1965

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

IN THE SUPREME COURT OF THE STATE OF UTAH

BOGIES, INCORPORATED,
Plaintiff-Respondent,

vs.

SALT LAKE COUNTY, a corporate body politic,
Defendant-Appellant.

Case No. 10397

BRIEF OF RESPONDENT

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

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STATEMENT OF THE NATURE OF THE CASE

This action was brought by a corporate tavern Lessee-operator, not a building owner, to compel the Salt Lake Licensing Director to issue a Class B beer license and Liquor Consumption license. The licenses had been refused on the basis that applicable zoning did not allow that type of business, though they had

been granted historically for 6 years prior to the instant refusal, with plaintiff having been in possession for one year prior to refusal.

DISPOSITION OF CASE IN LOWER COURT

Case was heard upon stipulated facts and reciprocal motions for summary judgment. After argument, the trial Court held that Salt Lake County, by its prior conduct of ignoring the enforcement of zoning and subsequent annual renewals, is now estopped from refusing plaintiff a license to operate the premises as they had been operated in the past. The Court ordered 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

Respondent contends that the judgment of the trial Court should be affirmed.

STATEMENT OF FACTS

Since the case was tried upon stipulated facts, that Stipulation is herewith set forth in full:

I.

"Plaintiff is a corporation licensed to do business in the County of Salt Lake, State of Utah,

and Defendant is a corporate body politic existing under and by virtue of Title 17, Ch. 4, et seq., 1953 Utah Code Annotated, and is authorized to license cabarets and issue beer licenses and liquor consumption licenses within the confines of the County of Salt Lake, State of Utah, as set forth in Title 17, Ch. 1, Sec. 21, 1953 Utah Code Annotated, and that business, known as the Black Hand Lounge, is within the confines of defendant County, and is situate at 7263 South State Street, Salt Lake County, State of Utah.

II.

"Commencing in the year 1958 the premises popularly known as 7263 South State Street, Salt Lake County, State of Utah, were licensed by Defendant to serve bottle and draft beer, and the premises situate there have continuously since said date been so licensed by Defendant until objection was raised on the 30th day of June, 1964.

III.

"On or about the 21st day of January, 1963, Plaintiff leased said premises for a term which expires in November, 1967, with an option for renewal for an additional five years for use as a cabaret, and in reliance upon being permitted license for Class B beer and liquor consumption licenses, and since said day and until the 30th day of June, 1964, said business has been so conducted

under license from Defendant by Plaintiff, though during the period July 1, 1963 to June 30, 1964, licenses were issued in the name of one, Reba J. Clerico, who was merely in there as an operator for Plaintiff, and Plaintiff has since the 21st day of January, 1963, been the sole and only person authorized to conduct business upon said premises, individuals named being only managers.

IV.

On or about the 1st day of October, 1963, Defendant notified Plaintiff that subsequent licenses would not be issued because said premises were zoned C-2 and not C-3, as required for the type license historically issued upon said premises.

V.

Plaintiff has made substantial improvements at said premises and is absolutely obligated upon the lease for said premises through the month of November, 1967, and the continuing and accruing sum of Two Hundred Twenty-Five Dollars ($225.00) per month in an absolute obligation from Plaintiff-Lessee to the Lessor of said premises.

VI.

It is agreed that the sole and only issue to be determined in this matter is whether or not Defendant should be estopped from preventing relicensing upon the basis of improper zoning by

reason of past acquiescence in waiving zoning requirements and the reasonable reliance thereon by Plaintiffs of past acquiescence and permissive violation of said zoning ordinance, and upon that basis the issue of law to be determined is should the Court issue an order compelling permanent annual renewal of said type licenses for said premises for so long as said premises are maintained and operated by Plaintiff strictly in accord with all other ordinances of Salt Lake County, State of Utah."

ARGUMENT

Point One: Defendant, by its past conduct in failing to enforce zoning ordinances in connection with plaintiff's business, and in making annual renewals, after plaintiff relied on such past conduct, is now estopped from refusing plaintiff a license to operate its business at those premises as had been done in the past.

It must be clearly understood that these premises had been licensed for the conduct of a cabaret commencing in the year 1958. The licenses were renewed annually by defendant in the years 1959, 1960, 1961, and 1962. In 1963, plaintiff took the lease relying upon past apparency that such premises could be operated as a cabaret. Plaintiff was first licensed and operated the premises in 1963 and was refused licenses in 1964.

Most certainly, plaintiff would not have obligated itself to an absolute lease through the month of No-

vember, 1967, had it not relied upon the concept that there was assured future use because of past use and initial grant of license. If licenses had not been granted, the lease would not have been made.

There is modern tendency to invoke estoppels against public authority when equity and justice require such application. See 19 *Am. Jur. Estoppel,* Sec. 168, p. 821.

Appellant relies upon the Utah case of *Morrison vs. Horne,* 12 Utah 2nd 131; 363 Pac. 2nd 1113 (1961), as authority for the denial by this Court of invoking equitable principals of estoppel against municipalities. That case is distinguishable. The plaintiff in that action purchased so-called commercial property that was in a residential zone at a period that was after 5 years from abandonment of its use as a store. The plaintiff attempetd to show that the prior owners and himself had determined, prior to this 5 years' abandonment, that the property would be used as a service station, eventually. This Court held that no such proof was offered and the case held there was abandonment of a prior non-conforming use for more than a year under the statute. It did not appear that the plaintiff made any undertaking or expenditures in reliance on the right to be granted a service station, as distinguished from a mercantile store, on the basis of the assessor's mistake in carrying the property as commercial rather than residential. Also, there was attempt to change a prior use which plaintiff here is not attempting.

The zoning in the case at bar is in a commercial area on South State Street in Salt Lake County, Utah, and there is another cabaret properly zoned for operation within 200 yards of the premises of plaintiff. Considering similar competing business very close together, with 4 years' history of operation, ordinary persons should be entitled to rely upon a 4-year past operation, when to deny them that right makes them liable to their lessor for the sum of Two Hundred Twenty-Five Dollars ($225.00) per month through the month of November, 1967.

Defendant-Appellant's statement that there is no claim or evidence that another business properly allowed by zoning cannot be profitably operated on the premises is a non-sequitor, because plaintiff is a cabaret operator. Such concept might become important, as pointed out in the case of *Fass vs. City of Highland Park,* 326 Mich. 19; 39 NW 2nd, 336 (1949), if the plaintiff here was owner of the property. Most certainly a purchaser of property should be more wary and more chargeable with zoning restrictions on property he purchases than would ordinary persons who are merely leasing premises for the continuation of a business that has been historically operated by others.

This Court could well distinguish between a purchaser of property having constructive notice of zoning regulations pertaining to the property to be purchased, and one who merely leases a going concern in reliance on appearance in a general business area where other

similar businesses are conducted and where the leased premises have been used for the identical type business for a long period of years prior to leasing.

Despite respondent's urging this Court to distinguish between lessees of a continuing business and purchasers of a new property, there is the case of *District of Columbia vs. Cahill,* 54 Fed. 2nd 453 (CADC 1931), that did not make that distinction, yet ruled in favor of a person having a business in an improper zone. From 1911 to 1926, prior owners of the property and successive tenants openly conducted a garage and storage business without objection. In 1926, Cahill bought the property and applied for and received a building permit to repair and improve it as a garage. The permit was issued and the owner spent $6,000 on improvement before the permit was revoked. The District Court voided the revocation and the Circuit Court affirmed, acknowledging that this is the type case warranting application of estoppel against a municipal body.

This Court should also so rule, because of historical operation and initial grant of licenses to this plaintiff by Salt Lake County. This record states that substantial improvements have been made by plaintiff on the leased premises, and it is submitted that the rationale and holding of the Washington, D.C., case is on all fours with the case at bar. Affirming the Trial Court assures the perpetuation of the concept that the ultimate object of equity is to see that justice under all the circumstances is done.

Respondent urges that in this case the public authority, in the exercise of proper supervisory and overseeing authority could, and perhaps should, have prevented the commencement of this type business in an improper zone in the year it was first licensed, 1958. It didn't, and the business operated for six (6) years before attempts to close it were initiated, after plaintiff had it only one (1) year and had assumed long term lease liability and made substantial improvements.

Presumably any member of the public injured by improper business in an improper zone had the same right to object to the same public authority, but didn't.

There was not only long failure to act which was passive acquiescence, but there was positive action taken by the public authority in the initial granting of license and positive action on each annual renewal.

Plaintiff reasonably acted on past action and appearance and reasonably made substantial improvements, not only with the active approval of the public authority, but also with the apparent approval of the affected public. Supra, *People ex. rel. Beardsley vs. Rock Island,* 215 Ill. 488; 74 NE 437.

CONCLUSION

Principles of equity require that defendant be estopped from putting plaintiff out of business until its lease expires, by its terms. The trial court should be affirmed.

Respectfully submitted,

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Received two (2) true copies hereof this ..... day of September, 1965.

SALT LAKE COUNTY ATTORNEY

By .....