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H. C. Hardgraves v. Harry L. Young et al : Brief of Defendants and Respondents

Utah Supreme Court

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In the Supreme Court of the State of Utah

H. C. HARGRAVES, Building Inspec-
tor for SALT LAKE CITY, a mu-
nicipal corporation,

Plaintiff,

vs.

HARRY L. YOUNG, KENNETH L.
ANDERSON, and WILLIAM
WALKENHORST,

Defendants.

FILED

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erk, Supreme Court, Utah

Case No. 8275

Brief of Defendants and Respondents

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In the Supreme Court of the State of Utah

H. C. HARGRAVES, Building Inspector for SALT LAKE CITY, a municipal corporation,
Plaintiff,

vs.

HARRY L. YOUNG, KENNETH L. ANDERSON, and WILLIAM WALKENHORST,
Defendants.

Case No. 8275

Brief of Defendants and Respondents

STATEMENT OF FACT

The three defendants in this case, all of whom are owners of homes located in Residential A Districts in Salt Lake City, Utah, constructed rigid awnings or patio covers adjacent to their homes. In each case the device extends into or across the minimum sideyard area as prescribed by Salt Lake City Zoning Ordinance in the areas concerned.

At the time of the construction, none of the defendants secured a building permit from the city because of the generally accepted view among the fabricators of awnings of this type that said awnings not being part of the building were not subject to the restrictions regarding use of sideyards for building purposes. After the awnings were completed and in place, each of the three defendants was advised by the city engineer's office that that office regarded them as being in violation of the zoning ordinance and suggested that the defendants apply to the Zoning Commission for a variance. This the defendants did. Their applications for variance were denied and the defendants were ordered to remove the awnings. This the defendants declined to do and it was agreed between counsel for the defendants and counsel for Salt Lake City Corporation that this action should be brought to secure a judicial interpretation of the Ordinances in question.

No question is raised by the City in its pleadings regarding the question of whether or not the defendants should or should not have secured a building permit. In the Court below the plaintiff likewise made no assertion that the defendants should have followed the provisions of Sec. 10-9-15, U.C.A. 1953. That position was taken by the plaintiff for the first time in their Brief in this Court. Counsel for both plaintiff and the defendants cooperated before the hearing in the District Court to secure a determination of the matter as expeditiously as possible. Accordingly, a stipulation of fact was entered into between the parties in which they attempted to set forth all the material facts of the case in order to permit the matter to be determined upon a Motion for Summary

Judgment. The Motion was made by the defendants. After extended argument before Judge Ellett, it was ruled that the city ordinances respecting sideyard clearance did not apply to devices of this type and if in fact they were so interpreted such ordinances would be invalid as being beyond the power of the City Commission to adopt.

As is pointed out in the appellant's brief, the case was dismissed as to William Walkenhorst. It is, therefore, on appeal to this Court only as to the other two defendants.

ARGUMENT

A. THIS WAS A PROPER CASE FOR SUMMARY JUDGMENT.

Counsel for defendants is somewhat amazed at the position taken by the plaintiff in this case that the Motion for Summary Judgment made in the court below was not a proper remedy. Before the action was commenced, it was agreed between counsel that it was desirable to get the case before the Court for determination as expeditiously as possible and a Motion for Summary Judgment was agreed upon as the proper procedure to accomplish this result.

Counsel for the plaintiff cooperated fully with counsel for the defendants in stipulating to all material facts so that the matter would be in proper condition to permit disposition on a Motion. Why the plaintiff has now changed his position, we, of course, do not know. However, it appears that the grounds upon which he relies for contesting the procedure are not well taken.

The plaintiff quotes Rule 56 (b) Utah Rules of Civil Procedure to the effect that Summary Judgment may be sought only on "a claim, counterclaim or cross-claim." Without quoting any authority whatsoever, he maintains that this action concerns none of the three. The defendants submit to the Court that these three terms as used in this section were intended to encompass the entire field of litigation. The term "claim" clearly appears to be intended to cover any affirmative relief sought by a plaintiff against a defendant. Certainly the plaintiff in this case is seeking some relief as against the defendants, otherwise he has no standing before a Court.

Rule 8 (a) Utah Rules of Civil Procedure covering general rules of pleading speaks of "original claim, counterclaim, cross-claim or third party claim." Rule 10 (b) Utah Rules of Civil Procedure speaks of averments in pleadings as "averments of claim or defense." Apparently the plaintiff takes the position that the term "claim" as used in the Summary Judgment rule applies only to a demand for money. This claim is without logical or legal support. The term "claim" is intended to apply to any demand for affirmative relief in a complaint.

Plaintiff also maintains that the provisions of Rule 56(c) were not complied with. They maintain that there were still issues as to material facts in the case. We agree there was an issue as to whether or not there was any relationship between the ordinance, if interpreted as the city maintains it should be interpreted, and the public health, safety, morals or general welfare. However, there were sufficient evidentiary facts stipulated to by the parties to permit the court to resolve this question of ultimate fact and law. If there were not

sufficient facts stipulated to, to permit the court to do this, then the fault lies with counsel on both sides because, as stated above, counsel got together and attempted to put the case in condition that the court could pass upon it on a Motion for Summary Judgment.

The defendants could have submitted affidavits as provided by Rule 56(c) and the plaintiff could have submitted counter-affidavits, however, we attempted to obviate the necessity of this by stipulating as to the facts. We stipulated as to the location of the structures in question and presented to the Court by stipulation photographs from which the size, location and character of the structures could be determined. Never until the Brief was filed in this court, did counsel for the plaintiff maintain that it was necessary to have any testimony of experts as to the density of population, fire hazard, health of the population and the efficient movement of traffic. The court was in a position to determine all of these matters on the basis of the stipulation entered into and in fact many of these matters could have no conceivable relationship to the particular type of device involved in this action.

The two cases cited by the plaintiff under this argument have no application here. The case of *State ex rel. Civello v. New Orleans*, 154 La. 271, 97 So. 440, 22 A.L.R. 260, merely stands for the proposition that where an ordinance *could* be justified by considerations of public health, safety, comfort or the general welfare, the discretion of the municipal counsel should not be over-ridden. It does not stand for the proposition, as the plaintiff seems to imply, that the decision of the city governing body on these matters is final. The courts still

have the power to review city ordinances to determine whether or not the municipal governing body has exceeded its jurisdiction.

The case of *People v. Leighton*, 44 N.Y.S. 2d 779, merely holds that evidence may be received on the question of the reasonableness of a city ordinance. As pointed out above, counsel here attempted to present this evidence before the court by stipulation and never until this appeal was taken did counsel for the plaintiff maintain that the court did not have before it all of the evidence necessary to a determination of the question.

B. THE PROVISIONS OF SECTION 10-9-15, UTAH CODE ANNOTATED, 1953 HAVE NO APPLICATION TO THIS PROCEDURE.

Section 10-9-1 to Section 10-9-15, U.C.A., 1953 contain provisions for property owners to obtain variances from zoning regulations to permit construction of buildings, which without the variance would be in violation of the zoning laws. They also provide for a review by the courts of the action of the Board of Adjustment on a petition for variance. Those provisions have no application here. It is true that in an effort to avoid a controversy, the defendants in this case did apply for a variance. However, the injunction action of the city was not resisted by the defendants on the grounds that the Board of Adjustment erred in refusing the variance. The action is resisted upon the ground that no variance is necessary because the ordinance as adopted does not prohibit these devices. In support of our position that the ordinance did not prohibit

open and unobstructed by what? The plaintiff admits that trees and shrubs may be planted in the yard but implies, without quoting any authority, that these are specifically excepted. If there is any specific exception for trees and shrubs in the ordinances, we have been unable to find it. There are specific exceptions made in the zoning ordinance to the sideyard requirement, and all of these exceptions are concerned with parts of the house or building on the yard. The conclusion is therefore inescapable that when the ordinance requires a sideyard open and unobstructed, it means open and unobstructed from a building or any part thereof. The question that must be answered therefore, is: are these structures a part of the building so as to come within the provisions of this ordinance?

Section 401 of the Building Code of Salt Lake City defines a building as follows:

“A building is any structure built for the support, shelter *and* enclosure of persons, animals, chattels or movable property of any kind.”

It should be noted that the foregoing purposes of a building are in the conjunctive and not in the disjunctive, and it cannot be doubted here that the devices in question provide no enclosure of any kind.

It is uniformly held that zoning ordinances or restrictive covenants which curtail the use of property, being in derogation of a property right, should be strictly construed against the restriction. Among recent cases so holding are:

Bolhack et al v. Temple Anshe Sholom of Kew Gardens, 56 N.Y.S. (2d) 598
Johnson et al v. Wellborn, 181 S.W. (2d) 839
Meyer et al v. Steine, 145 SW (2d) 105

There is a division of authority as to whether or not an open porch which is constructed as an integral part of a building is within the provisions of restrictive covenants and zoning ordinances so as to prohibit them being constructed in sideyards. So far as counsel has been able to determine, there are only two cases dealing with rigid awnings or carports which, while depending upon the house for part of their support, are readily detachable therefrom, and do not form an integral part of the building. Both of these cases hold that the construction of such rigid awnings or carports in the sideyard space does not offend against ordinances or covenants requiring open and unobstructed sideyards.

Among the cases holding that open porches are not part of a building so as to prohibit their construction in open sideyards, are:

Brigham v. H. G. Mulcock Co. a New Jersey case,
70 Atl. 185
Forsee v. Jackson, a Missouri case, 182 S.W. 783
Graham v. Hite, a Kentucky case, 20 S.W. 506
Hames v. Labor, an Illinois case, 43 N.E. 1076
Koffman v. Schreiber, a Michigan case, 188 N.W. 333

The first case dealing specifically with rigid awnings was the New York case of Olcott v. Sheppard Knapp Co., 89 N.Y.S. 201. The court held that an awning with a glass roof and set on poles did not violate the setback requirements.

The most recent case in point is the case of *French v. Cooper*, 43 Atl. (2d) 880, wherein holding that a rigid awning was not part of a building, the Court stated:

“The sketch returned with the record discloses that the building proper has the necessary setbacks on both Atlantic Ave. and North Street and in the absence of proof to the contrary, we hold that the awning is not a part of the building. There is no evidence that it is permanently attached to the building and it is at most an adjunct thereto, i.e. added but not essentially a part thereof.

“It is settled that a municipality has no power to limit the use to which property may be put unless the regulation is designed to promote public health, safety and general welfare. *Durkin Lbr. Co. v. Fitzsimmons*, 106 NJL 183, 147 Atl. 555. We fail to see in what respect the erection of this awning can adversely affect public health, safety or general welfare. The absence of a brief on behalf of the respondents suggests that they too experience the same quandry. The fact that nearby property owners have expressed themselves as favoring the proposed awning and they have no objection waives against the reasonableness of the decision to refuse the permit. Prosecutor is entitled to his permit and costs.”

The respondents further maintain that if the ordinance were interpreted to prohibit devices of this type in the sideyards it would be invalid as beyond the power of the City Commission to enact. It is fundamental that city governments have only those powers granted by the legislature. In regard to the power to adopt zoning regulations, Sec. 10-9-1, U.C.A. 1953 grants this power to the City Commission “for the purpose of

promoting health, safety, morals and the general welfare of the community.”

As is pointed out in the case of *French v. Cooper* above, there is no relationship between the promotion of public health, safety, morals, and the general welfare and the prohibition of devices such as the ones here concerned. While courts are inclined to construe the powers of the city government fairly liberally, there is a wealth of cases invalidating zoning restrictions because they are not enacted for the purpose of protecting the public health, safety, morals or general welfare.

In the case of *Catholic Bishop of Chicago v. Kinglig et al*, 20 NE (2d) 583, a zoning ordinance permitted the maintenance of public schools but prohibited private or parochial schools in a residential section. The court held that so far as the relationship to promotion of public health, safety, morals or general welfare, there was no difference between the two types of schools and so invalidated the ordinance.

For other cases invalidating building ordinances on this ground see: *Zadworny et al v. City of Chicago*, 44 N.E. (2d) 426; *Bennett v. City of Hope*, 161 S.W. (2d) 186; *City of Corpus Christi et al v. Jones, et al*, 144 S.W. (2d) 388; *Brandon v. Board of Commissioners of Town of Montclair, et al*, 11 Atl. (2d) 304 and *Szilvasy v. Saviers et al*, 44 N.E. (2d) 732.

A landmark case in this regard is the U. S. Supreme Court case of *Nectow v. City of Cambridge*, 277 U.S. 183. There, the court in invalidating an ordinance, stated:

“The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals or general welfare.”

What possible relationship can there be between prohibiting structures of this type and the public health, safety, morals and general welfare? One of the most common grounds for upholding zoning ordinances is that they are necessary to prevent congestion of the streets. This does not apply here. The devices in question are back of the building line. Furthermore, they will not increase the congestion of the area as they do not facilitate the residences for additional occupancy.

Another ground for prohibiting a building too close to the property line is that such building will prevent the passage of light and air. Neither of these apply here. The roofs of these structures are glass and the sides are free and open, thus permitting free passage of light and air.

The only suggestion which counsel for plaintiff had to make in the Court below was that these devices might prevent passage of fire fighting equipment between buildings. This contention rings rather hollow in view of the fact that it is admitted that trees, shrubs and other natural objects which would do much more to impede the passage of such equipment are permitted. Under the holding of the *Catholic Bishop of Chicago v. Kinglig* case above cited, the city may not prohibit one use of an area while permitting another use of a different character which is even more detrimental to public safety than the use permitted.

Certainly there can be no adverse relationship to the public health. If anything, these structures would improve the public health. Anderson's awning was erected to keep rain and easterly winds from flooding his basement. Young's was erected to permit his invalid wife to get in and out of his automobile during wet weather.

What possible relationship can there be to property values or general welfare? In each instance, as reference to the stipulated exhibits will show, the neighbors of the persons concerned filed petitions asking that the devices be left standing and stated that they increased rather than impaired values in the neighborhood.

The argument of the plaintiff that this decision would open the way to the construction of any type structure in sideyards, including carports with concrete roofs, is, of course, not well-founded. Each case must stand on its own merits. As pointed out above, there is a division of authority as to whether or not open porches or car ports which are an integral part of the house, must conform to sideyard requirements. However, there is no division of authority in regard to devices such as this, which while they form a valuable adjunct to a house, do not become a part thereof and are easily removable. Even though the devices may be easily removed, it would, of course, be a great financial sacrifice to the land owners in these cases if they were compelled to move them because the devices are tailored to fit the particular house and could not be used elsewhere. However, that fact does not make them part of the house any more than a room size rug tailored to fit a particular room would become part of the real property.

CONCLUSION

It is submitted to the Court that this matter was properly decided in the Court below, the court having held that the ordinance does not, by its terms, prohibit devices of this type and that if it attempted to do so, such ordinance would be invalid as having no reasonable relationship to public health, safety, morals, or general welfare.

Respectfully submitted,

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