1965

Bogie's, Incorporated v. Salt Lake County, A Corporate Body Politic : Brief of Appellant

IN THE SUPREME COURT OF THE STATE OF UTAH

Bogie's, Incorporated,
Plaintiff-Respondent

vs.

Salt Lake County, a corporate body politic,
Defendant-Appellant.

Case No. 10397

BRIEF OF APPELLANT

Appeal from a Judgment of The Third Judicial District Court in and for Salt Lake County The Honorable Stewart M. Hanson, Judge

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STATEMENT OF NATURE OF CASE

This was an action brought by a tavern owner in Salt Lake County to compel the County Licensing Director to issue to it a Class B beer license and a liquor consumption license. The licenses had been refused on the basis that applicable zoning did not allow that type of business.

DISPOSITION OF CASE IN LOWER COURT

The case was heard upon stipulated facts, wherein it was further stipulated that the only issue to be determined was whether Salt Lake County should be estopped, by reason of its past failure to enforce the zoning ordinance with respect to plaintiff's premises, and plaintiff's reliance thereon, from refusing to relicense plaintiff's tavern, on the basis of improper zoning. Upon reciprocal motions for summary judgment, the case was heard by the Honorable Stewart M. Hanson, who found that defendant was so estopped and entered judgment for plaintiff, ordering that defendant forthwith issue to plaintiff a cabaret license, a class B beer license and liquor consumption license, and that "such licenses shall continue to be issued for so long as plaintiff remains in possession of said premises under its present lease."

RELIEF SOUGHT ON APPEAL

By this appeal, defendant seeks to reverse the judgment of the lower court in its entirety and to obtain a dismissal of the action.

STATEMENT OF FACTS

The facts upon which this case was decided are fully set forth in the stipulation of facts appearing in the record and will only be briefly restated here.

Since 1958, premises located at 7263 So. State Street and popularly known as the Black Hand Tavern have been licensed by defendant to serve bottled and draft beer (Class B License). On January 21, 1963, plaintiff leased the premises as a tavern or cabaret, although from July 1, 1963 to June 30, 1964 the licenses were in the name of Reba J. Clerico, who managed the premises for plaintiff.

On or about October 1, 1963, defendant notified plaintiff that subsequent licenses would not be issued because the premises were located in a Commercial C-2 zone, which does not allow establishments where beer is consumed on the premises. Such premises had been so zoned prior to the time that plaintiff leased the premises. It is undisputed that, in view of the applicable zoning, defendant had erroneously issued licenses to plaintiff prior to June 30, 1964.

It was stipulated that plaintiff has made substantial improvements to said premises and is obligated on the lease through November, 1967, for the sum of $225.00 per month.

ARGUMENT

Point One: *Defendant, by its past conduct in failing to enforce the zoning ordinances in connection with plaintiff's premises, is not estopped from refusing the plaintiff a license to operate the premises, as in the past, in violation of the zoning ordinances, and the lower*

court erred in requiring defendant to issue such licenses to plaintiff.

Defendant submits that this case is controlled by a recent decision of this Court in Morrison v. Horne, 12 Utah 2d 131, 363 P 2d 1113 (1961).

In that case, the plaintiff had been refused a permit to erect a service station upon property in Salt Lake County. The property in question had been located in a residential zone since 1953, although a small grocery store had stood on the property and the County Assessor had, for a number of years after 1953, erroneously listed and assessed the property as commercial. The plaintiff had purchased the property in 1960 shortly before the store, which had been vacant since about 1955, burned down.

On appeal from a mandate requiring the county zoning authorities to issue a building permit for construction of the service station, this Court reversed, holding that the county was not estopped to assert the residential zoning requirement because the assessor had erroneously listed the property as commercial. In doing so, the court said (p. 1114):

> "As to estoppel: It would be unreasonable and unrealistic to conclude that a clerk or a ministerial officer having no authority to do so, could bind the county to a variation of a zoning ordinance duly passed, to which everyone has notice by its passage and publication, because a ministerial employee erred in characterizing the type of property. The authorities generally support

such a conclusion, and we are constrained to and do hold that the assessor's erroneous description of the subject property as commercial does not preclude the zoning authorities from denying the permit for the service station."

A case strikingly similar to the instant case was Fass v. City of Highland Park, 326 Mich. 19, 39 N.W. 2d 336 (1949). In that case, plaintiffs for several years had been given a permit to sell live poultry. Subsequently, when plaintiffs applied for a renewal of the permit, it was refused on the basis that the zoning, which had existed for a number of years, would not allow the sale of live poultry. Plaintiffs contended that the defendant city, by its past conduct, was estopped from enforcing the zoning ordinance. As additional ground for estoppel, the plaintiffs alleged that they had purchased the property in reliance on statements made by the city engineer that there would be no objections to the killing and sale of live poultry on the premises. They further alleged that they had thereafter expended the sum of $18,000 to construct and equip the building.

In denying the plaintiffs' contention, the court stated (p. 341):

> "Plaintiffs' claim that the defendant municipality is estopped to enforce its zoning ordinance against plaintiffs' property because of the improper issuance of the building permit and of the licenses for the years 1945, 1946, and 1947, is not tenable. At the time such acts were performed plaintiffs were charged with knowl-

> edge of the restrictive provisions of the ordinance as applied to property in a "B2" district. Such acts being unauthorized and in express contravention of ordinance provisions of the city, plaintiffs acquired no vested right to use their property for a purpose forbidden by law. No claim is made that the building erected by plaintiffs, or the equipment therein, cannot be utilized for the transaction of a permissible business."

There are numerous decisions supporting the two cited cases. It would accomplish little to repeat them here, since many such cases can be found annotated in Metzenbaum, Law on Zoning, Second Edition, Chapter V-t, page 162 et. seg. and 1 A.L.R. 2d 338, both of which works were cited with approval by this Court in the Morrison case.

It is true that there have been some decisions where estoppel has been successfully asserted in zoning cases. However, these have been exceptional cases and are in the distinct minority. A review of these cases will disclose that most of them dealt with situations where the official of the governmental agency (whose actions were alleged to be the basis of the estoppel) acted within his authority; albeit, perhaps erroneously. See, e. g., City of Dallas v. Rosenthal, 239 S. W. 2d 636 (Texas Civ. App., 1951); Crow v. Board of Adjustment, 227 Iowa 324, 288 N. W. 145. In some cases the restrictive ordinances or regulations had been passed after the acts claimed to have constituted the estoppel occurred. See, e.g., Texas Co. v. Town of Miami Springs, 44 So.2d 808 (Florida, 1950).

Neither of the above is the situation here. The county officials who had failed to enforce the zoning ordinance with respect to plaintiff's property had, of course, no authority to do so. Moreover, plaintiff took the property and entered into the lease charged with knowledge that the intended use was in violation of the zoning laws .Thus, it is difficult to see how it can be heard to say that it acted in reasonable reliance upon the acts of the defendant's officials.

Plaintiff implies that because it has expended substantial sums to improve the property and is obligated on the lease, it will be seriously damaged if it cannot operate the premises as a tavern. There is, however, no claim or evidence that a business allowed by the zoning ordinance cannot be profitably operated on the premises.

Defendant submits that under the law of this state and the vast majority of other jurisdictions, Salt Lake County cannot be estopped by acts of its officers beyond their authority, and should not be estopped in this case.

Point Two: *Even if defendant should be estopped from refusing plaintiff the license requested, the order of the court was too broad in requiring that the licenses shall continue to be issued for so long as plaintiff remains in possession of subject premises under its present lease.*

The judgment entered by the lower court did not merely prevent defendant from refusing licensing on the basis of improper zoning, but required it to issue

such licenses for so long as plaintiff remains in possession under its present lease. Obviously this is too broad, even assuming that plaintiff should prevail in its main contention.

There are a number of reasons why a beer license might be refused or terminated. The order, as it now stands, would ostensibly prohibit defendant from refusing or terminating the plaintiff's license should it become a nuisance or repeatedly violate other laws regarding the sale of beer or consumption of liquor.

Even though it should be found that defendant is estopped to raise the issue of plaintiff's violations of the zoning ordinance, the order should be amended to allow refusal of licensing in the event other grounds therefor occur.

Respectfully submitted,

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