance was found to be constitutional.

An exception in Arlington Heights' Ordinance, however, provided that lands under agricultural cultivation might be exempted from the ordinance upon written request to the Director of Health Services. The Court found this exemption to be unconstitutional, stating, "The fault of the ordinance lies not in the grant of discretion to the Director but in its failure to impose any standards by which he is to be guided." *Id. at 77*. The unlawful delegation was so closely related to the permissible height regulation that the Court was compelled to rule the entire act unconstitutional.

In *Lundquist v. City of Milwaukee, E.D. Wis., 643 F.Supp. 774 (1986)*, the disputed ordinance provided that no weeds of any kind would be permitted to grow or stand more than one foot high on any premises in the City. The Court found the description to be "well chosen to place a person of ordinary intelligence on notice that every weed over one-foot high . . . is prohibited." *Id. at 777*.

A court, absent specific authority in an ordinance, may not create standards when the local governing body did not deem such standards appropriate. *State v. Fort Worth, Tex. App., 314 S.W.2d 335 (1958)*; *Turturro v. Calder, Mass., 29 N.E.2d 744 (1940)*; Contra: *People v. Jack Resnick & Sons, Inc., N.Y. City Ct., 487 N.Y.S.2d 988 (1985)*.

Ordinance No. 402 also fails to describe, or provide examples of, the prohibited weeds or vegetation. Cf., *Lundquist v. City of Milwaukee, supra*; *Newark v. Garfield Development Corp., supra.* Ordinance No. 402 therefore does not provide either a height or type specification. Nor does it indicate what is intended to be included by the words "other vegetation." The language used in the ordinance would prohibit uncut ornamental bushes and shade trees. Even the Town Manager conceded that the Ordinance should not require the cutting of shade trees.

In summary, Ordinance No. 402 fails to provide a prior determination or definition of weeds or vegetation. This absence, in combination with a lack of a height requirement, makes Ordinance No. 402 impermissibly vague and unenforceable.

IX

Much of defendant's cross examination centered around his on-and-off claim that he owns a strip of land six feet wide adjacent to his property at 111 Aubrey Street [Parcels 9 and 10] which is not shown on the land records as being owned by him. His position on this issue was ambiguous and he refused to tell the Court, in response to a direct question from the Court, whether he claimed or did not claim the strip of land. At times defendant seemingly asserted that the Town could not force him to cut vegetation in the six-foot strip because he did not own it and the Town was at fault for not cutting it. At other times he seemed to claim that he owned it and the Town was trespassing on his property when it attempted to cut the vegetation in the six-foot disputed strip.

In any case, it is clear from the testimony that vegetation in the sixfoot strip is not being cut, is overgrown, and this condition has caused a loss of value as to other properties in the immediate area.

Defendant cannot merely defy the judicial system and expect to both claim and disclaim ownership of disputed land. Defendant's refusal to take a position as to whether he owns or does not own the disputed six-foot strip of land at 111 Aubrey Avenue in Georgetown, Delaware requires me to hold that, for the purpose of the issues raised in this suit only, defendant does not own it and the Town of Georgetown is therefore entitled to enter upon it and to cut the vegetation on it. Defendant therefore is enjoined and prohibited from denying the Town of Georgetown the right of entry for the purpose of cutting vegetation on the six-foot wide strip of land lying immediately east of defendant's property line at 111 Aubrey Avenue as that property line is shown on the recorded deeds in the Sussex County Court House. Defendant is also prohibited from refusing the Town entry on his property for the purpose of running a survey of the east property line of defendant's lot at 111 Aubrey Avenue.

X

In summary, the Town has shown that defendant is occupying his house at 307 Cedar Street and that it is not connected to the Town of Georgetown sewer system. Unfortunately for the welfare of the citizens of Georgetown, the Town has failed to show that a public nuisance exists because of this failure or that there is any other basis for this Court to enter a mandatory injunction compelling defendant to comply with Ordinance No. 202.

Likewise, the Town showed that defendant's properties are overgrown with vegetation and are by any reasonable standard a disgrace. Unfortunately the antiquated Town Ordinance No. 402 prohibiting "unregulated" growth is impermissible vague and is therefore unenforceable.

Defendant failed to offer any evidence or even to clearly claim that he owns a six-foot strip of land adjacent to his property. I therefore find that the Town is entitled to enter upon that strip of land and to cut the growth there and to enter upon the lands of defendant in order to establish the boundary line.

The evidence also showed that defendant is permitting an unused motor vehicle, an abandoned refrigerator, and other junk to accumulate on his property. Plaintiff in this suit, however, did not seek any relief as to these items and therefore none can be granted.

My inability to enter an injunction enforcing Ordinance Nos. 202 and 402 should not be any indication that the Court approves the conduct of the defendant nor should it be an indication that the Town cannot take whatever other means it has or may obtain to address this distressful problem.

From my observations of the conduct of the defendant in court, I have little hope that he will change his ways and become a good neighbor and responsible citizen by maintaining his properties in the manner which is reasonably expected of a resident of a built-up incorporated community. If he does not change, I also have little doubt that the Town will eventually find a way to force defendant to reasonably maintain his properties and comply with the Town's Ordinances. Unfortunately, this will likely be very expensive and troublesome to defendant, but he will have no one to blame other than himself.

The court costs are assessed one-half against plaintiff and one-half against the defendant.

Because defendant sometimes seems to profess that he has difficulty in understanding the Court, I point out to him that if he does not fully comply with the Order entered herein, he will be in contempt of Court and may be liable, after a hearing, for fine, imprisonment or other sanctions.

IT IS SO ORDERED.