1960

City of Bingham Canyon and Boyd Nerden v. Kennecott Copper Corp. et al : Brief of Respondent

Utah Supreme Court

A. M. Ferro; Ned Warnock; Attorneys for Respondent;

IN THE SUPREME COURT
of the
STATE OF UTAH

CITY OF BINGHAM CANYON and BOYD NERDEN,

Plaintiffs and Respondents,

vs.

KENNECOTT COPPER CORPORATION, a Corporation, and BOYLE BROTHERS DRILLING COMPANY, a Corporation,

Defendants and Appellants.

Case No.
9311

BRIEF OF RESPONDENT

A. M. FERRO
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INDEX

TABLE OF CASES

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STATEMENT OF FACTS

The Court has narrowed the issue on the granting of a temporary restraining order in the case to the question as to whether or not the violation of an ordinance is sufficient grounds for temporary relief.

There is no dispute as to the facts. The City of Bingham Canyon has zoned the property in question as industrial,

which does not include the permissive use of mining or drilling. (Record pages 12 & 13). The Defendants admit they are drilling in the area so zoned. There is no evidence that the drilling constitutes a nuisance. The evidence also is that the drilling is a part of a long range program of development and there is no urgency that it be continued. The only defense indicated by counsel at the hearing was, that the ordinance as it applies to the Defendant, Kennecott Copper Corporation, is unconstitutional. (Record page 41).

It is also undisputed that Defendant Kennecott has made no application to the Board of Adjustment of the City as is allowed by the ordinance. Record page 41).

We have made this short statement of facts for the reason that we believe the Law to be, that the granting or denying of a temporary restraining order is within the sound discretion of the Court. This rule has been invoked so universally that we do not believe any citations of authority is needed.

STATEMENT OF POINTS

1. Does the violation of an ordinance justify the issuing of a temporary restraining order?

ARGUMENT

The violation of a zoning ordinance has been temporarily restrained in the following cases:

City of Chico vs. First Avenue Baptist Church of Chico, California, 238 Page 2nd 587.

In this case the Defendants held religious meetings

in a home located in a residential zone. The City of Chico asked for a temporary restraining order. The case was decided on the pleadings, it being the contention of the Defendant that the ordinance was unconstitutional as an abridgment of the right of freedom of worship. The Court held that the restraining order was proper. There was no evidence that the use constituted a nuisance.

Miller, Building Inspector vs. Tanenbaum, Rhode Island, 200 A 449:

The Plaintiff in this case asked for a temporary injunction restraining the Defendant from using his premises as a lumber yard in violation of a zoning ordinance. There was no evidence that the use constituted a nuisance. The Defendant claimed a non-conforming use.

The lower court granted a temporary restraining order which was approved by the Supreme Court.

City of Stockton vs. Frisbie and Latta, California, 270 P. 270.

The city in this case asked a temporary restraining order for violation of a zoning ordinance. The Defendants operated a funeral parlor in violation of the ordinance. The lower Court refused to enjoin, in reversing the trial Court the Court of Appeal said the following:

> "But counsel for the respondents insist that the Complaint fails in the statement of a case for the relief thereby demanded, because it contains no allegations that the proposed business of the defendants will be a nuisance, (or) that the plaintiff has any property rights or interests which might be prejudiced by acts of the defendants, (or) that the alleged violation of the Statute affects either civil rights or

property of the City of Stockton at large." The propositions are not supported by the authorities. Citing 5 Pomeroy vs. Equity Jurisprudence (2nd Ed) Section 1894.

In re Debs, 158 U.S. 564, 15 Sup. Lt. 900, 39 L. Ed 1092.

Miller vs. Board of Public Works, California, 234 P 381, and many others.

A case which we believe is controlling on several questions raised in the cause now before the Court is City of Utica vs. Ortner, et al, 10 N.Y. Supp. 729. The Court said:

"This ordinance is presumed to be constitutional."

This in reference to a zoning ordinance.

On the question as to whether or not a violation of the ordinance was sufficient to grant a temporary restraining order the Court said:

"Plaintiff alleged that the Defendants were violating the provisions of the ordinance. No special damage or injury to the public need be alleged."

And on the question of the granting of a temporary restraining order the Court said:

"We think the Complaint states a cause of action and that, under the undisputed facts, the Plaintiff showed sufficient to entitle it to a temporary restraining order. Village of North Port vs. Walsh, 241 App. Div. 683, 269 N.Y.S. 966, affirmed 265 N.Y. 458, 193 N.E. 270."

Boatwright et al vs. Town of Leighton, Alabama, 166 So. 418:

The Defendant, Boatwright, despite protests made

preparation to construct a service station on property zoned residential. The lower Court granted a temporary restraining order which was sustained by the Supreme Court.

It has been held that where there is a clear violation of Law that the Court has no discretion in the granting of a temporary injunction. In the case of State ex rel Board of Medical Registration and Examination of Indiana vs. Frasure, 98 N.E. 2nd 365:

> In this case there was no question that the defendant was practicing medicine without a license. The Court held that it was mandatory on the trial court to grant an injunction. In the case now before the Court there is no question as to the violation of the ordinance.

City of New Orleans vs. Lecco, Louisiana, 58 So. 2nd 490.

> "The respondents contend that the granting or refusing of a preliminary injunction is a matter addressed to the sound discretion of the trial Judge and that his judgment should not be disturbed in the absence of a showing of a clear abuse of such discretion. They take the position that no abuse of discretion is shown. In support of their contention, the case of Noe vs. Maestri, 19 So. 588, and two prior decision of this Court are cited. We find no fault with this rule of Law but where there has been established a violation of a zoning ordinance, the legality of which has not been attached, the granting or refusing an injunction is no longer discretionary with the trial Judge.

There was no evidence that the theatre constituted a nuisance.

In reviewing the evidence adduced at the hearing these

facts stand undisputed. The City of Bingham Canyon has passed zoning ordinances which have not been attacked. The Defendant Kennecott is openly defying the ordinance and is knowingly violating it. It places itself above legislative control. If all residents and citizens arrogated to themselves the privilege of deciding what Laws apply to them, the rule of Law would become a shambles. Counsel for the corporation in open Court stated that the Company would not abide by the provisions of the ordinance in any respect. We submit that all of the equities are in favor of the Plaintiffs and that a temporary restraining order should be continued until the case is heard on its merits.

Respectfully submitted,

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