

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

City of Philadelphia :
 :
 v. : No. 2840 C.D. 2003
 : Submitted: January 28, 2005
 Navistar International :
 Transportation Company, Inc. and :
 Matthew P. Hehl and Keystone :
 Outdoor Sign Company, Inc. :
 :
 Appeal of: Keystone Outdoor :
 Sign Company :

BEFORE: HONORABLE ROCHELLE S. FRIEDMAN, Judge
 HONORABLE MARY HANNAH LEAVITT, Judge
 HONORABLE JIM FLAHERTY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
 BY JUDGE LEAVITT

FILED: April 13, 2005

Keystone Outdoor Sign Company, Inc. (Keystone) appeals an order of the Court of Common Pleas of Philadelphia County (trial court) granting injunctive relief to the City of Philadelphia (City). The trial court directed Navistar International Transportation (Navistar), Matthew P. Hehl,¹ and Keystone to pay a \$150 daily fine and to remove all advertising from an outdoor sign at 6601 New State Road, Philadelphia. Keystone is the only defendant that appeals.

¹ Hehl is the president of Freedom International Trucks, Inc. (Freedom International), which leased the subject property from Navistar.

The relevant facts, as found by the trial court, are as follows. The property at 6601 New State Road (Property) is a ten-acre commercial lot used by Freedom International for the sales and service of tractor trailer trucks.² The Property is located in a G-2 industrial zoning district, which permits outdoor advertising signs as a matter of right, subject to the requirements set forth in Section 14-1604 of the Zoning Code for the City of Philadelphia (Zoning Code). At issue in this case is one of two free-standing signs located on the Property.

The sign in question is double-faced, internally illuminated, and supported by a single steel pole. The sign measures sixty-one feet from grade to the bottom of the sign face, and eighty feet from grade to the top of the sign face. The sign face is nineteen feet high and sixty feet wide, with a total sign area of 2,280 square feet. The sign was originally approved in 1995 as an accessory sign when Freedom International moved its existing business to the Property.

Under the Zoning Code, an accessory sign is restricted to advertising incidental to the business conducted at the premises.³ By 1997, Freedom

² The area surrounding the property is mainly zoned G-2 General Industrial or L-R Limited Industrial. Other businesses in the area include three junk yards, an auto repair shop, a ladder company, and, on an adjacent lot, an adult cabaret. In addition, there is a recreational area (playground) within 400 feet of the property, but it is separated by the elevated Delaware Expressway and the elevated Philadelphia-Trenton railroad line. As a result, the sign is not easily visible from the recreational area.

³ An accessory sign, as defined in the Zoning Code, is

(b) *Accessory Sign or On-Premise Sign.* A sign containing copy which directs attention to information, identification or advertisements strictly incidental to a lawful use of the premises on which the sign is located. This includes signs or devices indicating the business transacted; services rendered; goods sold or produced on the premises; and, name or emblem of the person, firm, institution, organization or activity occupying the premises[.]

Zoning Code, §14-102(114)(b).

International claimed that its customers had grown accustomed to its new business location and, thus, it no longer needed to use the sign for its business. As a result, Navistar, the owner of the Property, sought a variance to convert the sign to a non-accessory use.⁴ This variance was granted by the Zoning Board of Adjustment (ZBA), and on September 9, 1997, the City's Department of Licenses and Inspections (L&I) issued a zoning and use registration permit to convert the sign to a non-accessory use. As a result, new advertising was placed on the sign. The variance was thereafter revoked.⁵

On May 9, 2002, L&I issued a permit revocation notice to Navistar, Hehl, and Freedom International, informing the parties that, as a result of the trial court's revocation of the relevant variance,⁶ the zoning and use registration permit was also revoked. On May 16, 2002, L&I issued a violation notice that the sign was being used or maintained in violation of the Zoning Code and that Navistar

⁴ A non-accessory sign, as defined in the Zoning Code, is

(k) *Outdoor Advertising or Non-Accessory Sign.* A sign which directs attention to a business, industry, profession, commodity, service, organization, activity, institution, product, or entertainment neither sold, located nor offered upon the property where the sign is situated[.]

Zoning Code, §14-102(114)(k).

⁵ In 1997, the ZBA granted the variance after Keystone appealed its initial denial by L&I. On September 29, 1997, the Society Created to Reduce Urban Blight (SCRUB) appealed the ZBA's decision to the trial court, which quashed the appeal based on lack of standing. SCRUB appealed to this Court. We reversed the trial court's order and remanded to the trial court for a decision on the merits. On March 28, 2001, the trial court reversed the decision of the ZBA and revoked the variance. On appeal, on October 11, 2001, this Court affirmed the trial court decision, concluding that there was no hardship. Keystone appealed this decision to the Pennsylvania Supreme Court. On December 21, 2002, our Supreme Court denied Keystone's appeal, thus settling the variance issue. As a result, the variance is not an issue in the current matter.

⁶ See *supra* note 5.

was maintaining a non-accessory sign without a permit. The parties appealed to the ZBA, which denied the appeal both as to the permit revocation and the violation. On August 7, 2002, the three parties, including Keystone, appealed to the trial court, challenging the revocation notice and the constitutionality of Section 14-1604 of the Zoning Code.⁷

However, on March 24, 2003, the City filed a complaint in equity, seeking to enjoin Keystone's non-accessory use of the sign in violation of the Philadelphia Administrative Code (Administrative Code) and the Zoning Code. The City claimed that Keystone's violations at the Property present a serious and immediate hazard to the safety, health, and welfare of the public in general. Moreover, the City requested an assessment of penalties.

On July 9, 2003, the trial court conducted an evidentiary hearing on the City's claim, and on December 19, 2003, the trial court issued the order under appeal here. The trial court found that Keystone's non-accessory use of the sign became illegal on May 16, 2002, the date on which L&I issued the violation notice. In addition, the trial court directed Keystone to remove all advertising from the sign within thirty days of the date of the order. Finally, the trial court ordered Keystone to pay a daily fine of \$150 from May 16, 2002, until the date that the advertising was removed from the sign.

On January 7, 2004, the trial court granted Keystone's motion to stay its December 19, 2003, order pending appeal before this Court. As a result of the stay, Keystone continues to operate the sign as a non-accessory use pending this Court's decision. After Keystone filed a timely concise statement of matters

⁷ On June 17, 2003, the trial court remanded Keystone's appeal to the ZBA to decide the constitutional claim. That issue remains pending before the ZBA.

complained of on appeal pursuant to Pa. R.A.P. 1925(b), on March 16, 2004, the trial court issued an opinion supporting the December 19, 2003, order.

On appeal,⁸ Keystone raises two arguments. First, Keystone contends that the trial court erred in issuing the December 19, 2003, order while Keystone's appeal of the ZBA decision revoking the permit was pending. Second, Keystone argues that the trial court erred in conducting an evidentiary hearing on the City's request for injunctive relief when the pleadings were not closed and discovery had not been completed. The City counters that Keystone waived its first argument because it was not raised in Keystone's 1925(b) statement. Alternatively, the City argues that the Zoning Code itself does not preclude the City from commencing an enforcement action on Keystone's violations of the Zoning Code. With respect to Keystone's second argument, the City contends that the affirmative defenses raised by Keystone in its Answer, New Matter, and Counterclaim, are irrelevant. Therefore, there was no need for the trial court to have the City's response before deciding the case on its merits.

We consider, first, Keystone's contention that the trial court erred in issuing an order relating to the permit revocation when Keystone's appeal to the ZBA on the same substantive issue was pending. Keystone asserts that it was excused from compliance with the permit revocation and the violation notice by virtue of Section A-805.1 of the Administrative Code. That provision states,

⁸ Our scope of review in a case where, as here, the lower court took additional evidence, is to determine whether or not the lower court abused its discretion or committed an error of law. *Metzger v. Zoning Hearing Board of Warrington Township*, 481 A.2d 1234, 1236 (Pa. Cmwlth. 1984). Further, this Court's scope of review in an equity matter is limited to determining whether the trial court committed an error of law or abused its discretion. *Cecil Township v. Klements*, 821 A.2d 670, 673 n.1 (Pa. Cmwlth. 2003).

A-805.1 Stay of action: Whenever an appeal filed pursuant to Sections A-801.0 or A-803.0 is pending, compliance with the decision, notice of violation, order, or license suspension or revocation which is the subject of appeal shall not be required except as provided in Section A-805.2.⁹

Administrative Code, §A-805.1. Indeed, Keystone filed a timely appeal to the ZBA of L&I's permit revocation. A strict reading of Section A-805.1 appears to excuse Keystone from complying with the December 19, 2003, order. However, the City counters that, since Keystone failed to raise this issue in its 1925(b) statement, the issue is therefore waived.¹⁰ We agree with the City.

In *Commonwealth v. Lord*, 553 Pa. 415, 719 A.2d 306 (1998), the Pennsylvania Supreme Court established a bright-line rule for waiver under Rule 1925: “[I]n order to preserve their claims for appellate review, [a]ppellants must comply whenever the trial court orders them to file a Statement of Matters

⁹ Section A-805.2 provides as follows:

A-805.2 Compliance action: An appeal shall not constitute a stay of proceedings by the department or the Fire Department where either department finds and certifies in writing that the violation is intentional or that there exists a condition of immediate danger or hazard to health, safety or welfare which requires immediate compliance. An appeal shall not constitute grounds for lifting a Stop Work Order or Cease Operations Order.

Administrative Code, §A-805.2. This provision is not implicated in this case, which involves an action of L&I, not the Fire Department. In this case, L&I did not issue a Stop Work Order or a Cease Operations Order. Further, there was nothing certified in writing that stated that Keystone's sign posed a hazard or danger. Also, at the July 9, 2003, evidentiary hearing conducted by the trial court, an L&I official admitted that Keystone's sign posed no hazard or danger. Notes of Testimony, Hearing, dated July 9, 2003, at 62-65 (N.T. ___); Reproduced Record at 111a-114a (R.R. ___).

¹⁰ Although not set forth in the 1925(b) statement, the issue of compliance based on Section A-805.1 was first raised in Keystone's Memorandum of Law in Opposition to the City's Request for a Permanent Injunction, filed September 25, 2003, in accordance with the trial court's April 1, 2003, Rule to Show Cause. Certified Record at 12, 76 (C.R. ___).

Complained of on Appeal pursuant to Rule 1925. Any issues not raised in a 1925(b) statement will be deemed waived.” *Id.* at 420, 719 A.2d at 309.¹¹

Following the trial court’s order, Keystone filed a timely statement of matters complained of on appeal. That statement set forth the following issues:

The December 19th Order was in error for the following reasons:

1. The Court committed an error of law and an abuse of discretion in ordering preliminary relief where the City did not seek preliminary relief and Keystone had no notice of a hearing on preliminary relief.
2. The Court committed an error of law and an abuse of discretion in ordering preliminary injunctive relief where the City did not meet its burden of proof, the City did not attempt to prove the elements necessary for preliminary injunctive relief and the Court found that Keystone’s signs posed no risk to the public health, safety or welfare.
3. The Court committed an error of law and an abuse of discretion in issuing the Order of Court dated December 19, 2003 where the pleading were not complete because the City had not responded to Keystone’s Answer, New Matter and Counterclaim, discovery was not complete and the Court had not held a trial on the merits of the City’s Complaint.

¹¹ The Court provided substantial reasoning to support this rule:

The absence of a trial court opinion poses a substantial impediment to meaningful and effective appellate review. Rule 1925 is intended to aid trial judges in identifying and focusing upon those issues which the parties plan to raise on appeal. Rule 1925 is thus a crucial component of the appellate process.

Lord, 553 Pa. at 419, 719 A.2d at 308.

4. The court committed an error of law and an abuse of discretion in ordering the payment of a fine, subjecting Keystone to criminal penalties, where the pleadings were not complete because the City had not responded to Keystone's Answer, New Matter and Counterclaim, discovery was not complete and the Court had not held a trial on the merits of the City's Complaint.

Reproduced Record at 221a (R.R. ____). None of these issues can possibly be read to encompass Keystone's argument relating to Section A-805.1. Since the issue was not raised in the 1925(b) statement, it is deemed waived.

In any case, Keystone's claim is meritless. It is the Zoning Code, not the more general Administrative Code, that governs the effect of an appeal upon an order issued under the Zoning Code.¹² The Zoning Code's provisions are exclusive with respect to zoning matters. It specifically states that "[e]xcept as otherwise provided in the Charter, the provisions of this Title constitute the exclusive law with regard to zoning in Philadelphia." Zoning Code, §14-1701(3). Further, it provides that an appeal to the ZBA or to a trial court does not affect an order's effectiveness. *See* Zoning Code, Section 14-1705(4),¹³ and Section 14-

¹² *See* 1 Pa. C.S. §1933, which provides:

Whenever a general provision in a statute shall be in conflict with a special provision in the same or another statute, the two shall be construed, if possible, so that effect may be given to both. If the conflict between the two provisions is irreconcilable, the special provisions shall prevail and shall be construed as an exception to the general provision, unless the general provision shall be enacted later and it shall be the manifest intention of the General Assembly that such general provision shall prevail.

¹³ It states:

(4) An appeal to the Zoning Board of Adjustment shall not stay any proceedings in furtherance of the action appealed from, except that the Zoning Board, upon application of the appellant, shall have the power to issue a stay upon a showing of good cause and likelihood of success on the merits of the appeal.

(Footnote continued on the next page . . .)

1807(2).¹⁴ Rather, a stay must be requested and will be granted only where there is good cause shown and a likelihood of success on the merits. Since Keystone did not file a stay application with either the ZBA or the trial court, there was no bar to the City seeking an injunction to enforce the order.¹⁵

In its second issue, Keystone contends that the trial court erred in holding an evidentiary hearing and thereafter granting injunctive relief to the City when the pleadings were not closed and discovery was not complete. Specifically,

(continued . . .)

Zoning Code, §14-1705(4).

¹⁴ It states:

(2) ... The filing of the Notice of Appeal shall not stay the decision appealed from, any proceedings upon the decision appealed from, or any other proceedings. However, the Court may consider a Motion by the appellant for an order of supersedeas where the Motion has been made in accordance with local rules of court, notice has been given to all parties entitled to be served with copies of the Notice of Appeal, and the appellant has shown due cause for filing such a Motion.

Zoning Code, §14-1807(2) (emphasis added).

¹⁵ In its May 16, 2004, opinion, the trial court made the following statement regarding this issue:

[T]he City's argument that because [Keystone] appealed the Revocation Notice, the Department of Licenses and Inspections was forced to proceed pursuant to §A-805.1 of the Administrative Code and seek an injunction through this case is not applicable in this matter. Whether or not [the trial court's] remand of [Keystone's appeal challenging the constitutionality of Section 14-1604 of the Zoning Code] to the Zoning Board meant an appeal of the revocation was still pending (the basis for the City's reference to the Administrative Code) and whether [the trial court's] relinquishment of jurisdiction bears upon the continuing existence of an appeal is an unnecessary consideration in the instant case. Based upon [L&I agent's] testimony, the Court found there is no 'immediate danger or hazard to health, safety or welfare which requires immediate compliance' as provided in §A-805.2. Thus the injunctive powers granted in the Administrative Code are not relevant to this Court's determinations.

Trial Court Opinion, dated March 16, 2004, at 5-6. The trial court cites this argument as misdirected, and once the matter at hand is stripped of these "extraneous issues," the matter stands alone as an enforcement action. We agree.

Keystone contends that the trial court violated the Pennsylvania Rules of Civil Procedure by holding a hearing before the City filed a responsive pleading to Keystone's answer, new matter and counterclaim. The City counters that Keystone's argument misapprehends the nature and scope of an enforcement proceeding.

The trial court believed, apparently, that because the constitutional issues raised by Keystone in its answer were pending before the ZBA, it did not need to consider them in the City's enforcement action. However, the City filed its complaint seeking permanent injunctive relief before the trial court remanded these constitutional claims to the ZBA. In any case, the trial court had to address the legal issues raised by Keystone. Legal issues determine the scope of a factfinding hearing; therefore, legal issues must be resolved before evidence is adduced.

In *City of Philadelphia v. Berman*, 863 A.2d 156 (Pa. Cmwlth. 2004), this Court held that the trial court did not have the authority to issue an enforcement order on the merits of a Zoning Code enforcement action where the pleadings were not yet closed and the case was not ripe for decision. In that case, it was the defendants that had not yet filed a responsive pleading. This Court vacated the trial court's order, holding that, *inter alia*, before the matter was ripe for decision, a defendant had the right to file responsive pleadings, and it was improper to conduct a hearing before the pleadings were closed.

Here, the City does not protest that it did not have the chance to file a responsive pleading. Even so, the pleadings are still open.¹⁶ The constitutional

¹⁶ "Before a case can be considered ripe for consideration of its merits, either by trial or other hearing, the pleadings must be closed." *Reddick v. Puntureri*, 363 A.2d 1198, 1200 (Pa. Super. 1976).

claims raised in the ZBA proceeding may mean that the legal claims raised by Keystone can be dismissed by the trial court under the doctrine of *lis pendens*. However, the trial court cannot simply ignore Keystone's legal issues or *sua sponte* dispose of them.¹⁷

The City might succeed in having the claims raised by Keystone in its new matter and counter-claim disposed of without a hearing. The point is that they need to be resolved and cannot simply be ignored. Accordingly, the trial court's order is vacated, and this matter is remanded to the trial court for further proceedings consistent with this Opinion.

MARY HANNAH LEAVITT, Judge

¹⁷ The City contends that Keystone's claims in its answer, new matter and counterclaim are irrelevant to an enforcement action. We disagree. Keystone has the right to challenge the validity of the legislation that is being enforced against it.

The City also argues that Keystone's constitutional claim is barred by the doctrine of *res judicata*. In *Bell v. Zoning Board of Adjustment of City of Pittsburgh*, 479 A.2d 71 (Pa. Cmwlth. 1984), this Court found that in a case where separate zoning applications sought the same ultimate relief based on separate theories requiring different proofs, the second application was not barred by *res judicata*. *Id.* 479 A.2d at 73. Here, Keystone asserts that it is challenging the permit revocation and sanctions, not the variance, making *res judicata* inapposite.

In any case, the arguments of the City should have been addressed, along with Keystone's arguments, by the trial court.

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ORDER

AND NOW, this 13th day of April, 2005, the order of the Court of Common Pleas of Philadelphia County dated December 19, 2003, is vacated, and this matter is remanded to the trial court for proceedings in accordance with the attached Opinion.

Jurisdiction relinquished.

MARY HANNAH LEAVITT, Judge